UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S OPPOSITION TO THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS' RESPONSE TO THE COURT'S ORDER OF JULY 31, 2018 (ECF 420)

As set forth in the Response of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") to the Court's Order of July 31, 2018 (ECF No. 418), filed yesterday, Lieff Cabraser maintains that the issues presented by the Special Master's Report and Recommendations ("Report") have been fully presented to the Court, and that no further advocacy adverse to Customer Class Counsel is necessary for the Court to perform its *de novo* review of the record. If the Court nonetheless determines that it will be assisted in performing its *de novo* review by the presence of an additional party, it should be the Special Master, with the proviso that any further compensation to the Special Master or his assistants for services or activities post-dating the submission of the Report should not be borne by Customer Class Counsel. For these reasons and those set forth in the opposition being separately filed by Labaton Sucharow LLP today, as well as the matters set forth in the Surreply by Lieff Cabraser Heimann & Bernstein, LLP to Competitive Enterprise Institute's Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as Guardian *Ad Litem* for Class or *Amicus* in Front of Special Master (ECF No. 168) (which are incorporated herein by reference), Lieff Cabraser respectfully opposes the appearance of the Competitive Enterprise Institute's Center for Class Action Fairness as guardian *ad litem* or *amicus* in this case.

Dated: August 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

August 7, 2018 */s/ Richard M. Heimann*
Richard M. Heimann

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LABATON SUCHAROW LLP'S OPPOSITION TO THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS' RESPONSE TO THE COURT'S ORDER OF JULY 31, 2018 (ECF 420)

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I. INTRODUCTION.

In accordance with this Court's July 31, 2018 Memorandum and Order (ECF 410), Labaton Sucharow LLP ("Labaton") and the Thornton Law Firm ("Thornton") hereby submit their opposition to the Competitive Enterprise Institute's Center For Class Action Fairness's ("CCAF") Response to the Court's Order of July 31, 2018 (ECF 420) (the "Response"). Labaton and Thornton incorporate Labaton's opposition to CCAF's original motion, which Labaton filed on February 27, 2017 (ECF 145).

CCAF's Response is boldly self-serving. There is no need for CCAF to enter this case, and no party or class member has requested it to do so. CCAF itself admits that it is incapable of serving in the role that it claims is necessary for the interests of the class without affiliating with a law firm at an unknown cost. CCAF now demands compensation for its redundant proposed work, despite its repeated representations earlier that it would represent the class pro bono. At bottom, for all its lip service toward protecting the class, CCAF has opportunistically seized a chance to carve out a role for itself in this case, with attendant publicity and potential compensation. The Court should reject this effort.

II. THE COURT NEED NOT – AND SHOULD NOT – APPOINT CCAF AS GUARDIAN *AD LITEM*.

A. As in Every Class Action Settlement, The Court Will Protect the Class, and the Court Is Especially Well Positioned to Do So Here.

CCAF's entire argument relies on the premise that the class "needs an advocate." Response at 14. However, CCAF ignores that the Court already is acting as a fiduciary for the class, as the Court itself has recognized. May 30, 2018 Hr'g Tr. (ECF 243) at 79 ("And my paramount responsibility is to the class . . ."). This is not unusual. The Court is in the same position as *every* court overseeing a class action settlement (and a corresponding award of attorneys' fees), and can similarly be expected to fulfill its duties in protecting the class's

interests. *See, e.g.*, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 71 (D. Mass. 2005) ("Although settlement is often a more favorable result than litigation, the court has a fiduciary duty to absent members of the class in light of the potential for conflicts of interest among class representatives and class counsel and the absent members.") (internal citations and quotations omitted); *Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."). Because courts are well-equipped to protect the interests of the class, it is unsurprising that they rarely appoint guardians *ad litem*. *See Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) ("While the need may indeed be compelling in some cases, we find few cases in which courts actually use guardians *ad litem*."). There is no "need for an advocate" here, and the Court should reject CCAF's attempts to create one. *See* Response at 14.

Moreover, the Court now has the backstop of the Master's investigation. While many of the Master's conclusions are deeply flawed, his investigation was undoubtedly thorough. As he noted, his investigation "spanned a period of some fourteen months and encompassed written discovery, the production of 200,000 pages of documents, 34 witness interviews and 63 depositions. Beyond this, the law firms that were the subject of the investigation were given extensive opportunities to contribute to the legal and factual record through briefing, providing expert opinions and oral argument, input which was helpful to the Special Master in obtaining a more complete view of the factual, legal, and ethical issues raised in the investigation." Report and Recommendations (ECF 357) ("R&R") at 7. In doing so, the Master retained two experts, Prof. Stephen Gillers and John Toothman, and employed a large "team," including his own counsel.

The Master's duties culminated in his 377-page report, which serves as his "primary means of communication with the court." Fed. R. Civ. P. 53, 2003 Advisory Note; *see also* ECF 357. Now, the Court must review the Master's conclusions *de novo*, in light of the objections interposed by the Customer Class firms. The fact that the Court will be considering these two vastly different viewpoints makes this case unlike an unopposed fee motion that is typically filed with a class action settlement. Instead, because the Master, through his Report, has offered intense scrutiny of the fee award, and because his conclusions are opposed by counsel, there will be an inherent adversarial element in the process. *See* May 30, 2018 Hr'g Tr. (ECF 243) at 7 ("Now there is somewhat of an adversary process with the Special Master . . ."). Even CCAF admits as much. *See* Competitive Enterprise Institute, "Arkansas Teacher Retirement System v. State Street" ("CCAF will continue to monitor the case, and is encouraged that Judge Rosen has appointed an attorney and accounting investigator *to provide an adversarial presentation so that class counsel's representations are not unchallenged.*") (emphasis added).[1] Thus, given the unique posture of this matter, the benefits of a two-party adversary process regarding the fee award are present, and the Court stands especially well-equipped to protect the interests of the class.[2]

Because the Master scrutinized the fee award, there is no reason to appoint CCAF (or any other entity) as a guardian *ad litem*. The roles of a fee-related master and guardian *ad litem*, while not identical, serve the same interests: providing additional scrutiny into what would otherwise be a non-adversarial process. *See Gottlieb*, 43 F.3d at 490 ("It is up to the individual judge's preference as to whether he uses a disinterested observer (e.g., magistrate or master) or

[1] https://cei.org/litigation/arkansas-teacher-retirement-system-v-state-street (last visited Aug. 6, 2018).

[2] CCAF appears to agree that Rule 53 does not allow a Master to become a full-fledged advocate without consent of the parties. *See* Response at 10-13.

an interested advocate (e.g., guardian)."). CCAF's amicus brief cites the concurring opinion in *Laffite v. Robert Half Int'l, Inc.*, which explains that a guardian could "provide counterpoints to class counsel's arguments concerning the risks and difficulty of litigating the case. Perhaps most importantly, the class guardian or a fee expert retained by the guardian would provide information on prevailing market rates for similar litigation." *Laffite v. Robert Half Int'l, Inc.*, 376 F.3d 672, 691 (Cal. 2016) (Liu, J., concurring); *see also* ECF 174 at 6. That is *precisely* the ground the Master covered here, along with many other issues. Adding CCAF into the mix as a guardian *ad litem* would thus be redundant and unnecessary. *See Gottlieb*, 43 F.3d 474 at 490 ("There is no indication that the district court failed to act in that [fiduciary] capacity in the fee proceedings in this case. Moreover, the district court initially referred the fee applications to a special master, an impartial observer who himself could insure that the class' interests were protected.").

Finally, in an effort to carve out a role for itself, CCAF argues that it should be appointed guardian *ad litem* because the Master's Report is "an impartial opinion," rather than "an advocate for the class." *See* Response at 14. This is incorrect. The Master has consistently staked out a position as an advocate for the class's interests – or, in his counsel's idiom, the "voice and guardian" of the class. Master's Accounting Opposition (ECF 377) at 14; *see also* May 30, 2018 Hr'g Tr. (ECF 243) at 16-17 (Master's counsel explaining that one of the Master's "priorities" is "protection of the class"); R&R at 327 (explaining that "the most challenging yet important aspect of this assignment has been to determine for recommendation to the Court appropriate and proportionate remedies and sanctions that fairly but adequately balance the interests of the class" and others). There is no question that the Master has zealously sought to argue a view that is contrary, in many respects, to Customer Class Counsels' positions. His

Report – which comprehensively sets forth his view – albeit disputed – of the case, will continue to serve as the "other side" throughout the *de novo* proceedings.

B. CCAF's Argument Regarding Class Counsel's "Voluminous Filings" is a Red Herring.

CCAF argues that the class requires an advocate to respond to Class Counsels' "voluminous" filings. CCAF Response at 16-17. CCAF's argument – based upon an "incomplete list of examples" – completely misses the mark. *See* Response at 16-17. CCAF's brief lists eleven instances of filings or conduct by Class Counsel. Three of the examples cited by CCAF were *in response to actions by CCAF*, stemming from its efforts to insert itself into this case (clearly, the class does not need a guardian to argue on CCAF's behalf). Four of the filings cited by CCAF relate to Labaton's recusal motion and attendant petition for writ of mandamus, a discrete issue that has been adjudicated and were well within Labaton's right to pursue. The remaining examples identified by CCAF were actions taken by Labaton or Customer Class Counsel in response to the Master's conduct, before his Report and Recommendations were publicly filed. At the risk of stating the obvious, if the Master's participation ends, there will be no such filings to which CCAF would respond. In short, CCAF's claim that the class requires an advocate to match the unfairly characterized "wild motions" of class counsel is disingenuous, and does not provide a reason to appoint someone new to "advocate" for the class. *Id.* at 17.

C. CCAF Concedes that It Is Unable to Act as Guardian for the Class.

CCAF admits that it "does not have the resources to represent the class" in this litigation. *Id.* at 23. As CCAF explains, it has three full-time attorneys, a busy schedule, and a case in the Supreme Court -- "obviously a top priority" -- which has a calendar that directly overlaps with this case. *Id.* at 23. Simply put, CCAF is admittedly incapable of carrying out the role it suggests is necessary to protect the class. In other words, although it does not believe that it can

act as guardian *ad litem* without help, CCAF presses forward. CCAF's limitations, which developed while its motion to be appointed guardian *ad litem* remained under advisement, should end this discussion.

Curiously, although conceding that it will be overextending itself, CCAF counterintuitively pursues its request to be appointed guardian *ad litem* for the class, this time for compensation, for its co-counsel and for itself, which presumably must be paid either from class funds or from class counsel's fees. While it was arguing for a role in this case (and searching for a client that might help in that effort), CCAF repeatedly stated that it could work on a pro bono basis, and insisted that the class be informed of this offer. *See* ECF 127 at 10-11 ("Thus, CCAF is willing to serve as guardian at whatever rate this Court sets in advance . . . even, if the Court feels it to be the best course, *pro bono* without compensation."); March 7, 2017 Hr'g Tr. at 35 (ECF 176) ("We would also request that the notice make clear to the class that pro bono representation is available."); ECF 186-1 at 2 ("CCAF's notice advises class members that they may financially benefit from these proceedings and also informs them of the availability of pro bono counsel to litigate any objection.").

Now that the Court has inquired as to the actual financial terms that CCAF proposes, CCAF's platitudes about "old Italian proverbs" and "vouchsafing" fairness have disappeared. *See* ECF 127 at 3 ("CCAF's interest lies in advancing the interests of absent class members and vouchsafing that Rule 23 operates in a systematically fair manner."). So has any mention of pro bono service. CCAF asserts that "[w]hatever firm serves as guardian *ad litem*, ordinary billing rates should be paid to adequately rebut Class Counsel's motions." Response at 25; *see also id.* at 26 ("the class needs a guardian *ad litem* that can be assured the resources to keep up with Class Counsel's" litigation). And, unsurprisingly, it wishes to have its cut paid from Class

Counsel's fee award (perhaps with a so-called "contingent multiplier" for appellate proceedings, which CCAF claims are "certain"). *See id.* at 26-27.

CCAF's explanation for its about-face is not credible. It claims that, when it "was willing to undertake this role *gratis* last year," it "believed the case would be more narrowly focused on appropriate billing rates." Response at 25. This does not make sense: there can be no question that there was more work for CCAF to do before the Master commenced his investigation than there is now. *See* ECF 174 at 7 (proposing to "relieve some of the special master's burden" by providing "two sets of eyeballs scrutinizing class counsel's billing records," and noting that if "CCAF is appointed as [] guardian, CCAF's willingness to perform its services *pro bono* or on a contingent basis means that the class stands to gain much in the best case, but lose nothing in the worst case."). CCAF repeatedly represented that it would care for the class pro bono; now, with its foot in the door, it demands payment. Given (1) the redundancy of any role for CCAF and (2) the fact that its incapable of acting as a guardian *ad litem*, the Court should look askance at CCAF's request to enter the case – and its grab an opportunistic payday.

Finally, in light of its bait-and-switch on its desired payment terms, appointing CCAF as guardian *ad litem* would also be unduly costly (especially when viewed in the light of the immense costs already produced by this process), and there is no justification whatsoever for foisting those costs onto Customer Class Counsel. As CCAF asserted in its February 2017 filing, "[o]ne concern about appointing a guardian *ad litem* is that doing so will encourage attorneys to stir up litigation for fees." ECF 127 at 10. CCAF claimed that it was "insulated from this concern." *Id*. The situation today appears to be just the opposite. First, despite implying that it would not "stir up litigation," after less than a week CCAF has injected two new and wholly irrelevant topics into the case. Response at 18-23. Second, CCAF has sought to retain a private

law firm, which certainly is not "insulated" from seeking out work (and fees) from a newfound case. Moreover, CCAF clearly does not expect its services to be inexpensive. It notes that the Master's continued participation would "likely be at lower cost and save time compared to appointing a new guardian *ad litem*." Response at 7. Considering the Master's prolific ability to spend cash – burning through almost $3.8 million in roughly a year-and-a-half – CCAF's prediction does not bode well for the size of its (and its private co-counsel's) bill. *See id.* Perhaps recognizing this, CCAF is already preparing to defend itself against accusations of over-billing. *Id.* at 26.

In short, CCAF admits that it does not have the "resources" to act as a guardian *ad litem*, but still seeks a role – and payment. The Court should reject its unhelpful and self-interested offer.

D. Customer Class Counsel Continue to Represent the Class Adequately.

1. Labaton has worked on behalf of the class since the settlement was approved.

Perhaps because it is unhelpful to its self-serving attempt to find a role in this case, CCAF makes no mention of the fact that Labaton, for nearly two years now, has continued working on behalf of the class in its role as Lead Counsel without any request for an additional payment of fees. While CCAF is quick to claim that Customer Class Counsel should be ousted from this role, CCAF does not, and cannot, explain how it would carry out these tasks moving forward.

More specifically, since the Court approved the settlement, Labaton has spent approximately 185 hours overseeing the post-approval administration process. Zeiss Decl. ¶¶ 3-4. Efforts have ranged from paying taxes related to earnings on the Settlement Fund, to securing approval of a distribution to Registered Investment Companies ("RICs"). *Id.* Moreover,

Labaton has overseen A.B. Data's execution of the settlement notice program and administration process, and worked with A.B. Data and WilmerHale (State Street's counsel) to provide information needed by Class Members. *Id*. Labaton has also acted as the liaison between A.B. Data and WilmerHale in connection with the notice program and implementation of the Court-approved plan of allocation and worked with A.B. Data to complete and finalize the administration process with respect to class members that are RICs, including determining payment amounts, preparing notification letters, and preparing Plaintiffs' Assented-To Motion For Authorization To Distribute To Eligible Registered Investment Company Class Members (ECF 209-211). *Id*. In addition, Labaton has overseen A.B. Data's processing of certifications submitted by Class Members that are Group Trusts concerning their ERISA assets and Indirect FX Trading Volume, as set forth in the plan of allocation. *Id.*

This role has not ended. Looking forward, Labaton is in the process of working with A.B. Data and the United States Department of Labor to obtain additional information concerning Group Trusts that have not submitted certifications to A.B. Data. *Id.* at ¶ 5. Once these efforts are concluded, and total ERISA volume is known and quantified, Labaton will: work with A.B. Data to move forward with determining payment amounts for all Class Members other than RICs (who have already received payments pursuant to the RIC distribution order (ECF 213); notify Class Members of payment amounts; and prepare a second motion for authorization to distribute and then oversee the distribution to all non-RIC Class Members. Zeiss Decl. ¶ 5. At that point, a second distribution to RICs of the amount held in reserve from the initial distribution (*see* ECF 211 at 9-11) and of unclaimed funds will also need to be completed. Zeiss Decl. ¶ 5.

Thereafter, Labaton will continue to work with A.B. Data to answer Class Member questions about distributions and conduct additional distributions, as contemplated by Paragraph 40 of the Plan of Allocation and Settlement Agreement, until it is no longer economically feasible to do so. *Id.* at ¶ 6. At that point, Labaton will request Court approval of a plan for the unclaimed balance and the administration of the Settlement will be completed. *Id.* Labaton expects that these actions will require between approximately 135 and 200 additional hours of its time. *Id.* at ¶ 7.

All of this work has been done, and will be done, on behalf of the class without any request for further compensation. CCAF's suggestion that Labaton is acting against the best interests of the class is belied by these ongoing actions for the class' benefit.

2. Customer Class Counsel are not conflicted.

Finally, CCAF claims that Customer Class Counsel are conflicted, which necessitates their replacement by a guardian *ad litem*. Response at 14-18. CCAF's arguments are not persuasive. First, CCAF contends that Customer Class Counsel have "a dollar-for-dollar antagonistic interest" in recovering a larger share. *Id.* at 16. This dynamic is no different than any class action fee award. Second, CCAF argues that because Customer Class Counsel could be sanctioned, they are necessarily adverse to the interests of the class. This is false. Whether any of Customer Class Counsel should be sanctioned is an issue between the firms, the Master, and the Court. Clearly, Customer Class Counsel can advocate on behalf of the class – which is also being protected as a fiduciary of the Court – while simultaneously arguing that their conduct should not be sanctioned.[3]

III. CCAF IS AN IMPROPER AMICUS.

[3] CCAF also claims that ATRS can no longer represent the class. Response at 16. Its one-sentence statement on this point is entirely conclusory and contains no analysis whatsoever. *See id.* It should be rejected out of hand.

The Court should exercise its discretion to prohibit CCAF from participating as an *amicus*. Rather than clarify matters for the Court, CCAF's participation will only serve to cloud the issues, prolong the proceedings, and inject partisanship into the case. The participation of CCAF as *amicus*, in other words, will "increase only the heat, not the light." *See Animal Prot. Inst. v. Martin*, No. CV-06-128-B-W, 2007 U.S. Dist. LEXIS 13378, at *8-9 (D. Me. Feb. 23, 2007).

Although "the acceptance of amicus briefs is within the sound discretion of the court," the First Circuit has cautioned that district courts "should go slow in accepting, and even slower in inviting, an amicus brief" and further that "an amicus who argues facts should rarely be welcome." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Among the concerns with allowing *amici* are (1) inundating the judge with extraneous reading; (2) making an end-run around court-imposed limitations on the parties, including discovery restrictions, the rules of evidence, and the length and timing of the parties' briefs; (3) increasing the cost of litigation; (4) creating side issues not generated directly by the parties; and (5) injecting interest group politics in the federal judicial process. *See Animal Prot. Inst.*, 2007 U.S. Dist. LEXIS 1338, at *8 (citing *Voices for Choices v. Ill .Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)). Many of these concerns are present in this case.

A. CCAF and CEI Are Political Organizations with Dubious Goals and a Bias Against Class Action Law Firms.

First, there is no doubt that CCAF is first and foremost a political organization. It is owned and funded by the Competitive Enterprise Institute ("CEI"), a Washington, D.C. public policy organization that describes itself as being "dedicated to advancing the principles of limited government, free enterprise, and individual liberty." *About*, CEI, https://cei.org/about-cei (last visited Aug. 7, 2018). CEI's basic legal philosophy is that "[g]overnment regulations are

based on laws, and those laws in turn rest on the limited powers granted to government by the Constitution. Whether these constitutional limits succeed in actually reining in government is one of the basic issues facing our country." *Law and Constitution*, CEI, https://cei.org/issues/law-and-constitution (last visited Aug 7, 2018).

CEI does not disclose who its donors are, so it is unclear whose interests it actually represents. *See* Juliet Eilperin, *Anatomy of a Washington dinner: Who funds the Competitive Enterprise Institute?*, THE WASHINGTON POST, June 20, 2013. Although it purports to be a libertarian organization, many of its positions over the years have aligned with the interests of large industries such as fossil fuel and tobacco. It may be easy for the CEI, through CCAF, to feign interest in "protecting" class members from their lawyers' fees, but perhaps its true interests actually match those of its likely funders: reducing the incentives for plaintiffs' attorneys to pursue class actions against large corporations. Although each successful objection by CEI (through CCAF) yields additional funds for a particular class, in the long run this strategy aligns with corporate interests by reducing the overall incidence of successful class actions. The Court should be wary of permitting this type of organization to inject its ideology into the proceedings, especially at this late stage.

B. CCAF's Self-Serving Involvement in Factual Matters Is Disqualifying.

Especially in view of the First Circuit's admonition against *amici* that argue facts, *Strasser*, 432 F.2d at 569, CCAF's self-promoting involvement in factual matters in this case should be disqualifying. *See*, *e.g.*, *McCarthy v. Fuller*, No. 08-cv-994-WTL-DML, 2012 WL 1067863, at *2 (S.D. Ind. Mar. 29, 2012) (denying *amicus* status to lawyer who proposes to "aid the court by providing facts, insights and explanations," which "suggest[ed] the type of contribution a fact or expert witness would offer"); *Portland Pipe Line Corp. v. City of S. Portland*, No. 15-cv-00054-JAW, 2017 WL 79948, at *6 (D. Me. Jan. 19, 2017) (party was

"right to be concerned about whether the amici will infuse external facts into the Court's consideration."). In past filings, rather than restrict itself to arguments of law, CCAF has attempted to introduce and argue an array of new purported facts. For instance, Mr. Frank has described his extended involvement with the *Boston Globe* and a prior, detailed review of the fee submissions, and has submitted on the public docket the analysis referenced in the December 17, 2016 *Boston Globe* article. *See* Frank Decl., ECF 125-1 ¶¶ 30-32; Memorandum dated Nov. 13, 2016 from Ted Frank to Andrea Estes, ECF No. 125-2 ("Frank Memo"). CCAF's recent Response continues this pattern of injecting new facts. *See* Response at 18-23.

Further, even if it does not secure its paid role as guardian *ad litem*, it appears that CCAF intends to use this litigation, and its potential role as an *amicus*, as a vehicle for self-promotion. For example, on August 6, 2018, Mr. Frank "tweeted": "CEI State Street case filing is 🔥🔥🔥 [symbol for fire]" – an apparent reference to his disjointed and self-serving Response.[4] Moreover, on June 28, 2018 (the day the Court unsealed the Special Master's Report and Recommendation), Mr. Frank "tweeted": "It's more than a little flattering that a big powerful law firm, in an effort to keep me out of a case, asks to spend $2 M on a former federal district judge to investigate them so that there would be no reason for me to do so."[5] These are two examples of his online self-aggrandizing. The Court should be wary of a self-promoting amicus, who may be drawn to advocate for extreme positions in order to bolster his image, rather than to present reasoned legal argument in order to serve the Court. *See BancInsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton County, Inc.*, 830 F.Supp. 2d 294, 307 (E.D. Ky. 2011) ("The role of an amicus is generally to aid the Court in resolving doubtful issues

[4] Ted Frank (@tedfrank), TWITTER (Aug. 6, 2018, 10:25 AM), https://twitter.com/tedfrank/status/1026519707229335552.

[5] Ted Frank (@tedfrank), TWITTER (June 28, 2018, 11:09 AM), https://twitter.com/tedfrank/status/1012397562987536385.

of law rather than present a partisan view of the facts.") (internal quotation marks and citation omitted); *CalMat Co. v. Oldcastle Precast, Inc.*, No. CV 16-26 KG/JHR, 2017 WL 6001757, at *3 (D.N.M. Dec. 4, 2017) ("[T]he Court has grave concerns that [the] legal argument would not be useful and, instead, would be confusing, unhelpful, and self-serving.").

C. There is no need for CCAF to Participate as Amicus.

In addition to the reasons why CCAF in particular should not serve as an *amicus* in this proceeding, there is the simple fact that the Court does not need any *amicus* (much less a partisan advocate such as CCAF) in order to conduct its *de novo* review. The legal issues in this matter are more than fully briefed and are ripe for the Court's rulings. Moreover, in addition to the Special Master's Report, the Court has access to the lengthy "expert reports" of Prof. Stephen Gillers. His reports, which focus on the law, are best viewed as (novel, misguided, and incorrect) amicus briefs. *See, e.g.*, *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1247 n.7 (N.D. Ca. 2000) ("The court notes that all three professors are respected scholars, and that their participation as *amici curiae* (or even as advocates for the Much Shelist firm) might have been appropriate."); *In re In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 69 (S.D.N.Y. 2001) ("Professors Hazard and Wolfram . . . could have submitted an amicus brief arguing how the law *should be* interpreted . . ."). The Court surely does not need another amicus in the case, especially the biased and self-interested CCAF.

IV. CCAF'S ARGUMENTS ARE MISLEADING.

Finally, CCAF, in its efforts to disparage Labaton, makes several misleading statements to which Labaton is constrained to respond.

A. The Court Did Not Rescind, Revoke, or Vacate the Award of Fees.

CCAF characterizes Labaton's statement that the Court "did not rescind, revoke, or vacate the aware of fees" as an "abusive misstatement." Response at 4 n.2. Histrionics aside,

CCAF is wrong. At the March 7, 2017 hearing, the Court indicated that it wished for the parties to file a motion for relief pursuant to Fed. R. Civ. P. 60. It was understood that the effect of doing so would ensure that the Court retained jurisdiction to modify the award, but would not otherwise change the award until further action from the Court. *See* March 7, 2017 Hr'g Tr. (ECF 176) at 19 ("It wouldn't be any concession that any money should be ordered returned at the end of all of this . . ."). Thus, Labaton filed the Rule 60(b) motion "at the Court's request in order to eliminate any potential doubt as to whether the Court retains continuing jurisdiction to modify the Fee Order *if the Court determines any such modification is appropriate*." ECF 179 at 6 (emphasis added). And, when the Court entered the Order, it did not grant any specific relief, but instead granted the Order "to assure the court's continuing jurisdiction to modify the Fee Order, should the court find modification to be appropriate[.]" ECF 331 at 2.

CCAF's claim that the Court's order "vacated" the award is simply false. *See* Response at 4. The Court has continuing jurisdiction with respect to the fee award, but has not rescinded, revoked, or vacated. *See* ECF 332.

B. CCAF's Reference to the Former Treasurer is Unavailing.

CCAF attempts to create a sideshow by referencing contributions made totaling $6000 by six Labaton partners and their spouses to the former Arkansas State Treasurer a full year *after* the ATRS Board of Trustees approved Labaton's application to become monitoring counsel. *See* Response at 18. ECF 420-1 at 20-21. This "argument" should be rejected out of hand. The former Treasurer was a single member of the Board of Trustees, which did not have – and does not have – any authority to influence litigation decisions on behalf of ATRS.[6] *See Knurr v. Orbital*, Declaration of George Hopkins, 1:16-cv-01031 (E.D. Va. Oct. 31, 2016) (ECF 33-1) at

[6] The State Treasurer, Martha Shoffner, to whom the contributions were paid was not even personally present at the meeting at which the vote occurred. Id. at 5.

¶ 9 (Oct. 31, 2016); *Hachem v. General Electric*, Declaration of George Hopkins , 1:17-cv-08457 (S.D.N.Y. Jan. 18, 2018) (ECF 49-5) at ¶ 5 ("I never discussed any political contributions by Labaton Sucharow LLP with the former Treasurer, nor have I ever consulted with her regarding the use of outside counsel to prosecute a particular securities class action. The former Treasurer never asked me to use or not use Labaton Sucharow LLP in any particular case and never provided any input to me about Labaton Sucharow LLP whatsoever."). CCAF does not attempt to connect these contributions to anything related to the issues in this case; rather, it is content to score cheap points with references to an unrelated political scandal.

Second, CCAF's suggestion that George Hopkins "abdicat[ed] any responsibility to supervise class counsel" is either dishonest or uninformed. *See* Response at 21. It is undisputed that Mr. Hopkins played an extremely active role in the *State Street* case, including overseeing class counsel. *See* R&R Ex. 4 at 85:14-23 ("My duties were you to, first of all, to oversee the litigation, to oversee the attorneys, to ensure that all our attorneys were appropriately taking all action necessary, to be prepared in the mediations, to be prepared to do all the discovery, to respond to all the motions, and to comply with all the judge's orders."). He spent "several hundred hours" working on the case. *Id.* at 102:7-19. In the end, he had a major role in negotiating the settlement. *Id.* at 66:22-68:24. The Master even observed that Mr. Hopkins "was more involved, more engaged and contributed more value than not just the average class representative but almost any class representative . . ." R&R Ex. 162 at 50:20-24. As for his position regarding allocation of fees among counsel, Prof. Rubenstein has explained that, "class action law has no expectation that a class representative in a standard non-PSLRA case will oversee the fee allocation process. I don't know of a single fee allocation case that references the class representative's involvement in any way whatsoever . . ." R&R Ex. 235 at 144:14-23.

Compounding CCAF's counterfactual statement, CCAF relies upon a wholly irrelevant case in which the proposed class representative communicated with counsel a total of four times and never saw the settlement agreement – the diametric opposite to Mr. Hopkins. *See* Response at 21 (*citing Foley v. Buckley's Great Steaks, Inc*., 2015 WL 1578881 (D.N.H. Apr. 9, 2015)). That CCAF is willing to blatantly twist both fact and law speaks volumes about its bias in this case, and its motive to remove ATRS and Customer Class Counsel in order to earn a (well-paying) seat at the table.

C. Labaton Has Not Paid, and Will Not Pay, a Referral Fee to Chargois in Facebook

CCAF's accusation that Labaton "continues to conceal" the Chargois relationship in *In re Facebook, Inc. IPO Securities and Derivative Litigation* ("*Facebook*") is baseless and false. *See* Response at 22. Labaton has not paid a referral fee, and will not pay a referral fee, to Damon Chargois in *Facebook*. Johnson Decl. ¶ 2. Thus, in that case, Labaton is in full compliance with Local Rule 23.1 of the United States District Courts for the Southern and Eastern Districts of New York Local Rules, which requires disclosure of "any fee sharing arrangements with anyone." *Id.* at ¶ 3. CCAF's willingness to level this accusation against Labaton without a factual basis, and to further suggest that a sanction is appropriate, Response at 23, is irresponsible and makes plain CCAF's bias.

V. CONCLUSION.

For the foregoing reasons, the Court should deny CCAF's motion to participate in this case as guardian *ad litem* or amicus.

Dated: August 7, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 7, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF JAMES W. JOHNSON IN OPPOSITION TO THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S RESPONSE TO THE COURT'S ORDER OF JULY 31, 2018

JAMES M. JOHNSON declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a member of Labaton Sucharow LLP ("Labaton" or the "Firm"). I submit this declaration in opposition to The Competitive Enterprise Institute's Center For Class Action Fairness's Response To The Court's Order of July 31, 2018.

2. I am one of the principal attorneys who prosecuted the action in *In re Facebook, Inc. IPO Securities and Derivative Litigation*, MDL No. 12-2389 (RWS) (S.D.N.Y.) ("*Facebook*") on behalf of the putative class. Pursuant to the direction of the client, Arkansas Teachers Retirement System, and the Executive Committee of Labaton Sucharow LLP, of which I am a member, no referral fee has been paid or will be paid to Damon Chargois in the *Facebook* case.

3. In addition, the payment of any referral fee in *Facebook* is subject to Rule 23.1 of the Local Rules of the United States District Courts For the Southern Districts of New York, which requires disclosure of "any fee sharing agreements with anyone." Because Labaton will not pay a referral fee to Chargois in the *Facebook* case, Labaton complied with L.R. 23.1 in issuing notice to the Class and the Court in that case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 7, 2018.

/s/ James W. Johnson
JAMES W. JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 7, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, *et al.*, 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, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF NICOLE M. ZEISS
CONCERNING ONGOING SETTLEMENT WORK

NICOLE M. ZEISS declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a member of the law firm of Labaton Sucharow LLP ("Labaton Sucharow" or the "Firm"), attorneys for Plaintiff Arkansas Teacher Retirement System ("ARTRS") and Court-appointed Lead Counsel[1] for the Settlement Class in the above-titled consolidated Class Actions. I am admitted to practice before this Court *pro hac vice*.

2. I have been involved in various matters concerning the Settlement, including the process of negotiating and documenting the Settlement Agreement and the plan of allocation for the proceeds of the Settlement (the "Plan of Allocation"), and overseeing the notice program and administration of the Settlement to date. I respectfully submit this declaration to provide the Court with information about the ongoing settlement-related administrative work conducted by Labaton Sucharow.

3. Labaton Sucharow, as Lead Counsel, has overseen the entire pre and post approval administration process. Since the Judgment was entered on November 2, 2016, efforts have ranged from paying taxes related to earnings on the Settlement Fund to securing approval of a distribution to RICs. Overall, Labaton Sucharow has:

- Overseen A.B. Data's execution of the settlement notice program and administration process.
- Worked with A.B. Data and Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale") to provide information needed by Class Members.
- Been the liaison between A.B. Data and WilmerHale in connection with the notice program and implementation of the Court-approved plan of allocation.
- Worked with A.B. Data to complete and finalize the administration process with respect to Class Members that are Registered Investment Companies ("RICs"), including determining payment amounts, preparing notification letters, and

[1] Unless otherwise indicated, capitalized terms have the same meanings as in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement," ECF No. 89).

preparing Plaintiffs' Assented-To Motion For Authorization To Distribute To Eligible Registered Investment Company Class Members (ECF Nos. 209 - 211).

- Overseen A.B. Data's processing of certifications submitted by Class Members that are Group Trusts concerning their ERISA assets and Indirect FX Trading Volume, as set forth in the Plan of Allocation.

4. To date, this post-approval administration work, for which Labaton Sucharow will not seek additional compensation, has involved approximately 185 hours of work.

5. Looking forward, we are in the process of working with A.B. Data and the United States Department of Labor to obtain additional information concerning Group Trusts that have not submitted certifications to A.B. Data about their ERISA assets or volume. Once these efforts are concluded, and total ERISA Volume is known and quantified, Labaton will work with A.B. Data to move forward with determining payment amounts for all Class Members other than RICs (who have already received payments pursuant to RIC distribution order (ECF No. 213)), notify Class Members of payment amounts, and Labaton will prepare a second motion for authorization to distribute and then oversee the distribution to all non-RIC Class Members. At this point, a second distribution to RICs of the amount held in reserve from the initial distribution (*see* ECF No. 211 at 9-11) and of unclaimed funds will also need to be completed.

6. Thereafter, Labaton Sucharow will continue to work with A.B. Data to answer Class Member questions about distributions and conduct additional distributions, as contemplated by the Plan of Allocation and Settlement Agreement ¶ 40, until it is no longer economically feasible to do so. At that point, Labaton Sucharow will request Court approval of a plan for the unclaimed balance and the administration of the Settlement will be completed.

7. I anticipate that this future work will require between 135 and 200 hours of additional time, depending upon the number of additional distributions to Class Members.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 7, 2018.

/s/ Nicole M. Zeiss
NICOLE M. ZEISS

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 7, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. State Street Bank and Trust Company, Defendants.	C.A. No. 11-10230-MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. State Street Bank and Trust Company, Defendants.	C.A. No. 11-12049-MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. State Street Bank and Trust Company, Defendants.	C.A. No. 12-11698-MLW

KELLER ROHRBACK L.L.P.'S AND ZUCKERMAN SPAEDER LLP'S OPPOSITION TO THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S REQUEST TO SERVE AS GUARDIAN AD LITEM FOR THE CLASS

In its July 31, 2018 Order (ECF 410), the Court provided: "If CCAF still seeks a role in this case, any opposition to its request shall be filed by August 7, 2018." The Competitive Enterprise Institute ("CEI"), acting through its Center for Class Action Fairness (collectively, "CCAF"), has expressed interest in playing such a role. ECF 420.

In this submission, Keller Rohrback L.L.P. ("Keller") as counsel in *The Andover Companies Employee Savings and Profit Sharing Plan v. State Street Bank and Trust Company*, No. 12-11698, and Zuckerman Spaeder LLP ("Zuckerman") as counsel in *Henriquez v. State Street Bank and Trust Company*, No. 11-12049, oppose CCAF's instant request to serve as Guardian Ad Litem ("GAL") for the class.

A. The Court Has Authority to Amend Its Order Appointing the Special Master, but the Court Need Not Do So

A threshold issue is whether the Court may amend the Order appointing the Master to authorize him to respond to the objections to the Report and to address related issues. *See* Order at 3 (citing Fed. R. Civ. P. 53(b)(4)). Such an amendment is not only allowed under Rule 53, it is also expressly reserved in the Court's original Appointment Order. ¶ 16, ECF 173. If it chooses to do so, the Court has authority to amend its Appointment Order. CCAF concedes this point.

The Court however, need not amend its Appointment Order at this time, even if it wishes for the Master to perform additional work on the Report. Resubmitting the matter to the Master with instructions (for example, 'respond to the issues raised in the objections'), would be within the explicit terms of Rule 53(f)(1) and would not require amendment of the Appointment Order. CCAF concedes this point as well. Determining the Master's compensation for such additional work is a separate issue that may be addressed pursuant to Rule 53(g).

B. CCAF Should Not Be Appointed Guardian Ad Litem

CCAF is an advocacy group that is not secret about its mission or views.[1] It is certainly entitled to lobby for political change, but it is important that this proceeding not become infected by partisan advocacy. While such advocacy may be appropriate when serving as an amicus, it is not appropriate when serving as a GAL. CCAF's request for appointment as a GAL should be rejected for three independent reasons.

1. CCAF Misconstrues the Role of "Consent" in Rule 53

CCAF argues that a GAL is necessary unless all parties consent to the Master's continued service, but this argument is inconsistent with the fact that Rule 53(f)(1) *already* authorizes the Court to resubmit the Report to the Master with instructions. Rule 53(f)(1) does not envision or require consent by any party.[2]

Under *other* provisions of Rule 53, consent is relevant in two distinct ways, neither of which has any bearing on CCAF's argument in favor of a GAL. *First*, if a potential master has "a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455," those potential grounds for disqualification must be disclosed and the parties must consent to the appointment. Fed. R. Civ. P. 53(a)(2). That happened here: all parties ultimately consented to the appointment of Judge Rosen following the requisite disclosures. Appointment Order at 2 n.2. *Second*, under some circumstances—not applicable

[1] The Competitive Enterprise Institute states that it is a "non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty." *See* Competitive Enterprise Institute, https://cei.org/about-cei (last visited Aug. 7, 2018); *see also* Keller's Resp. to CCAF's Mot. for Leave to Participate as Guardian Ad Litem ECF 148, and Zuckerman's Opp'n to Mot. of CCAF for Leave to Participate as Guardian Ad Litem for Class, ECF 146, which are incorporated herein by reference.

[2] To be clear, Keller and Zuckerman consent to the continued service of the Master under the Appointment Order, any amendment of the Appointment Order, and/or any resubmission to the Master under Rule 53(f)(1).

here—consent can be relevant to the scope of the master's appointment. *See* Rule 53(a)(1)(A) (requiring consent of the parties). Here, the Master's appointment arises out of Rule 53(a)(1)(C) (addressing appointment of a master for posttrial matters that cannot be addressed by an available district judge or magistrate judge). Judge Rosen was asked to address post-judgment matters identified by the Court, not the parties. Consent is not a requisite to appointment under Rule 53(a)(1)(C).

The "consent" elements of Rule 53 do nothing to support CCAF's argument in support of a GAL. Indeed, the clear language of Rule 53(f)(1) and Rule 53(a)(1)(C) make it plain that the Court may seek further assistance from the Special Master with or without the parties' consent and without creating the need for a GAL.[3]

2. A GAL Is Not Necessary or Appropriate for the Sake of Adversariness

CCAF's request is premised on the idea that a legal adversary is necessary to defend the Master's Report and by extension the Court's ultimate decision in the case. That premise is flawed. The Master's Report, like any judicial document, speaks for itself. The Master considered and weighed evidence, made findings of fact and reached conclusions of law, and the parties objected to some of those findings and conclusions. The Court may, if it chooses, instruct the Master to consider those objections and issue an updated Report.[4] A judicial officer is not an adversary when she makes findings against a party based on the facts and the law, or even when

[3] CCAF cites no authority for its position that Class Counsel should prophylactically consent to allowing the Master to continue in his role. CCAF's Response at 13.

[4] The Master's investigation is not an adversarial process in the traditional sense, it is a judicial process. As the Rule 53 Advisory Committee Notes observe, a master's investigatory role can be "quite unlike the traditional role of judicial officers in an adversary system," but it is still an adjunct of the Court's inherent power regarding implementation and enforcement of post-trial matters.

she defends those findings (if the circumstances allow such a defense, as in some mandamus petitions, *see* Fed. R. App. P. 21(b)(4)). CCAF is wrong to imply the contrary.

CCAF also insinuates that Class Counsel might get away with something if a GAL is not appointed. This assertion is belied by the efforts of the Court and the Master to fully investigate the facts and consider the resulting legal ramifications.

3. Appointment of a GAL Would Create Additional Expense and Delay

Rule 53(a)(3) states: "In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3). Here, the Court and the parties are intimately aware of the expense that delaying or extending the proceeding may engender. Bringing in two new parties at this point in the proceeding—CCAF, with its own policy-driven agenda, and the law firm of Burch, Porter & Johnson, PLLC, a firm with no past exposure to the Master's investigation—that now require additional time to respond to the Court's July 31 Order,[5] would certainly exacerbate this situation. Moreover, CEI is a 501(c)(3) tax exempt organization that stated in its 2016 Form 990 that it receives a "substantial part of its support from . . . the general public . . . ."[6] Review of the Form 990 reveals that CEI in fact received substantial contributions from undisclosed individuals in amounts ranging from $150,000 to $786,000 each.[7] As a result, a substantial portion of CEI's budget appears to be contributions from a handful of individual mega donors. Before CCAF could be appointed GAL for the Class in this matter, CEI's mega donors should all

[5] CCAF states that any entity appointed GAL for the class should be given sufficient time to "digest the unredacted report and exhibits and file Rule 53 objections." CCAF's Response at 9.
[6] CEI's 2016 Form 990, at 13 https://cei.org/sites/default/files/990%20-%202016.pdf.
[7] *Id.* at pp. 22-23 (Schedule B).

be disclosed and reviewed by the Court so that the Court can consider whether CEI's impartiality would be compromised as a result of any of those major funding relationships.

RESPECTFULLY SUBMITTED this 7th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, I electronically filed the above with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

Dated: August 7, 2018

/s/ Laura R. Gerber
Laura R. Gerber

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. State Street Bank and Trust Company, Defendants.	C.A. No. 11-10230-MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. State Street Bank and Trust Company, Defendants.	C.A. No. 11-12049-MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. State Street Bank and Trust Company, Defendant.	C.A. No. 12-11698-MLW

MCTIGUE LAW LLP'S AND BEINS AXELROD, P.C.'S OPPOSITION TO PARTICIPATION OF CCAF IN THIS CASE AND PROPOSAL FOR SEPARATE REPRESENTATION OF ERISA MEMBERS OF THE CLASS OR AN ERISA SUBCLASS

McTigue Law LLP ("McTigue Law") and Beins Axelrod, P.C. ("Beins Axelrod") (collectively "Henriquez ERISA Counsel") — counsel representing named Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland — object for the following reasons to the participation of Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") as guardian *ad litem* for the class and/or *amicus* in this case. Henriquez ERISA Counsel also suggest that they be named Class Counsel for ERISA members of the Class or a subclass of claimants whose claims fall within the jurisdiction of ERISA, 29 U.S.C. §1001 *et seq.* This objection is being filed pursuant to the Court's July 31, 2018 order, ¶4, (Dkt. 410).

The Labaton firm's Opposition to the appointment of CCAF as guardian *ad litem* which was filed today provides additional reason for the appointment of Henriquez ERISA Counsel rather than CCAF or the Labaton firm which currently represents ERISA members of the Class.

I. BACKGROUND

On February 17, 2017, CCAF moved for permission to file an amicus brief on behalf of the Class. Dkt. 126. The Court took CCAF's motion under advisement. In the meantime the Court appointed a Special Master, the Honorable Gerald E. Rosen (ret.) who conducted an extensive investigation, creating a voluminous record, and issued a lengthy Report and Recommendations on June 28, 2018. Dkt. 357.

Class Counsel took issue with and objected to many parts of the Report and Recommendations and various aspects of the Special Master's authority. Many objections are yet to be resolved.

The Court issued an Order on July 31, 2018, stating that CCAF's guardian *ad litem* "request is now relevant" and asked CCAF to inform the Court whether CCAF still seeks a role in this case. (Dkt. 410 at 2).

II. CCAF REPORTS THERE ARE SEVERAL DIFFICULTIES WITH ITS PARTICIPATION AT THIS JUNCTURE

CCAF's Response to the Court's Order was filed yesterday (August 6) ("Response"; Dkt. 420). The Response began with the conclusion that the Court "may and should" remand the matter to the Special Master to file a supplemental report responding to the Customer Counsels' objections to the Special Master's original Report. The Response then stated that it would be "most efficient and cost-effective" if the Special Master served in the role of guardian *ad litem* (the role CCAF seeks) once those Special Master's duties were completed. Dkt. 420 at 2.

In the alternative and in the meantime, the CCAF Response suggests it serve as the guardian *ad litem.* However, CCAF's Response reported that "due to changed circumstances" CCAF can only serve a guardian *ad litem* with the assistance of counsel (*Id.* at 6) noting that CCAF has fewer attorneys now than when it filed its motion for appointment as guardian *ad litem* and that CCAF has since undertaken commitments which are time-consuming and of greater priority. *Id.* at 23.

CCAF's Response concludes that CCAF consequently needs the assistance of an outside law firm. CCAF found a firm without conflicts to undertake the role two days ago, on Sunday August 5th. *Id*. at 6. CCAF cautions that appointing CCAF and its law firm would occasion a delay in the proceedings because of a guardian *ad litem's* need to get "up to speed on a voluminous record," (*id*. at 12) including unredacted versions of the Special Master's Report and Recommendation and the large number of exhibits that remain unredacted. *Id*. at 9. The CCAF Response further acknowledges appointment of CCAF and its outside counsel would occasion

extra expense in appointing another law firm—one without the deep familiarity with the facts and law—to advocate for the class. *Id.* at 13.

III. SEPARATE ERISA REPRESENTATION COULD BENEFIT ERISA CLASS MEMBERS, ESPECIALLY WITH RESPECT TO THE UNIQUE AND APPARENTLY DELAYED ALLOCATION OF ERISA SETTLEMENT FUNDS

McTigue Law and Beins Axelrod suggest that if the Court prefers that the Special Master not be authorized to advocate for the class, or if the Court desires the assistance of additional counsel, they be named Class Counsel for ERISA members of the Class or a subclass of participants in ERISA Plans and Group Trusts which hold the assets of ERISA Plans whose claims fall within the jurisdiction of ERISA, 29 U.S.C. §1001 *et seq*.

McTigue Law and Beins Axelrod would accept attorney's fee rates identified in their previous filings in this case for this work. These rates are lower than the rates charged by Customer Class Counsel. McTigue Law and Beins Axelrod would accept attorney's fee rates identified in their previous filings in this case for this work. See Dkts. 104-19, Ex. A and 104-22, Ex. A, Biographies of McTigue Law and Beins Axelrod and their principal attorneys. These rates are lower than the rates charged by Customer Class Counsel.

If the court also prefers, existing ERISA Class Representatives Michael T. Cohn and Arnold Henriquez are willing to serve as Class Representatives of ERISA members of the Class or an ERISA subclass.

Little is known of the ERISA expertise and experience of CCAF's outside counsel, while Henriquez ERISA Counsel have years of experience, in this case and others. Appointing them would afford the ERISA Class members or an ERISA subclass independent legal representation and/or Class Representatives who would not need to learn and familiarize themselves with the

voluminous and still confidential record in the case. It would avoid the time, expense and delay in appointing a new law firm unfamiliar with the record.

There is an additional reason that ERISA Class members should be separately represented by knowledgeable ERISA Counsel, and not CCAF and its outside counsel, whose ERISA experience and expertise are unknown.

The ERISA members of the existing class have distinct interests in the administration of the settlement. $60 million (20%) of the total settlement fund is set aside for ERISA Class members. No more than $10,900,000 in attorney's fees may be deducted from this $60 million set aside. This means that ERISA Class members *who can be identified* will receive an "ERISA premium" under the Settlement. Dkt. 89 at 79.

Today, Class Counsel Labaton filed a Response to the Court's Order requesting oppositions to CCAF's request to be appointed guardian *ad litem* or amicus. Dkt. 427. Labaton's Response incorporated another Labaton filing today. Dkt 429

Remarkably, Labaton's two filings today report that settlement funds have yet to be distributed to ERISA members of the Class, while non-ERISA settlement funds have been distributed,

> "Labaton has overseen…processing of certifications submitted by Class Members that are Group Trusts concerning their ERISA assets…This role has not ended. Looking forward, Labaton is in the process of working … to obtain additional information concerning Group Trusts that have not submitted certifications…Once these efforts are concluded, and total ERISA volume is known and quantified, Labaton will …work with [the Settlement Administrator] to move forward with determining payment amounts for all Class Members other

than RICs [registered investment companies or mutual funds]" DKT #427 at pp. 8-9.

Today's Labaton filings indicate that a second distribution order involving ERISA members of the class, "Group Trusts that have not submitted certifications …about their ERISA assets or volume," is being prepared. "Labaton will prepare a second motion for authorization to distribute and then oversee the distribution to all non-RIC Class Members." Dkt. # 429 at p. 2. Remarkably today's filings by the Labaton firm do not disclose that the *deadline for the submission of Group Trust certifications closed December 20, 2016.* Notice to "Group Trust" Customers of State Street Bank and Trust Company. Dkt. 211-1 Ex A. Apparently, the rate of Group Trust ERISA certifications has been unacceptably low and the deadline is being reopened.

This is yet another reason to appoint separate counsel to represent ERISA members of the Class, counsel who are experienced with ERISA, this case, and uniquely represent ERISA class members, not other members of the Class or their own self-interest.

Henriquez ERISA Counsel are better situated than either CCAF or Labaton to ensure that *all* absent and deserving ERISA class members, not only a few, receive their share of yet undistributed settlement funds.

By: /s/ J. Brian McTigue

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was filed through the ECF System on August 7, 2018 and accordingly will be served electronically upon all attorneys of record.

/s/ J. Brian McTigue

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. August 8, 2018

It is hereby ORDERED that:

1. The Competitive Enterprise Institute's Center for Class Action Fairness's Motion for an Extenstion of Time to Supplement Its Motion to Participate (Dkt. 126) Pursuant to the Court's Order of July 31, 2018 and Memorandum in Support (Docket No. 419) is ALLOWED.

2. In view of the substantial submissions made on August 7, 2018, the August 9, 2018 hearing will begin at 1:30 p.m., rather than at 10:00 a.m. as previously ordered.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LABATON SUCHAROW LLP'S OBJECTIONS TO
SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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PRELIMINARY STATEMENT

Labaton Sucharow LLP ("Labaton") objects to the Master's findings of fact and conclusions of law set forth in his Report and Recommendations (the "Report"), as detailed below.

After nearly four million dollars spent and an investigation spanning more than a year, the Master has produced a 377-page Report that is unmoored from the law governing the conduct in question. His investigation – launched as a result of a self-reported and inadvertent double-counting error in the lodestar reports of the three Customer Class law firms – has morphed into a challenge of the practice of paying referral fees, despite it being perfectly permissible in Massachusetts. The Master has asserted several accusations of misconduct against Labaton. Each of them flows from an unprecedented misapplication of the law. Instead of applying the actual rules, the Master has – quite unfairly – sought to impose his own personal feelings and aspirations. As a matter of law, he is incorrect. The Court, reviewing the Master's findings of fact and conclusions of law *de novo*, must reject them.

Despite the millions expended by the Master, this case is simple. Labaton, along with several other firms, litigated a hard-fought battle for five years, which resulted in a terrific result for the class. Everybody involved in this case, including the Master, agrees. The attorneys requested 25% of the settlement as a fee award, which the Court determined was fair, in large part based on the difficulty of litigating the case, the risks of investing five years into the effort, and the outstanding result achieved for the class.

But two issues have surfaced regarding the attorneys' fees that were paid. First, Labaton, along with the other Customer Class Firms (Lieff Cabraser Heimann & Bernstein LLP and The Thornton Law Firm), mistakenly double-counted hours on their lodestar reports. This was an unfortunate error, which Labaton regrets. But because the Court used these lodestars as a cross-

check to determine whether the 25% fee award was fair, and because the inadvertent double-counting error did not materially affect the result of that cross-check (with the multiplier being adjusted from 1.8 to 2), this mistake should not affect the Court's conclusion that the 25% fee was fair.

Second, Customer Class Counsel paid a portion of their own fee award as a referral fee. Because it was taken from the fees already earned by Customer Class Counsel, this payment did not reduce the amount received by the class whatsoever (instead, it only affected the bottom line of the three firms paying the referral). Crucially, in Massachusetts, referral fees such as this are perfectly permissible.

Labaton obtained the consent of its client, Arkansas Teacher Retirement System ("ATRS"), to pay this fee. Five different experts have concluded that Labaton complied with the governing rules regarding referral fees. Three – Professors Peter Joy, W. Bradley Wendel, and Bruce Green – are law professors specializing in legal ethics. One, Hal Lieberman, is a practitioner who has worked in attorney discipline for over 35 years, including for the Massachusetts Office of Bar Counsel, as Chief Counsel to the Disciplinary Committee for New York's First Judicial Department, and as a private practitioner (in addition to teaching ethics for over a decade and serving on numerous committees involving professional discipline). The final expert is Camille Sarrouf, who has been practicing in the Commonwealth since 1960, including a term as president of the Massachusetts Bar Association in 1998. The combined expertise of this group on this particular issue is unmatched. Each one of these experts has opined, unequivocally, that Labaton complied with its obligations. And, in any event, ATRS has reaffirmed its consent to the payment of this referral fee, which is adequate under clear and controlling precedent from the Massachusetts Supreme Judicial Court.

Related to Labaton's permissible payment of this referral fee from its own share of the fee award, the Master has accused Labaton of misconduct because the referral payment was not disclosed to the Court or the class. The law on this issue is crystal-clear: Labaton was not required to disclose the referral fee absent an order from the Court. There was no such order. Although the Federal Rules of Civil Procedure are already definite and dispositive, Professor William Rubenstein – who literally wrote the book on class action law – has decisively confirmed that Labaton complied with its disclosure obligations as a matter of law. Labaton's conduct comported with the controlling Federal Rules of Civil Procedure, applicable precedent, local practice, and the Massachusetts Rules of Professional Conduct.

For his part, the Master's findings of fact are, in many instances, incorrect. He ignores or fails to address record evidence that squarely contradicts his findings. Far from acting as a neutral – as he purports to be – the Master has rendered factual findings that are skewed toward his desired result.

While some of the Master's findings of fact are one-sided, his conclusions of law are almost entirely incorrect. His legal conclusions regarding the referral fee are not only erroneous – in large part, they are unprecedented. For example, he claims that Labaton violated Massachusetts Rule of Professional Conduct 7.2, which marks the first time in the Commonwealth's history that this Rule has been applied in such a way. He also concludes that Labaton was required to disclose the referral fee to the Court, based largely on a strained reading of the Federal Rules of Civil Procedure that has never been applied by any court. Moreover, in many places, the Master does not rely on any law at all, instead choosing to render edicts in wholly conclusory fashion. The Master's conclusions are incorrect as a matter of law. And his

efforts to impugn and punish Labaton with accusations of misconduct while relying on novel and unprecedented legal interpretations are offensive to due process.

Labaton helped deliver a result for the class that was lauded by all. Its own client, ATRS, has repeatedly reaffirmed its satisfaction with Labaton's representation. The Master's findings are the outgrowth of his animosity toward referral fees and his refusal to apply the plain language of the Federal Rules of Civil Procedure. Labaton, at long last, welcomes this opportunity for the Court to scrutinize the Master's flawed conclusions and decide these questions *de novo.*

OBJECTIONS TO THE MASTER'S FINDINGS OF FACT

1. Labaton Did Not Take "Pains At Every Turn" to Hide the Chargois Agreement from ATRS.

Labaton disputes the Master's finding that Labaton "took pains at every turn not to reveal" the Chargois Agreement to George Hopkins or ATRS. Special Master's Report and Recommendations ("R&R") at 102-04. This finding is unsupported by the record.

a. ATRS' Institutional Knowledge of Chargois & Herron.

The Master improperly frames the knowledge of ATRS (the client) only in terms of what Hopkins knew. *Id*. This conveniently ignores the institutional knowledge of ATRS. It is undisputed that ATRS was aware of Damon Chargois and the Chargois & Herron firm. That firm facilitated the introduction between ATRS and Labaton, and Damon Chargois was present at the initial meeting. Ex. 125 (Chargois Dep.) at 36:12-37:10.[1] Further, Chargois & Herron and Labaton jointly responded to ATRS' Request for Qualifications for a monitoring counsel role and expressly stated that they intended to work together. Ex. 128 (LBS017738-55). ATRS answered through its Chief Counsel (Christa Clark) that, while the state system could not accommodate two unaffiliated firms as a single monitoring panel member, Labaton would be

[1] Exhibits attached to the Declaration of Justin J. Wolosz are indicated with a letter (e.g., "Ex. A"). Exhibits to the Master's Report and Recommendations are referred to by number (e.g., "Ex. 1").

free to "affiliate that firm [Chargois & Herron] or utilize them." Ex. 129 (LBS017455-56). Thereafter, Belfi spoke with Chief Counsel Clark and told her that Labaton would be working with Chargois & Herron and that the firm would be involved in the relationship. Ex. 122 (Belfi 9/5/17 Dep.) at 117:20-24, 118:5:7. The foregoing facts are undisputed, but not meaningfully acknowledged or accepted by the Master.

b. Labaton Followed Client Instructions.

Apart from the fact that ATRS, as an institutional party, was unquestionably aware of a relationship between Chargois & Herron and Labaton, the finding of concealment disregards the testimony of the only two people with knowledge of whether there was any attempt to hide information from ATRS (Hopkins and Labaton relationship partner Eric Belfi). After Hopkins joined ATRS, Belfi raised the subject of "how fees worked." *Id.* at 23:17-23. Hopkins responded that "he only wanted to deal with [Labaton] and wasn't concerned about how [Labaton] would cut fees up if [they were] working with other firms." *Id.* In short, Hopkins was interested in the aggregate attorney fee amount – not the allocations of that aggregate fee among various firms. *Id.* Hopkins' testimony confirmed Belfi's understanding: "I told Eric if I ever want to know about your attorney fees and who you all hired, I'll ask you . . . I don't feel misled because I made it real clear to them I didn't want to be the gatekeeper on all this attorney relationship. And I think if they thought I wanted to know, they would have told me because Eric always said if you ever want to see how we do all these fees, just let me know." Ex. 12 (Hopkins 9/5/17 Dep.) at 68:24-69:1, 73:11-18. The explanation provided by the two individuals with personal knowledge of the truth should be credited, and the Master's finding should be rejected.

c. ATRS' Engagement Letter With Labaton For the *State Street* Matter Permitted the Payment of Referral Fees.

Labaton objects to the suggestion by the Master that ATRS did not know or had no reason to know that Labaton may pay referral fees to another law firm in connection with the *State Street* matter. *See* R&R at 103-104. In their engagement letter, ATRS consented to Labaton dividing its fees, *inter alia*, with "local or liaison counsel" or as "referral fees." Ex. 138 (LBS011060-62). This express language in the letter sets forth (1) notice to ATRS of the potential payment of referral fees and (2) ATRS' consent for the payment of such fees.

Labaton also objects to the Master's finding that it was required to tell ATRS the name of the firm it paid a referral fee or the percentage of such fee. *See* R&R at 103. Under governing Massachusetts law at the time (and currently), there was no requirement to identify the name of the attorney being paid a referral fee or the percentage fee paid to such attorney. *See* § III.B, *infra*.

2. George Hopkins Ratified the Chargois Agreement on Behalf of ATRS.

Labaton objects to the Master's statement that the Hopkins Declaration (Ex. 130) (March 15, 2018) was anything other than a ratification of the Chargois Agreement on behalf of Labaton's client, ATRS, following full disclosure. *See* R&R at 101 n.83 (stating that Mr. Hopkins "purports" to ratify the Chargois Agreement). In his Declaration, Mr. Hopkins, the Executive Director of ATRS, acknowledged the fee division with Chargois, recited its details, and consented to and ratified the fee division on behalf of ATRS with respect to the *State Street* matter. Ex. 130. There is nothing "purported" about Mr. Hopkins' Declaration. *See* R&R at 101 n.83. It is unequivocal. And, as the SJC held in *Saggese v. Kelley*, 445 Mass. 434 (2005) in the context of MRPC 1.5(e) on fee sharing, "[r]atification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate." 445 Mass. at 442.

3. The Payment to Chargois & Herron Was Not Required To Be Disclosed In the Fee Petition Or Any Settlement Documents.

Labaton objects to the Master's finding that "the failure to include the payment to Chargois in the Fee Petition, or anywhere else in the settlement documents, was a material omission." R&R at 88. This is a legal conclusion, not a finding of fact, and for the reasons set forth herein (§§ IV and V, *infra*), there was no duty to disclose the payment to Chargois to the Court, in the notice to the class, or in any of the settlement documents filed in the case.

4. The Payment to Chargois & Herron Did Not Come From "Class Funds."

Labaton objects to the Master's finding that the payment to Chargois & Herron came from "class funds." *See, e.g.*, R&R at 7, 87 n.67, 114 n.93, 263, 287, 299, 306, 311, 324-25, 358-59. The payment came from the share of reasonable attorneys' fees that the Court had already awarded to Customer Class Counsel. *See* Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs dated November 2, 2016, ECF No. 111. It did not come from "class funds."

After the Court entered the aggregate fee award, the attorneys apportioned the aggregate fees pursuant to their previously agreed upon fee allocation agreements. As part of that process, Labaton transferred the aggregate attorneys' fee award from the settlement fund into a separate escrow account. The referral or origination fee payment to Chargois was funded by the three Customer Class Counsel. Accordingly, Labaton reduced the payment to Lieff and Thornton by the amount they had agreed to contribute to the Chargois payment, and included these amounts in the transfer to the Labaton IOLA account. From Labaton's IOLA account, Labaton paid service awards and made the payment to Chargois. *See* Ex. 238 (Response by Labaton Sucharow LLP to Special Master's September 7, 2017 Request for Supplemental Submission) at 37.

The suggestion that Labaton was shifting a pre-existing obligation to the class is flat-out wrong. Labaton's agreement was to pay a portion of its share to Chargois & Herron (although, in this case, it was also funded by Lieff and Thornton). If Labaton itself was entitled to no share of attorneys' fees, then Chargois & Herron likewise would be entitled to no payment.

Throughout these proceedings, Customer Class Counsel and several of their experts, including Prof. Rubenstein, have vigorously disputed the notion that the payment to Chargois & Herron came from "class funds." As Professor Rubenstein testified at his deposition:

> I think it's an important distinction in a big case like that that there are these two phases; that the fee is set in the aggregate in the first phase. That's the important phase 'cause that's when the class' money is being taken from the class. And that's the key to the whole thing in my opinion. And then once the Court has decided that's a fair fee to take from the client, then the question of how the lawyers divide that fee up among themselves is what I refer to as the allocation phase which I think has less pertinence for the class in most cases. Ex. 235 (Rubenstein Dep.) at 23:16-24:4.

The repeated finding in the R&R that the payment to Chargois & Herron came from "class funds" and that Labaton used "class funds" to satisfy a preexisting obligation are baseless and incorrect, and therefore should be rejected.

5. Labaton Did Not Improperly Hide the Chargois Agreement From Other Counsel.

Labaton objects to the Master's suggestion (R&R at 116, 132-133 & n. 115) that it improperly hid the Chargois Agreement from the other lawyers in the case. The Labaton witnesses testified to their belief that their business arrangements, which would include the payment of permissible referral fees to other lawyers, were not required to be disclosed to other counsel. Ex. 42 (Goldsmith 9/20/17 Dep.) at 167:12-168:21; Ex. 38 (Sucharow 9/1/17 Dep.) at 94:8-95:6. This information about the identity of local counsel who helped Labaton develop certain business relationships is proprietary to the Firm and Labaton did not expect other counsel to share any such relationships with it. Moreover, the other firms were not surprised by this. *See*

Ex. 162 (4/13/2018 Hearing) at 266 (Lieff attorney stating "how competitive the field is in the plaintiffs' securities bar for clients like Arkansas . . . the identity of your local counsel in the minds of some plaintiffs' firm is proprietary); *id.* at 269-70 (Lieff attorney stating "Labaton did not want to disclose to the world who their local contact was for their Arkansas Fund client . . . it's just not a surprise. It is not – it was not a surprise to me").

6. The ERISA Firms Had No Intention of Sharing Any Attorneys' Fee Allocation Information with the Department of Labor.

Labaton objects to the Master's finding that its failure to tell ERISA counsel (McTigue Law LLP, Keller Rohrback L.L.P. and Zuckerman Spaeder LLP) about the Chargois Agreement kept it from being disclosed to the Department of Labor. *See* R&R at 117-18, 349. Lynn Sarko, counsel for the ERISA plaintiffs, made contemporaneous statements admitting that he would not provide any fee allocation or agreement information to the DOL.

First, on August 9, 2015, Mr. Sarko wrote to plaintiffs' counsel with his thoughts prior to an upcoming call with the DOL. *See* Transmittal Declaration of Justin J. Wolosz, submitted herewith ("Wolosz Decl."), Ex. A (TLF-SST-043022). Under the heading "Expect the DOL to ask," Mr. Sarko wrote: "Are there deals/arrangements on how to divide the fees between the class lawyers – and are we willing to tell the DOL what those arrangements are (I have stayed away from commenting on this – and have always changed the subject or ignored their question – ***as I feel it is none of their business***"). *Id.* (emphasis added).

Second, on August 28, 2015, Mr. Sarko wrote to plaintiffs' counsel: "We need to be careful about this as the DOL has asked if there were any agreements on fees between counsel. ***I would never answer their question***. And then they seem to forget about it." Ex. 35 (TLF-SST-052975) (emphasis added).

Therefore, it is simply incorrect for the Master to credit Mr. Sarko's *post hoc* and self-serving testimony that, had he known of the Chargois Agreement, he would have disclosed it to the Department of Labor. *See* R&R at 117-18, & n.96. The fact that the Master does not even address these statements by Mr. Sarko speaks volumes about the unbalanced nature of his Report.

7. The Special Master Is Incorrect Regarding Amounts Supposedly Owed to ERISA Counsel.

Throughout the course of the investigation, the Special Master (as was apparent through his questioning) misunderstood or misconstrued a term in the Stipulation and Agreement of Settlement. The relevant provision states that: "no more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in attorneys' fees shall be paid out of the ERISA Settlement Allocation." ECF 89, ¶24. In questioning, the Special Master appeared to mistakenly believe that this term means that ERISA Counsel was entitled to receive up to $10.9 million in attorneys' fees. *See, e.g.,* Ex. 42 (Goldsmith 9/20/17 Dep.) at 101:13-16 (asking what would occur "if the differential between the 10.9-million-dollar cap and what ERISA counsel received didn't go to ERISA counsel for fees"); Ex. 41 (Chiplock 9/8/17 Dep.) at 85:13-20 (The Master: "Where maybe the lack of understanding is . . . It looks in the agreement like there's a 10.9 percent cap because it's captioned ERISA settlement allocation. It looks like that is an allocation for ERISA counsel."). In the R&R, the Master confirms that this was his erroneous understanding, making demonstrably incorrect statements describing the $10.9 million cap, such as: "attorneys' fees *for ERISA counsel* would not exceed $10.9 million" (p. 277, emphasis added) and "fees *for ERISA counsel* will not exceed $10.9 million" (p. 343-344, emphasis added). He also makes a "recommendation" that the award of fees to ERISA Counsel should be increased by $3.4 million, so that they would receive a total of $10.9 million. *Id.* at 368-69.

The Special Master conflates the amount of total attorneys' fees that could permissibly be paid from the ERISA Settlement Allocation with the amount of fees payable *to ERISA Counsel*. There is no basis to say that "those two numbers have anything to do with each other." Ex. 42 (Goldsmith 9/20/17 Dep.) at 100:12-13; *see also id. at* 101:6-11 ("There was never, to my knowledge, any sort of cross-over or discussion of how this cap, which was requested by the DOL and negotiated between the DOL and Lynn Sarko to my recollection, informed or had anything to do with" how a fee award would be divided among Customer Class Counsel and ERISA Counsel).

Nor would there be a basis to increase the amount payable to ERISA Counsel to $10.9 million, or anything above what they received. ERISA counsel contributed to the effort in this case – as acknowledged by Customer Class Counsel when they increased the ERISA Counsel's share of attorneys' fees from 9% to 10% – but ERISA Counsel played a much less significant role than Customer Class Counsel. Among other things, ERISA counsel never litigated a motion to dismiss. *Id.* at 16:12-17:1; 43:11-18. Likewise, ERISA Counsel did not invest nearly as much as Customer Class Counsel in expenses and fees to develop the theory of the case, conduct massive document review and analysis, and respond time and again to contentious presentations by State Street's counsel during the mediation sessions, leading ultimately to a settlement for all. *See, e.g.,* Ex. 58 (Goldsmith 7/17/17 Dep.) at 48:18-20 ("And based largely on our efforts they were able to settle their cases without having those allegations tested."); 65:11-67:11 (explaining his recollection that ERISA counsel never requested access to the voluminous documents that Customer Class Counsel had requested and reviewed); Ex. 10 (Chiplock 6/16/17 Dep.) at 79:7-82:21 (ERISA firms did not have a role working with Customer Class Counsel on document review or pleadings). Any suggestion by the Special Master that ERISA Counsel were solely

responsible for obtaining the entire portion of the ERISA Settlement Allocation – which seems to be the premise behind the Special Master's suggestion that ERISA Counsel were supposed to receive $10.9 million (and the "recommendation" that their share should be increased now) – fails to reflect the reality of how this case proceeded.

The amount of the losses suffered by the putative ERISA class members likewise provides no basis to increase the share of attorneys' fees paid to ERISA counsel. The Special Master's Report and Recommendation states affirmatively that after reaching the agreement that ERISA Counsel would take 9% of any fee award, "it was later learned" that losses to the putative ERISA class were "actually about 12-15% of the total trading volume." R&R at 46. Although the Special Master includes a footnote saying that Labaton's counsel indicated *at oral argument* that the trading volume was between 9 and 10% (R&R at 46 n.28), this statement is misleading: Labaton had submitted a written rebuttal response that made clear that there was no record evidence for any finding that the ERISA trading volume was 12-15% of the total trading volume. *See* Ex. 161 (Rebuttal Response by Labaton Sucharow LLP) at 10-11.

As explained in the Court-approved Plan of Allocation for the proceeds of the Settlement, the Class's ERISA trading volume is derived from the volume of ERISA Class Members and also from certain Class Members that are "Group Trusts." *See generally* Class Notice, ECF No. 104-13 at 17-20. "The amount of the ERISA Settlement Allocation has been set based on the Indirect FX Trading Volume information provided, including information concerning the total amount of Indirect FX Trading Volume executed during the Class Period by ERISA Plans and Group Trusts." *Id*. at 17.

However, both the amount of the Class's ERISA trading volume, *i.e.,* the Indirect FX Trading Volume of ERISA Class Members and eligible Group Trusts, and the proportion of the

Class's ERISA trading volume to total Indirect FX Trading Volume of the Class *is not known at this time*.[2] This is because the scope of Group Trust ERISA trading volume and assets is only known to the Group Trusts and, as part of the Settlement administration and Plan of Allocation, they were asked to provide certifications concerning their ERISA assets and/or the Indirect FX Trading Volume made by their ERISA Plans so that the Claims Administrator could determine their ERISA Volume. *See id.* at 18-19. As explained by the Claims Administrator in connection with Plaintiffs' Assented-To Motion For Authorization To Distribute To Eligible Registered Investment Company Class Members (ECF Nos. 209-211), this Group Trust certification process is ongoing. *See* Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Support of Motion for Authorization to Distribute to Eligible Registered Investment Company Class Members, ECF 211 at ¶¶ 13-14.

Moreover, the deposition testimony cited by the Special Master in support of his finding does not even support his proposition regarding Indirect FX Trading Volume. Lynn Sarko's July 6, 2017 testimony states:

> THE WITNESS: I guess in my view was, you know, in the perfect world, we would have received –
>
> SPECIAL MASTER: Something commensurate with what the ERISA trading volume turned out to be?

---

[2] "The ERISA Settlement Allocation (which shall be the source of distributions *to ERISA Plans and certain Group Trusts,* as set forth below) shall be at least Sixty Million Dollars ($60,000,000.00) …. The ERISA Settlement Allocation, even without the $10,900,000 cap on attorneys' fees described above, provides a premium per dollar of Indirect FX Trading Volume for ERISA Plans and eligible Group Trusts in comparison to the allocations to other Settlement Class Members. The precise size of the premium is not known at this time because *the amount of ERISA assets within Group Trusts is currently undetermined*…." *See* Class Notice, ECF No. 104-13 at 17 (emphasis added). Moreover, "*[i]n light of the fact that the amount of ERISA assets within Group Trusts is currently undetermined*, the Parties, with input from the DOL, have agreed that the Plan of Allocation will be modified in the event that the total amount of Group Trusts' ERISA Volume is in excess of 2/3 of the total amount of Group Trusts' Indirect FX Trading Volume, as reported by State Street on July 25, 2016." *Id*. at 18 (emphasis added).

> THE WITNESS: Correct. Or you can say, put it differently, should we receive a lower multiplier than certain other folks?

Ex. 28 (Sarko 7/6/17 Dep.) at 64:3-11.

Moreover, Carl Kravitz's full testimony actually supports the opposite finding:

> As things played out, the number was between slightly above 9 and 15, or maybe slightly above 15. Why it went to from slightly below 9 to slightly above 9, I don't know.
>
> But there was another group of entities called group trusts. Group trusts have both ERISA and non-ERISA assets. And I believe that they were not included in the original data we were given under the heading ERISA assets.
>
> And so somewhere between 9-plus and 15-plus would be the actual ERISA volume, depending on what part of the group trusts turned out to be ERISA and what part turned out not to be ERISA.
>
> The settlement, if you look at it, has a process for determining exactly what that percentage is because, at the end of the day, you need to know whether the group trust assets that are ERISA are going to take from the ERISA pile or the non-ERISA pile. And if you ask me do I know what that process has revealed in terms of what the actual percentage is, the answer is I don't know. So I wish I could answer that question.

Ex. 21 (Kravitz 7/6/17 Dep.) at 53:23-54:20.

Accordingly, the Master's finding that ERISA trading volume "was actually about 12-15% of the total trading volume. . . ." is unsupported by the record.

Finally, the division of fees between Customer Class Counsel and ERISA Counsel was not entirely predicated on an estimate of the ERISA trading volume. In fact, the 9% share of fees initially allocated to ERISA counsel was also based on the fact that the ERISA claims were largely duplicative of the claims asserted in the "customer" case (i.e., *ATRS v. State Street*). In other words, when the fee allocation was negotiated, the ERISA claims were not expected to be solely responsible for any recovery to ERISA-eligible claimants. Thus, even leaving aside the

exact trading volume, the fee agreement between Customer Class Counsel and ERISA Counsel was still fair.

8. ERISA Plaintiffs Were Not Labaton Clients Until, at the Earliest, a Class Was Certified.

The Report makes a blanket statement – twice – that Customer Class Counsel considered ERISA plaintiffs to be Customer Class Counsel's clients. R&R at 28, n.16 and 281, n.232. This conclusion is inaccurate, at least as to Labaton. With respect to Labaton, both statements cite to the testimony of David Goldsmith. *Id.* The first is a citation to a September 20, 2017 deposition that apparently was intended to refer to a July 17, 2017 deposition. The actual quotation (when the citation is corrected) merely says that Customer Class Counsel "did allege a class which was broad enough to encompass ERISA governed assets." Ex. 58 (Goldsmith 7/17/2017 Dep.) at 42:11-14. The second citation, which also points to the wrong deposition date, does include a quotation with a passing comment saying that putative ERISA class members "were our clients." *Id.* at 61:7-14. But the reference to that comment fails to acknowledge that, when questioned more directly about the issue, Mr. Goldsmith testified unequivocally that, "I would not view the ERISA plaintiffs as clients of Labaton Sucharow." Ex. 42 (Goldsmith 9/20/2017 Dep.) at 31:10-12; *see also id.* at 32:9-11; 33:21-24. As the deposition continued, Mr. Goldsmith further explained that in his mind, the ERISA plaintiffs and putative class members "actually weren't Labaton clients, to the extent they ever were, until the class [was] certified . . . until the settlement was finally approved by the Court which was I think on or about November 2, 2016." *Id.* at 65:19-66:2.

9. Labaton's Purported "Compartmentalization" Is Not Inappropriate.

Labaton disputes the Special Master's repeated conclusion that Labaton has a structure of "compartmentalization" that is somehow inappropriate. *See, e.g.,* R&R at 56, 97-98. Labaton

does have settlement counsel who focuses on the preparation of settlement documentation and fee submissions, and relationship partners who serve as the primary conduit with clients. But the Special Master's suggestion that these individuals do not communicate with each other goes much too far. *See, e.g.,* Ex. 58 (Goldsmith 7/17/07 Dep.) at 14:3-7 (one of the lead litigators on the State Street matter, who explained that: "I did have a lot of involvement in the documentation of the settlement and the submission of papers relating to the settlement."). Labaton recognizes that, in this case, more communication might have caught the double counting issue. But that does not mean that Labaton's staffing structure is somehow flawed, and Labaton objects to any suggestion that it is. To the contrary, there are many benefits to having (for example) a Settlement Group, which can devote resources to develop more in-depth knowledge of this important area of the law and important part of Labaton's practice, and offer their services in all of Labaton's cases.

10. Labaton Was Not Required to Disclose the Referral Relationship in Response to RFPs or Interrogatories.

The Special Master's initial round of discovery, as modified, did not ask Customer Class Counsel to produce information regarding the fee-sharing arrangement with Chargois & Herron. On Thursday, May 18, 2017, counsel for the Special Master sent via email the Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Labaton Sucharow LLP ("First RFP") and the Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP ("First Interrogatories"). *See* Wolosz Decl. at ¶ 4, Ex. B (First RFP), Ex. C (First Interrogatories). The First RFP included fifty-six (56) requests that sought an enormous number of documents. The First Interrogatories asked seventy-five (75) separate questions, some of which were further expanded with sub-parts. The Special Master

demanded in the preamble to each document that Labaton provide written responses and produce all of the requested documents within fourteen (14) days.

The scope of the request made the timing demanded completely unrealistic. Accordingly, Labaton's counsel and the Master's counsel agreed to meet on Monday, May 22, 2017, at the offices of counsel for the Master, to confer regarding the requests. At the beginning of the meeting, one of the Special Master's attorneys handed counsel for Labaton a list of document requests and interrogatories that the Special Master had decided to strike in their entirety. *Id.* ¶ 5 and Ex. D. Included in the list of stricken discovery was RFP No. 22, which sought:

> 22. All documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms, and/or ERISA counsel regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award.

Id.

This stricken Request No. 22 is the only request that arguably could have called for production of *some* documents regarding the payment to Chargois & Herron. In the R&R, the Special Master takes great pains to claim that other requests called for this information (R&R at 119-123), but in the end, the Master can identify no such request:

- Request No. 18 asked for documents regarding certain communications "relating to sharing costs and/or expenses" of the litigation. Ex. 164 at 8. The Special Master has pointed to no such documents that discuss the referral fee arrangement.
- Request No. 40 sought "[a]ll documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records." Ex. 164 at 12. The

Special Master has pointed to no such documents that discuss the referral fee arrangement.

- Interrogatory No. 60 asked Labaton to "[i]dentify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor." Ex. 174 at 16. Labaton gave a detailed response that provided a significant amount of information (*see id.*, p. 16-24), but did not identify anything regarding Chargois & Herron because it was not called for by the question.
- Interrogatory No. 72 asked Labaton to "[i]dentify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge." *Id.* at 37. This interrogatory is impossible to answer as drafted, because there could be thousands of people, inside and outside of Labaton, who have some degree of "knowledge of the . . . SST Litigation." Labaton objected and stated that it will "construe this Interrogatory as a request that the Firm identify (to the extent not otherwise identified in its response to the Interrogatories) the principal Labaton Sucharow attorneys or staff who worked on, or have unique knowledge regarding, the topics being reviewed by the Special Master." *Id.* at 37-38. As reasonably construed in this manner, the request did not call for identification of Chargois & Herron.

Simply put, once the Master voluntarily eliminated a number of the requests contained in the First RFP, there was nothing left that even arguably called for identification of the Chargois & Herron relationship. The fact that Thornton – for whatever reason – chose to include some of

the documents does not make them responsive. The Master did not ask for these documents, and Labaton objects to any "finding" to the contrary.

11. There Has Been No Failure to Accept Responsibility.

Although not expressly included as a "finding," the Special Master makes unnecessary, inflammatory commentary saying that Labaton has somehow failed to "own up" to wrongdoing. The Special Master describes this as "[o]ne of the most troubling elements of the Chargois" relationship, claiming that Labaton has failed to "accept[] responsibility for the calculating and secretive nature of the conduct," failed to "express[] contrition" or "remorse." R&R at 362. The Special Master goes on to criticize Labaton for retaining what he terms a "phalanx of experts" and "erect[ing] a wall of legalistic and formalist excuses and blame-shifting." *Id.*

The Special Master's musing is wrong and highly inappropriate. The suggestion that Labaton should express remorse or contrition fails to recognize the threshold fact that Labaton (together with highly-credentialed experts who have testified in this case) disputes the Special Master's findings and conclusions. The Special Master also ignores that he arrived at an early view that the Chargois relationship was somehow improper, leaving Labaton with no choice but to defend itself. For example, during the deposition of Mr. Sucharow – which occurred *on the very first day of depositions relating to the Chargois issue* – the topic of whether the referral fee should have been disclosed to ERISA Counsel came up. Abandoning any sense of impartiality or suggestion that he was engaged in fact-finding (or a deposition, for that matter), the Special Master argued with the witness, stating his predisposition:

> THE SPECIAL MASTER: There is a difference, Larry. Let me tell you what it is.
>
> Your fees, Lieff's fees and Thornton's fees were going to be before the Court, disclosed to the Court, and the allocation was going to be disclosed to the Court.

> The fees of the ERISA counsel were going to be before the Court, and the allocation disclosed to the Court.
>
> By not bringing it to the ERISA counsel's attention that a lawyer who is not before the Court is going to get 5.5 percent of the total award is depriving the ERISA counsel of having the opportunity to weigh in not only as to their own distribution but as to whether or not it's appropriate in the larger context of the class distribution and the larger context of the allocation to the other lawyers. You don't see that?

Ex. 38 (Sucharow 09/01/2017 Dep.) at 27:5-27:23.

This exchange occurred near the beginning of the referral fee portion of the Special Master's investigation. In the months that followed, the Special Master doubled down on his view that the referral relationship (and/or disclosures about it) must somehow be improper, and he took great pains to find *some* legal basis upon which he could call the fee or disclosure issues into question. *See, e.g.,* Ex. 232 (Gillers Report, which was prepared over the course of almost three months); Ex. 253 (Gillers 3/20/18 Dep.) at 53:9-62:17 (conceding that he found no opinions of the Massachusetts Board of Bar Overseers, the Massachusetts Bar Association, or the Boston Bar Association, or any Massachusetts judicial opinions, which explain or hold that his interpretation of Rule 1.5(e) is correct.). Labaton's retention of a so-called "phalanx of experts" was merely an attempt to ensure that the one-sided, novel opinions being leveled at Labaton were not left unrebutted in the record.

It does not lie in the Special Master's mouth to now accuse Labaton of being legalistic or formalistic. In the face of new legal interpretations being used to suggest serious wrongdoing, the Firm had no choice but to push back, pointing to the actual, controlling legal principles. Although the Special Master largely ignored Labaton's arguments, the process is now past that stage and Labaton has the opportunity for a *de novo* review before the Court. Surely Labaton is not required to forego that review and express some kind of "remorse" or "contrition" before there is a fair adjudication of whether the Firm did anything wrong.

To the extent that the Special Master's inappropriate commentary can be considered a "finding" of any sort, Labaton objects.

12. ATRS Continues to Be an Adequate Class Representative.

The Special Master takes the position that ATRS is not appropriate to serve as class representative moving forward. R&R at 78 n.58 and 257-58, n. 207. The "finding," if it rises to that level, is outside the scope of what the Special Master was asked to do in this case. The Appointment Order commissions the Special Master to "prepare a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses, and service awards *previously made in this case.*" Appointment Order (ECF 173) at 2 (emphasis added). It says nothing about opining on the fitness of ATRS or its executive director to serve in a class representative position in the future. For this reason alone, the Special Master's unsolicited opinions about ATRS serving as class representative going forward should be disregarded.

Moreover, even if the Master had been asked to look into this issue, there is no reason for him to conclude that ATRS should step down. As the Special Master himself stated, "[y]ou're not going to get any disagreement from me on whether [ATRS' Executive Director] was more involved, more engaged, and contributed more value than not just the average class representative but almost any class representative." Ex. 162 (4/13/2018 Hearing) at 50:20-24. In addition, the remaining issue being litigated involves the allocation of attorneys' fees, which is not something in which a class representative is normally involved. Ex. 235 (Rubenstein Dep.) at 177:1-9 ("And again, my testimony – and I'll repeat it – is that I don't expect much of the class representatives as to fee allocation, nor does class action law. I don't know of a single class action case that says the class representatives oversee fee allocation. In all the cases that your expert cited no one ever mentions a class representative as being a key factor in the fee allocations or the fee agreements. It's the Court."). In a situation where the class representative

has performed better service than "almost any class representative" in the past, and there is no real role left for it on the key contested issue remaining in the case, there is certainly no basis to find that the representative should step down.

Nor is there any suitable alternate class representative who would be available if ATRS were to step down. There are no other named plaintiffs in the case brought by Customer Class Counsel. No possible class representative other than ATRS would satisfy the requirements of Rule 23(a)(4). *See* Fed. R. Civ. P. 23(a)(4). For reasons that he does not fully articulate, after praising ATRS for the work it performed as class representative, the Special Master makes these passing, disparaging remarks in two footnotes that purport to raise a question about ATRS' fitness to serve as class representative going forward. The footnote comments are outside the scope of the Master's mandate, insufficiently explained or supported, and inappropriate. They should be disregarded.

OBJECTIONS TO THE MASTER'S CONCLUSIONS OF LAW

Labaton objects to the following of the Master's Conclusions of Law, and all subsidiary conclusions reached by the Master, including but not limited to the following:

1. Labaton objects to the conclusion that it violated any duties to ATRS concerning the Chargois Agreement. *See* R&R at 248-73; 331-34. In particular, but not exclusively:

    - Labaton objects to the conclusion that it violated MRPC 1.5(e). *See* R&R at 248-63.

    - Labaton objects to the conclusion that it violated MRPC 7.2(b). *See* R&R at 263-73.

    - Although the Master reached no such conclusion, Labaton objects to any suggestion that it violated MRPC 1.5(a). *See* R&R at 261 n.209.

2. Labaton objects to the conclusion that it "failed to meet its fiduciary duties to the class members as clients." *See* R&R at 346; 273-286; 338-46. In particular, but not exclusively:

- Labaton objects to the conclusion that it was required to disclose the Chargois Agreement to the named plaintiffs/class representatives. *See id.*

- Labaton objects to the conclusion that it violated MRPC 1.2 or MRPC 1.4. *See id.*

3. Labaton objects to the conclusion that it was required to disclose the Chargois Agreement to the Court. *See* R&R at 139-141; 303-26; 343; 353-362. In particular, but not exclusively:

    - Labaton objects to the conclusion that Rule 23(e)(3) required disclosure of the Chargois Agreement. *See* R&R at 278, 306-309; 354-57.

    - Labaton objects to the Master's suggestion (not conclusion) that Labaton's non-disclosure of the Chargois Agreement was "supportable" of a Rule 11 violation of Labaton or any of its attorneys. *See* R&R at 309-318; 357-59.

    - Labaton objects to the conclusion that at the fee petition stage attorneys must present "all relevant facts" and there exists "an enhanced duty of full disclosure." *See* R&R at 139-141; 303-305, 313-314; 353-54.

    - Labaton objects to the conclusion that it "deprived the Court information it needed to discharge its fiduciary obligations to protect the class's interests" or otherwise withheld from the Court information that Labaton had a duty to disclose. *See* R&R at 303-326.

    - Labaton objects to the conclusion that its non-disclosure of the Chargois Agreement violated MRPC 3.3(a) or MRPC 8.4(c). *See* R&R at 318-22; 359-62.

    - Labaton objects to the conclusion that it violated a duty of candor to the Court. R&R at 322-326.

4. Labaton objects to the conclusion that it was obligated to disclose the Chargois Agreement to Customer Class Counsel and ERISA counsel. *See* R&R at 287-303; 346-53.

5. Labaton objects to the remedies recommended by the Master regarding Labaton. *See* R&R at 362-77.

    - Labaton objects to the recommendation that the Customer Class Counsel firms should disgorge in equal amounts the $4 million of double-counted time. *See* R&R at 363-64.

    - Labaton objects to the recommendation that it should disgorge $4.1 million representing the payment to Chargois. *See* R&R at 368-69

- Labaton objects to the recommendation that it work with the Court regarding on-going ethics supervision. *See* R&R at 372-73.

ARGUMENT SUPPORTING LABATON'S
OBJECTIONS TO THE MASTER'S CONCLUSIONS OF LAW

I. STANDARD OF REVIEW.

"The court must decide *de novo* all objections to conclusions of law made or recommended" by the Master. Fed. R. Civ. P. 53(f)(4). "[T]he court also may decide conclusions of law *de novo* when no objection is made." *Id.*, 2003 Advisory Note. Moreover, "[t]he court must decide *de novo* all objections to findings of fact made or recommended by a master," except in two situations that do not apply here. Fed. R. Civ. P. 53(f)(3).

II. THE MASTER MISSTATES THE APPLICABLE LEGAL STANDARDS.

The Master's findings and legal conclusions concerning counsels' duties in connection with a class action fee petition suffer from a fundamental flaw – the Master misstates the applicable law. At the outset of his legal conclusions, the Master describes the "general standards" that "guided" his decisions in this case. R&R at 139-41. He sets forth sweeping obligations: "[a]ttorneys seeking fees from a common fund have a duty to present all relevant facts to the court reviewing the petition;" "[t]he fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function fully and completely advised of all factors and agreements that impact the allocation of attorneys' fees vis-à-vis the actual recovery of the class;" and "[a]bsent full disclosure, the court cannot, with full knowledge, discharge its gatekeeping function and ensure fairness to the class." *Id*. In addition, the Master describes Labaton's duty as requiring it to "provide the Court with all the information it needed to make an informed decision as to the award of attorneys' fees out of the State Street settlement fund. This included disclosure of the identity of all attorneys – including Damon Chargois – who would be

sharing in the award and what the share of each attorney would be." R&R at 354 (citing no case law).

These unbounded standards may be the Master's aspirations, but ***they are not the law***. The Master fails to mention that Federal Rules 23(h) and 54(d) expressly govern the required disclosures in connection with a class action fee petition. These rules directly contradict the Master's unsupported view of attorneys' disclosure obligations. As further explained herein, they do not require the disclosure of the identity of all attorneys sharing in the fee award or the share that each attorney will receive.[3] And, in this case, the governing Federal Rules did not require disclosure of the Chargois Agreement. *See generally* Ex. 234 (Rubenstein Rep.); Ex. 241 (Joy Rep.) at 31-55.[4]

In sum, the Master presents a woefully incomplete and incorrect view of the law. *See* § IV, *infra.* His misguided first principles therefore taint his legal conclusions. *See* R&R at 141 ("The Special Master is guided by the foregoing general standards in deciding the issues presented in this case.").

III. THE CHARGOIS FEE-SHARING AGREEMENT COMPLIED WITH THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT.

Labaton's fee division with Chargois was a permissible referral fee and complied with MRPC 1.5(e). Moreover, even if the fee division did not initially comply with MRPC 1.5(e),

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[3] The Master also relies heavily on *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216, 222 (2d Cir. 1987) – calling it the "leading case" – without acknowledging that the Second Circuit issued an opinion in 2016 explaining that Rule 23 does not require the automatic disclosure of fee sharing agreements. *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 137-38 n.2 (2d Cir. 2016).

[4] Professor Gillers, relied upon by the Master, is not an expert in class action practice and disclaims reliance on the governing Federal Rules of Civil Procedure in reaching his opinions. *See* Ex. 253 (Gillers 3/20/18 Dep.) at 114:23-115:7 ("I'm not relying on Rule 54 as the source of authority or obligation to disclose participation of a lawyer whom the Court does not know about."). On the other hand, Prof. Rubenstein – who testified that Customer Class Counsel were not required to disclose the Chargois Agreement to the Court or class – is one of the nation's preeminent scholars on class action law.

ATRS subsequently ratified it, which constitutes adequate consent under controlling Massachusetts precedent. Finally, leaving aside whether Labaton perfectly complied with MRPC 1.5(e), neither MRPC 1.5(a) nor MRPC 7.2(b) apply to the Chargois Agreement.

A. The Master's Animosity Toward Referral Fees is Squarely at Odds With Massachusetts Law and Practice.

Under longstanding Massachusetts practice, the Chargois Agreement was permissible. "Bare" referral payments – i.e., payments for the referral itself without the requirement of any work being performed by the referring lawyer – are "quintessentially a Massachusetts practice." Board of Bar Overseers, *Massachusetts Legal Ethics: Substance and Practice* at 185 (2017) (Ex. E). But one would never know this from reading the Master's Report, as it fails to acknowledge that Massachusetts permits bare referrals until page 251.

Throughout the course of his investigation, the Master has made his opposition to referral fees crystal-clear.[5] His findings reflect his animosity: in his Report, he refers to the fact that Chargois performed "no work" on the *State Street* case at least 25 times. *See generally* R&R;

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[5] As one example among many, the Master impressed his views regarding referral fees onto George Hopkins during his deposition:

> THE WITNESS: Because -- well, first of all, where does it end? If the secretaries in the firm got a bonus do I need to know that? You know, if –
>
> THE SPECIAL MASTER: Not quite the same as paying a lawyer for doing nothing 20 percent of a fee.
>
> . . . .
>
> THE SPECIAL MASTER: Had this relationship been disclosed to Judge Wolf, might he not have said, well, wait a minute, that's an awful lot of money to be going to a lawyer who hasn't done anything on the case, did no work, didn't refer this specific case at all, and maybe the class should get some of that money, or maybe the ERISA counsel should get some of that money rather than this lawyer in Texas who was not involved at all in this case? Isn't that why disclosure to the Court in a non-adversary proceeding, which this was, is a better practice?
>
> THE WITNESS: Let me say this: I've spent enough time with you now that I can feel your -- your passion's not the right word -- your --
>
> THE SPECIAL MASTER: Skepticism.

Ex. 12 (Hopkins 9/5/17 Dep.) at 74:2-76:6.

see id. at 271 (attributing "great significance" to the fact that Chargois did no work on the *State Street* case). And at several points, he openly criticizes referral fees. *See, e.g.*, R&R 261 n.209 ("[A] $4.1 million fee paid to someone who does no work on a case is excessive by any definition of that word . . ."); *id.* at 375 ("However, the practice of 'bare referrals' – permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client – seems to invite abuses . . ."). But regardless of the Master's personal animus toward bare referral fees, the Massachusetts Bar has reaffirmed its support for the practice time and again, as explained by the Supreme Judicial Court ("SJC"), the Board of Bar Overseers, and lifelong Massachusetts practitioners, among others. *See Saggese v. Kelley*, 445 Mass. 434, 442 (2005) (describing referral fees as a "time-honored practice in this State"); *Mass. Legal Ethics* at 185 (Ex. E); Ex. 239 (Sarrouf Decl. 10/31/17) at ¶¶ 19-21; H.P. Wilkins, *The New Massachusetts Rules of Professional Conduct: An Overview*, 82 Mass. L. Rev. 261, 261-262 (1997) (Ex. F). The Master may not approve of bare referral fees, but in Massachusetts, they are a bedrock tradition.[6]

B. Labaton Complied With MRPC 1.5(e).

Labaton complied with MRPC 1.5(e) (the rule governing the division of fees among lawyers, including referral fees) because it notified ATRS that it would be sharing its fee and obtained ATRS' consent to do so. In February 2011, when ATRS engaged Labaton for the *State Street* litigation, MRPC 1.5(e) provided that a "division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable." Ex. 225

[6] The type of referral at issue here, which involved referring a client, rather than a specific matter, is "common." Ex. 228 (Lieberman Dep.) at 44:12-14.

(former Mass. R. Prof. C. 1.5(e)).[7] In the parties' engagement letter, ATRS consented to Labaton dividing its fees, *inter alia*, with "local or liaison counsel" or as "referral fees." Ex. 138 (LBS01160-62).[8] This satisfied MRPC 1.5(e) at the time. *See* Ex. 240 (Green Rep.) at 19-20 ("Particularly in the context of a retention letter setting forth the parties' respective rights and responsibilities, it seems reasonably plain to me that the sentence in question in fact memorializes ATRS's permission.").[9]

Moreover, to the extent that it was required at the time – which is an open question in the view of the experts[10] – Labaton also complied with the written consent requirement described in the Supreme Judicial Court's *Saggese* opinion, decided in 2005 (but not codified in the Massachusetts Rules of Professional Conduct until March 15, 2011, after ATRS engaged Labaton for the *State Street* case). *See Saggese*, 445 Mass. at 434. The SJC explained that MRPC 1.5(e) would be construed prospectively to require consent to be obtained in writing,

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[7] Mass. R. Prof. C. 1.5(e) was amended on March 15, 2011 to provide that: "A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable." The requirements of the applicable MRPC 1.5(e) were considerably more lenient than the current version of MRPC 1.5(e) in terms of proving compliance, *e.g.*, consent did not have to be in writing at all.

[8] The Master contends that the "more plausible" way to read the engagement letter is to view the clause "as referral fees" as modifying "local or liaison counsel." R&R at 260. This is a tortured reading of the sentence. *See* Ex. 229 (Wendel Dep.) at 26:7-12 ("I read those as alternatives."); Ex. 228 (Lieberman Dep.) at 38:1-23 ("I read it that they have the right to, under this agreement, allocate fees to people who serve as local or liaison counsel or allocate fees as referral fees or allocate fees for other services performed in connection with the litigation . . . That's the way I read it. It's plain language to me, sir."); Ex. 230 (Green Dep.) at 119:11-1. Moreover, it does not make sense, as not every local or liaison counsel deserving of compensation would have referred the case. But, under the Master's reading, local or liaison counsel could *only* share fees with Labaton if they referred ATRS. This leads to absurd possibilities, such as both local and liaison counsel working with Labaton, but neither getting paid because neither referred ATRS to Labaton.

[9] The Special Master claims that a referral fee must be "matter-specific." R&R at 262. This does not appear to comport with everyday practice. As Mr. Lieberman testified, "I think this is a referral fee, and it happens all the time, common." Ex. 228 (Lieberman Dep.) at 44:12-14.

[10] *See* Ex. 227 (Joy Dep.) at 69:4-70:3; Ex. 228 (Lieberman Dep.) at 125:5-16; Ex. 243 (Wendel Rep.) at 14.

which Labaton did. *Id*. at 443; Ex. 138 (LBS011060-62).[11] Importantly, the *Saggese* Court, in its two-sentence description of its prospective interpretation of MRPC 1.5(e), does not require the disclosure of the identity of other attorney(s) receiving fees or the details of the fee agreements. 445 Mass at 443. Nor is there such a requirement in either the old or the new version of MRPC 1.5(e). *See* Ex. 228 (Lieberman Dep.) at 34:17-20 ("The rule doesn't require anything more than that. And that's been the common understanding of the rule."); *see also* Ex. 241 (Joy Rep.) at 29. Thus, despite the Master's misguided efforts to import an "informed consent" requirement into MRPC 1.5(e), Labaton provided the sufficient level of disclosure. *See* R&R at 249 n.191; *see* also Ex. 230 (Green Dep.) at 117:14-17 ("[T]he rule itself does not require more").[12] Accordingly, the ATRS/Labaton engagement letter met the requirements of both MRPC 1.5(e) and *Saggese*. *See, e.g.*, Ex. 240 (Green Rep.) at 19-20.

The Master describes the MRPC 1.5(e) inquiry as a "close call" and concedes that "reasonable experts and lawyers may differ" on whether Labaton complied with the Rule. R&R at 250, 337. In fact, five different experts – three academics, one veteran of the Massachusetts

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[11] The SJC also explained that the written consent must be obtained before the referral is made (*Saggese*, 445 Mass at 443), which, as Hal Lieberman noted, makes no sense. Ex. 228 (Lieberman Dep.) at 131:1-7. Once the rule was actually amended, the requirement was for written consent to be obtained "before or at the time the client enters into a fee agreement for the matter;" thus, the *Saggese* statement and the new rule as ultimately promulgated are not identical, suggesting that *Saggese* did not create an enforceable rule.

[12] The Master appears to read MRPC 1.5(e) to require "informed consent," or its equivalent. R&R at 249. The Master glosses over the fact that MRPC 1.5(e) *does not* require "informed consent," which is a defined term in the Massachusetts Rules of Professional Conduct (and, at any rate, appears inapplicable to a fee division). MRPC 1(f) ("Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."). Rather than accepting the rules as written, the Master claims they reflect an "incongruence" that represent a "distinction without a difference." *Id.* The Master's willingness to assume incompetence or sloppiness by the drafters of the Massachusetts Rules of Professional Conduct (and the Federal Rules of Civil Procedure), and instead impose his own preferences onto these rules, undermines his conclusions. This is one of many examples where the Master reaches to make the law allow for his desired outcome. *See also*, § IV-VI, *infra*.

Board of Bar Overseers, and one lifelong Massachusetts practitioner – examined the circumstances of the fee division with Chargois and ATRS' engagement of Labaton. Each concluded that Labaton complied with the applicable requirements of the Massachusetts Rules of Professional Conduct. Ex. 240 (Green Rep.) at 19 ("Labaton therefore complied with the relevant version of Rule 1.5(e)."); Ex. 241 (Joy Rep.) at 27 ("Labaton's engagement letter with ARTRS for the State Street Litigation met the requirements of Mass. R. Prof. C. 1.5(e) as it existed at the time of the engagement letter."); Ex. 242 (Lieberman Rep.) at 16 ("Labaton obtained ARTRS' consent to divide its fees with Chargois, and therefore complied with MRPC 1.5(e), as it then existed."); Ex. 243 (Wendel Rep.) at 14 ("In my opinion, the negotiations between Labaton and the ATRS and the written consent provided by Clark [ATRS' Chief Counsel] and Hopkins satisfy the requirements of Mass. RPC 1.5(e) and the interpretation placed on the rule by the *Saggese* court."); Ex. 252 (Sarrouf 3/21/18 Dep.) at 106:6-107:5.

The Court should credit these experts and reject the Master's finding. Indeed, in resolving this "close call," the Master failed to apply the clear terms of MRPC 1.5. Instead, he grafts onto MRPC 1.5(e) the additional requirement that Labaton disclose to ATRS the percentage of Labaton's fee that would be paid to Chargois. *See, e.g.*, R&R at 250 ("While it is admittedly a close call, by not disclosing to ATRS that it had a preexisting obligation to pay Chargois 20% of its fee for performing no work, we conclude that Labaton simply failed to comply with MRPC 1.5(e) and its requirement of disclosure to its direct client, ATRS."). The Master's attempt to rewrite the Rule is directly contrary to Comment 7A of MRPC 1.5, which provides that Labaton was *not* required to inform ATRS that Chargois' share would be 20%. MRPC 1.5 cmt. 7A ("The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the

lawyer is required to disclose the share of each lawyer."). [13] The Master nevertheless elevates his own predilections above the Rule's actual text, arguing that any "other interpretation of this Rule would invite a lack of candor and half-measure disclosures to a client and deprive the client of the ability to make a meaningful decision in its own best interests." *See id.* at 250.

The Master's refusal to apply the plain terms of MRPC 1.5(e) undermines his conclusion.[14] The Court should reject his misapplication and instead find that Labaton complied with MRPC 1.5(e) in the first instance, as five experts have determined.

C. In Any Event, ATRS Ratified The Fee-Sharing Agreement With Chargois.

To the extent that Labaton did not fully comply with the *Saggese* decision, any non-compliance has now been cured because George Hopkins, acting on behalf of ATRS, ratified the Chargois Agreement with respect to the *State Street* matter. *See* Ex. 130 (Hopkins Decl.) at 3-4. In *Saggese*, the SJC explained that "the beneficiary in a fiduciary relationship may ratify conduct that otherwise would constitute a breach of fiduciary duties, provided the requisite disclosure has been made." 445 Mass. at 442. In that case, a client ratified her attorneys' agreement to pay a 33% referral fee two years after the referral was made (and after the referring attorney received several payments). *Id.* at 436-40. The SJC was unequivocal: "[r]atification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate." *Id.* As such,

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[13] The Master references Comment 7A in a footnote but then precedes to ignore its application in his analysis. *See* R&R at 255 n.203. Throughout his legal conclusions, he frames Labaton as being obligated to disclose to ATRS the fact that Chargois' portion would be 20%. *See, e.g.*, R&R at 249 (arguing that "Labaton had a duty to inform ATRS as its client, but more so as a representative of the class, *that Chargois would receive 20% of Labaton's share of the total fee award*," and noting that MRPC 1.5(e) "speaks directly to this issue.") (emphasis added); s*ee also id.* at 250 ("By failing to inform Hopkins – or anyone at ATRS – of the Chargois Arrangement [defined by the Master to mean the agreement to pay Chargois 20%] . . . Labaton breached its duty under MRPC 1.5(e)."); *id.* at 255 ("But neither Labaton nor Chargois & Herron revealed" that Chargois "would receive 20% of Labaton's fees . . ."); *id.* at 256 ("[N]othing in that response alerted ATRS that Chargois would receive 20% of Labaton's gross attorneys' fees . . .").

[14] This is especially true because he views the question as a "close call" despite applying an invented, heightened standard.

Hopkins' ratification on behalf of ATRS is "adequate" here. *See id.*[15] MRPC 1.5(e) exists for the benefit of clients; and, here, the client was protected and is content.[16]

When discussing Labaton's obligations to its "direct client, ATRS," the Master does not address, let alone mention, the substantive effect of Mr. Hopkins' ratification. This is remarkable, especially because the Master otherwise relies upon *Saggese*. *See* R&R at 252 n.200. The Master's failure to address a key fact and controlling precedent in his report of legal conclusions to the Court is troubling and further demonstrates his lack of neutrality. Although the Master avoids discussing the issue, *Saggese* makes clear that Hopkins' ratification "is adequate" on behalf of ATRS. *See* 445 Mass. at 442. Even the Master's expert Prof. Gillers agrees. Ex. 253 (Gillers 3/20/18 Dep.) at 106:18-22 ("Q: Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral to Chargois & Herron? A: On behalf of Arkansas alone."). Based on the SJC's controlling holding in *Saggese*, regardless of whether Labaton initially complied with MRPC 1.5(e), it subsequently obtained its client's effective consent.

D. Despite the Master's Suggestions, the Chargois Agreement Falls Within MRPC 1.5 and Fulfilled the Purpose of That Rule.

The Master also claims that the Chargois Agreement falls "outside the fee-sharing context altogether, and, thus, outside MRPC 1.5(e)." R&R at 272. This is objectively incorrect. MRPC 1.5(e) applies to a "division of fees . . . between lawyers." There is no dispute that

[15] *See also* Ex. 242 (Lieberman Rep.) at 16 ("In my opinion the foregoing facts fully support the conclusion that ATRS was adequately informed, in writing, at the inception of the retention, and *de facto*, and retroactively, assented to Labaton's sharing of its fees with Chargois.").

[16] *See* Ex. 240 (Green Rep.) at 20 ("Further, the purposes of the procedural requirements were adequately served."); Ex. G (Sarrouf 3/24 Dep.) at 257:17-258:5 ("[T]he Court in this state has repeatedly said . . . that the purpose of the statute is to protect the clients. And the client says 'I have not been harmed. Matter of fact, I think I've been tremendously well represented, and I agree with letting him pay from his fee a portion to someone else.'. . . The client [] has not been harmed in any way. And that's the purpose of the statute."). Notably, the facts here are similar to *Saggese*, although the fee division in the latter was greater (33%). *Saggese*, 445 Mass at 437.

Labaton agreed to (and did) divide its fee with Chargois & Herron, a law firm, with regard to the *State Street* matter. As such, the Chargois Agreement falls within the plain terms of MRPC 1.5(e).[17]

Moreover, the Chargois Agreement comports with the Massachusetts policy behind referral fees because it benefited the client, ATRS. "As a matter of good policy and the public interest, it is well recognized that the bar should encourage fee sharing relationships that serve the client by helping to ensure that cases, especially litigation matters, are handled by the best, most experienced lawyer in the particular area of the law." Ex. 242 (Lieberman Rep.) at 18. As Mr. Lieberman notes, "[t]hat is exactly what happened here." *Id.* Labaton spearheaded a case that achieved what the Master describes as "an excellent result for the class." R&R at 6.

That "excellent result" depended on Labaton's unique capabilities. Among ATRS' several law firms, Labaton initially helped ATRS push forward with a potential suit against State Street. Ex. 4 (Hopkins 6/14/17 Dep.) at 39:20-40:8. And, after a successful half-decade litigation, Mr. Hopkins explained that he does not "think another law firm could have gotten the outcome they did." *Id.* at 100:8-10. Mr. Hopkins speaks from experience: he is a seasoned attorney and, as Executive Director at ATRS, he has been a class representative in approximately 30 cases. *Id.* at 32:9-13, 34:19-37:6. In his view, Labaton was crucial in securing the $300 million settlement. *Id.* at 100:8-10. Simply put, Chargois, a practicing attorney, referred ATRS (an organization that routinely considers whether to hire firms as monitoring counsel and as

[17] The Master states that the Chargois Agreement "seems more in the nature" of a "finder's fee." R&R at 273. Regardless of the label the Master applies, this was a referral fee under Massachusetts law and within the ambit of MRPC 1.5(e). For example, in *Vita v. Berman, DeValerio & Pease, LLP*, 81 Mass. App. Ct. 748 (2012), the Massachusetts Court of Appeals repeatedly described as a "referral fee" an arrangement in which a criminal defense lawyer used his "many contacts in the financial services field" to refer "potential class action plaintiffs" to a law firm. *Id.* at 749-50 and n.4 (citing *Saggese*). The criminal defense attorney referred at least one potential plaintiff "at the request" of a partner at the law firm, and eventually referred so many plaintiffs so as to require a spreadsheet to track them. The Massachusetts Court of Appeals expressed no disapproval of this relationship. *See generally id.*

plaintiff's class action counsel) to Labaton, a preeminent plaintiffs' class action law firm. *See, e.g.*, Ex. 122 (Belfi 9/5/17 Dep.) at 37:15-39:14. This referral allowed ATRS and the class to obtain excellent representation and achieve an extraordinary result. *See* Ex. 130 (Hopkins 3/15/18 Dec.) at ¶4 ("Personally, I am not aware of another law firm that could have worked as tenaciously or produced as good a result on behalf of the class as Labaton did.").

In short, the Chargois Agreement was a referral fee within the terms of MRPC 1.5(e), and delivered the exact type of benefit that the Rule is meant to foster. By the client's own (sophisticated) estimation, ATRS' retention of Labaton provided significant value. *See id.*

E. Even if Labaton Failed to Comply With MRPC 1.5(e), Which It Did Not, No Sanctions or Discipline Are Warranted.

The Master is incorrect in finding that Labaton did not comply with MRPC 1.5(e), as interpreted by *Saggese*. However, leaving aside his misapplication of MRPC 1.5(e), he rightly notes that, under these circumstances, the "obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction." R&R at 334.

First, any alleged violation of MRPC 1.5(e) was a technical procedural lapse. At worst, ATRS did not consent in writing that Labaton would split its fee with Chargois specifically, although (1) *Saggese* does not require that the attorney sharing a fee be named; (2) ATRS was informed that Chargois & Herron would be involved with Labaton on ATRS cases; and (3) the engagement letter permitted Labaton to pay "referral fees." *See Saggese*, 445 Mass. at 443; Ex. 138 (LBS011060-62); Ex. 129 (LBS017455-56); Ex. 122 (Belfi 9/5/17 Dep.) at 117:20-24, 118:5:7. "Technical non-compliance with a state rule of professional conduct – particularly one regulating, rather than prohibiting, a practice – is not the kind of fraud or abuse of the judicial process that justifies sanctions under the federal court's inherent power." Ex. 243 (Wendel Rep.)

at 19.[18] Any procedural violation by Labaton is especially benign because ATRS has now expressly ratified the Chargois Agreement with respect to the *State Street* matter.

Second, no discipline is warranted because any non-compliance is a result of the *Saggese* decision's gloss, rather than the text of the rule in place at the time the *State Street* engagement began. It is fundamental that the codified rules of professional conduct are the touchstone for any disciplinary adjudication. For example, SJC Rule 4:01 – "Bar Discipline" – states that: "Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline . . . ." SJC Rule 4:01, § 3(1); *see also* James S. Bolan*, Ethical Lawyering in Massachusetts* § 1.1, MCLE (4th Ed. 2015) (Ex. H) ("[The rules] set forth the standards of professional conduct for members of the Massachusetts bar and serve as the basis for professional discipline."). Likewise, in the District of Massachusetts, Local Rule 83.6.1 provides that "[t]he rules of professional conduct for attorneys appearing and practicing before this court shall be the Massachusetts Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court, *as set forth as Rule 3:07 of that court* . . ." D. Mass. L. R. 83.6.1(1) (emphasis added).

Therefore, while *Saggese* may have changed how the courts would construe MRPC 1.5(e), it did not change the codified rules that provide a basis for discipline.[19] During the

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[18] *See also* Ex. 240 (Green Rep.) at 22-23 ("Imperfect compliance with a prophylactic procedural requirement of a professional conduct rule (as construed by a court opinion) is unlikely to signify that the lawyer in question poses a threat to future clients or to the public generally.").

[19] In that vein, research has not uncovered a single case between November 30, 2005 and March 15, 2011 disciplining a lawyer for an improper fee division under the terms of *Saggese* (or otherwise). Indeed, when searching a comprehensive Massachusetts Board of Bar Overseers database, not a single decision citing to *Saggese* has been found. Tellingly, the BBO appears not to have used *Saggese* as a basis for discipline. Mr. Lieberman's experience is consistent: "I have never seen a disciplinary case for a lawyer where the court has disciplined a lawyer based on a ruling of a court as opposed to a violation of a Rule of Professional Conduct . . ." Ex. 228 (Lieberman Dep.) at 120:2-7.

intervening time period between *Saggese* and the amendment to MRPC 1.5(e), attorneys' obligations regarding fee divisions were unclear. For example, the chairman of the Standing Advisory Committee that initiated the 2011 amendments explained that "[b]efore these rules were adopted, *there were not such clear guidelines as to what had to be done*." Christina Pazzanese, *Attorney Fee Rules Undergo Revisions in Massachusetts*, Mass. Law. Wkly., Jan. 12, 2011 (Ex. I) (emphasis added). And, even when the SJC finally amended MRPC 1.5(e), it allowed for a three-month period between the amendment and the new Rule taking effect, reflecting that some time was necessary for lawyers to adjust to the changes. *See* December 22, 2010 Order of the Supreme Judicial Court regarding SJC Rule 3:07 (Ex. J); *see also* Pazzanese, *Attorney Fee Rules Undergo Revisions in Massachusetts* (Ex. I) (local attorney and former BBA subcommittee member explaining that "the rule changes will require the bar to do some broad educational outreach").[20]

The lack of a rule implementing *Saggese* raises due process concerns regarding attorney discipline, particularly with attorneys admitted *pro hac vice*, like Labaton here, who rely on the Rules of Professional Conduct to understand their obligations. As the SJC has acknowledged, "[o]rdinarily, an individual case is an inappropriate mechanism for promulgating rules." *In re Saab*, 406 Mass. 315, 324 n.13 (1989). Even if Labaton's conduct did not comply with the *Saggese* opinion – which, to be clear, it did – it would be inappropriate to impose discipline because Labaton complied with the Rule then in effect. *See* Ex. 242 (Lieberman Rep.) at 19 ("In my opinion, which is informed by decades of practice in the disciplinary realm, an attorney

[20] The import of *Saggese* is not clear, as Labaton's experts have testified. As Professor Joy noted, the text of the amended MRPC 1.5(e) did not even match the language in *Saggese*. *See, e.g.*, Ex. 227 (Joy Dep.) at 69:4-19 ("So the fact that neither disciplinary body or the courts were following *Saggese* after *Saggese*, the fact that the bar didn't immediately change the rule, and then when they did change the rule, they didn't use the same wording as *Saggese* had, and then when they changed the rule, they had a period of time between the new rule and when it came into effect led me to conclude that *Saggese* [was] probably dicta.").

would not be expected to research case law in order to ascertain the relevant standards of conduct, and should not be sanctioned for failing to do so.").[21]

F. MRPC 7.2 Does Not Apply.

The Master argues that, if Labaton did not comply with MRPC 1.5(e), then Labaton also violated MRPC 7.2. *See* R&R at 263-73; *see also* MRPC 7.2(b) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services"). The Master's argument relies on a strained and novel reading of the Rules and should be rejected.[22]

As the First Circuit has explained, "courts are bound to afford statutes a practical, commonsense reading. Instead of culling selected words from a statute's text and inspecting them in an antiseptic laboratory setting, a court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (internal citations omitted). The Master's construction brushes aside this admonition by focusing on narrow semantics but ignoring the logical structure of the Rules. By its plain terms, MRPC 1.5(e) governs a fee division between lawyers. Thus, simply stated, non-compliance with MRPC 1.5(e) is a violation of MRPC 1.5(e). *See Saggese*, 445 Mass. at 441-42 (in the context of an

[21] Mr. Lieberman expanded on this point at his deposition: "[A]s a regulatory lawyer in disciplining or recommending discipline for a lawyer who, theoretically or arguably, didn't comply with the admonition or prospective ruling, but was in compliance with the rule as it existed in the Code of Professional Responsibility, I would be very reluctant to charge that lawyer with misconduct if the lawyer were relying on, and as he would have a right or she would have a right to do, [] the rule as it existed in the code, because the SJC, Supreme Judicial Court, is ultimately the authority for implementing and changing the rule." Ex. 228 (Lieberman Dep.) at 113:7-114:4; *see also id.* at 88:1-9 ("And if there is no notice that a rule requires, for example, disclosure of the name of the . . . lawyers who referred, it would be very, very difficult for a prosecuting lawyer, as I was for many years, to bring charges against that lawyer . . . because of the notice and due process concerns."). Prof. Gillers concedes as much. Ex. K (Gillers 3/21/18 Dep.) at 395:1-5 ("There is a constitutional notice requirement for discipline of course. And so a lawyer can't be disciplined under a rule that didn't exist at the time the lawyer's conduct was committed.").

[22] The argument regarding MRPC 7.2 is entirely academic, because Labaton complied with MRPC 1.5(e). *See* §III.B, *supra.*

undisclosed referral fee, explaining that either MRPC 1.5(e) or its prior iteration, DR 2-107, "governed the conduct of the lawyers," and mentioning no other rules of professional conduct). Yet the Master argues that a violation of MRPC 1.5(e) automatically constitutes a violation of a second rule, MRPC 7.2(b) ("Advertising"). This illogical result ignores the clear structure and purpose of the Rules: MRPC 1.5(e) governs fee divisions, and it is the relevant disciplinary standard when assessing an improper fee division. *See* Ex. 227 (Joy Dep.) at 21:1-4 ("[T]hey are separate rules meant to address separate issues.").[23]

Nothing contained in the text of either MRPC 1.5(e) or MRPC 7.2(b) suggests otherwise. MRPC 7.2(b) does not provide that noncompliance with MRPC 1.5(e) will violate 7.2(b). The Master focuses on MRPC 7.2(b)(5), viewing it as an exception that indicates non-compliant fee-sharing agreements fall within MRPC 7.2. However, as Prof. Green explains, the reference to MRPC 1.5(e) in MRPC 7.2(b)(5) actually demonstrates that "fee sharing, generally, is excluded from the rule." Ex. 230 (Green Dep.) at 58:6-59:16 ("I think what it means is to emphasize that fee-sharing arrangements are okay in Massachusetts.").[24] And, importantly, MRPC 1.5(e) does not even mention MRPC 7.2(b) – an odd omission, if non-compliance with MRPC 1.5(e) is an automatic violation of MRPC 7.2(b). Under a natural reading of the Rules, MRPC 1.5(e) governs the division of fees between lawyers, whether perfect or imperfect.[25]

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[23] As Hal Lieberman explained, he is "not aware of any such bootstrapped interpretation or application of MRPC 7.2 in *any* jurisdiction." Ex. 242 (Lieberman Rep.) at 17. Mr. Lieberman has an extensive background in attorney discipline: he was former Assistant Bar Counsel in Massachusetts and Chief Counsel to the First Judicial Department Disciplinary Committee in New York.

[24] The Master rejects this sensible construction, incorrectly framing Labaton's position as a contention that MRPC 7.2(b)(5) amounts to "surplusage." *See* R&R at 268. But, as Prof. Green testified (despite his use of the term "surplusage," which the Master introduced during cross-examination), MRPC 7.2(b)(5) serves a purpose: "I think it's fair in the context of the history [of referral fees in Massachusetts] and in the context of 1.5(e) to read this as, indeed, surplusage, but making it crystal clear . . . that fee sharing is not prohibited by 7.2(b)."). Ex. 230 (Green Dep.) at 60:17-22.

[25] If there were any doubt regarding this natural reading of the Rules – which, frankly, there should not be – MRPC 1.5(e) is titled "Fees," while MRPC 7.2 is titled "Advertising." *See Almendarez-Torres v.*

The history of both Rules confirms this construction. It appears self-evident that, if a violation of MRPC 1.5(e) also constituted a violation of MRPC 7.2(b), attorneys found to have violated MRPC 1.5(e) would also be found to have violated MRPC 7.2(b).[26] Yet, "Massachusetts state courts, Massachusetts disciplinary authorities, and the United States District Court for Massachusetts have never considered a fee division between law firms based on a flawed or imperfect division of fee arrangement between law firms and a client under Mass. R. Prof. C. 1.5(e) to be a violation of Mass. R. Prof. C. 7.2[b]." Ex. 241 (Joy Rep.) at 16. Neither the Master, Prof. Gillers, nor Labaton have located a single instance of this happening in Massachusetts. *See* Ex. 241 (Joy Rep.) at 16-27 (exhaustive survey of ethics law did not find any authority supporting Prof. Gillers' position)[27]; Ex. 242 (Lieberman Rep.) at 17; R&R at 273; Ex. 253 (Gillers 3/20/18 Dep.) at 53:9-62:17.[28] Historically, MRPC 7.2 was never intended to apply,

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United States, 523 U.S. 224, 234 (1998) (explaining that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotations omitted). While the Master asserts that the title of a statute cannot alter its unambiguous text, R&R at 265 n.216, here the Master has proffered completely novel readings of MRPC 1.5(e) and 7.2(b). Thus, if anything, he has injected doubt into how those Rules should be applied. Accordingly, using the titles of the Rules for guidance is appropriate here. *See Almendarez-Torres*, 523 U.S. at 234. In this case, the respective titles demonstrate a focus on "fees" (MRPC 1.5), on the one hand, and "advertising" (MRPC 7.2), on the other. The Chargois Agreement involves the division of a *fee*, rather than advertising. *See also Mass. Legal Ethics* (Ex. E) at 298 ("MRPC 7.2 provides guidance to lawyers about advertising . . .").

[26] *See, e.g.*, Ex. 241 (Joy Rep.) at 18-19 ("If in 2016, or any time before 2016, ethics authorities in Massachusetts viewed sharing fees in violation of Mass. R. Prof. C. 1.5(e) as a violation of Mass. R. Prof. C. 7.2(b) (previously Mass. R. Prof. C. 7.2(c)), then, in my opinion, I would have expected the Admonition to discuss a violation of Mass. R. Prof. 7.2(b).").

[27] "Massachusetts state courts, Massachusetts disciplinary authorities, and the United States District Court for Massachusetts have never considered a fee division between law firms based on a flawed or imperfect division of fee arrangement between law firms and a client under Mass. R. Prof. C. 1.5(e) to be a violation of Mass. R. Prof. C. 7.2(c)." Ex. 241 (Joy Rep.) at 16.

[28] Prof. Gillers claims that *Daynard v. Ness, Motely, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp. 2d 115, 130 (D. Mass. 2002) stands for the proposition that an imperfect fee division would result in the application of MRPC 7.2(b). Ex. 253 (Gillers 3/20/18 Dep.) at 84:22-86:18. The case does not state, or even suggest, that concept. *See Daynard*, 188 F. Supp. 2d at 130. In fact, despite an analysis of both MRPC 1.5(e) and its New York equivalent, MRPC 7.2(b) is never mentioned. *Id.* at 124 n.5. Prof. Gillers' reliance on *Holstein v. Grossman*, 246 Ill. App. 3d 719 (1993) is similarly inapposite. That case extensively discusses imperfect fee-splitting agreements under Ill. Sup. Ct. R. 2-107. Despite its lengthy

and has never applied, to a division of a fee between attorneys. *See, e.g.*, Ex. 243 (Wendel Rep.) at 16; Ex. 240 (Green Rep.) at 16 n.13; Ex. 241 (Joy Rep.) at 18-27. The Master and Professor Gillers are both outsiders to Massachusetts practice, yet they seek to break new ground with their novel application of MRPC 7.2. *See* R&R at 375; Ex. 253 (Gillers 3/20/18 Dep.) at 53:23-54:12.[29]

In short, the Master's interpretation of the relationship between MRPC 1.5(e) and MRPC 7.2(b) is unprecedented and unsupported by the language of the Rules and the history of their application in Massachusetts. The Court should reject it and instead adopt the conclusion that MRPC 1.5(e) governs a fee division between lawyers and that Labaton complied with 1.5(e).

Nevertheless, the Master correctly does not recommend any discipline or sanctions relating to Rule 7.2(b). *See* R&R at 337-38. In making this determination, the Master notes that "apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer for paying another lawyer under Rule 7.2(b)." R&R at 337. In addition, the Master states that because this issue is one of "first impression and not one of which the profession might have been well-advised in advance, it would not be appropriate to impose professional discipline in these circumstances." R&R at 337-38; *see also id.* at 273 ("What does give us some pause before recommending redress for a

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discussion – and the fact that the referral fees at issue were not consented to in writing – the court never mentions MRPC 7.2(b) or its Illinois analogue. *Id.*

[29] The Master's discussion (R&R 270-72) of *In re Disciplinary Action Against McCray*, 755 N.W.2d 835 (N.D. 2008), badly misses the mark. First, the rule at issue stated that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." *See id.* at 845; *see also* N.D. R. Pro. C. 5.4(a). Stating the obvious, Chargois was a lawyer, and Labaton's payment to him was a referral fee. Second, the Master's claim that Chargois' introduction "parallels" that in *McCray* is absurd. *See* R&R at 271. In *McCray*, the conduct at issue was a nonlawyer's funneling of hundreds of clients to a lawyer, who spent an average of 12 minutes on each client's case sending nonfactual dispute letters to credit agencies. *McCray*, 755 N.W.2d at 841-42. The lawyer then turned over 95% of his fees to the nonlawyer. *Id.* at 845. Here, Chargois referred ATRS to Labaton, who then spent five years working on the *State Street* case and earned ATRS a recovery lauded by all involved. This case does not resemble *McCray* whatsoever, let alone being a "parallel" to it.

violation of MRPC 7.2(b) is the fact that, apparently, no bar disciplinary authority or Court has ever imposed discipline upon an attorney for a violation of this Rule by paying another attorney."). Finally, as the Master acknowledges, his (incorrect) finding of a MRPC 7.2(b) violation depends on his (incorrect) finding of a MRPC 1.5(e) violation. Thus, because the law surrounding MRPC 1.5(e) was too unclear to impose discipline, there should be no discipline under MRPC 7.2(b), either. *See* R&R at 337 ("Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline.").

G. MRPC 1.5(a) Does Not Apply to the Chargois Agreement.

Prof. Gillers and the Master do not make a finding regarding MRPC 1.5(a). *See* Ex. 233 at 94 ("In answering Judge Rosen's questions at my deposition, I did not say, nor do I now say, whether the Chargois fee is clearly excessive."); R&R at 261 n.209 (Master "make[s] no finding" regarding MRPC 1.5(a)).[30] Nevertheless, they have introduced the topic into their analyses, and Labaton will thus respond. Although neither Prof. Gillers nor the Master offer a definitive position on MRPC 1.5(a), any suggestion that the Rule applies to the Chargois fee must be rejected.

The payment at issue is a division of Labaton's fee with Chargois & Herron. MRPC 1.5(e) governs fee divisions; MRPC 1.5(a) does not. Instead, MRPC 1.5(a) assesses whether a singular "fee" is "clearly excessive." Once that threshold inquiry is made, MRPC 1.5(e) addresses the requirements for dividing the singular "fee," and notes that the "total fee" must be reasonable. In other words, the whole fee is evaluated for excessiveness – as the Court did here

[30] Prof. Gillers first introduced his opinion on 1.5(a) during deposition testimony, largely in response to a line of leading questions from the Special Master. Ex. 253 (Gillers 3/20/18 Dep.) at 364:8-370:17. His original report contained no discussion of Rule 1.5(a). Ex. 232. Labaton reserves the right to supplement its Objections should the Court allow Customer Class Counsel to depose Prof. Gillers regarding his Supplemental Report (Ex. 233).

– and then it may be divided according to the requirements of MRPC 1.5(e). There is no requirement that each portion of the fee not be "clearly excessive." *Compare* Mass. R. Prof. C. 1.5(a) *and* Mass. R. Prof. C. 1.5(e).

As with his argument regarding MRPC 1.5(e), Prof. Gillers' construction of MRPC 1.5(a) appears to be unprecedented in Massachusetts.[31] The absence of any supporting authority is unsurprising. Applying MRPC 1.5(a) to fee divisions would run counter to the "time-honored" Massachusetts tradition of allowing referral fees, even where the referring attorney does no work. *See Saggese*, 445 Mass. at 442 (enforcing a 33% referral fee where no work was performed by referring lawyer, without questioning whether the 33% division was clearly excessive); *Mass. Legal Ethics* at 185 (Ex. E).[32] The encouragement of referral fees in Massachusetts is the result of deliberate consideration by the state's Bar, and undermines any argument that MRPC 1.5(a) is intended to restrain referral fees. *See Mass. Legal Ethics* at 185 (Ex. E); Wilkins, 82 Mass. L. Rev. at 261-262 (Ex. F).

As a practical matter, it does not make sense to apply MRPC 1.5(a) to a referral fee because the factors that Rule enumerates contemplate work being done. In particular, subsection

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[31] *See, e.g.*, Ex. 241 (Joy Rep.) at 55 ("I could not locate a single case, advisory ethics opinion, or any authority for the proposition that a lawyer's *share* of a fee in a division of fee under Mass. R. Prof. C. 1.5(e) must not be clearly excessive."); Ex. 242 (Lieberman Rep.) at 19 ("[I]n my experience I cannot recall a single instance in which a referral fee was scrutinized for reasonability under the Mass. Rules…."); Ex. 240 (Green Rep.) at 25 ("Prof. Gillers cites no judicial or bar opinions supporting his theory of independent analysis of each lawyer's share of a fee under MRPC 1.5(a). I am unaware of any."); Ex. 243 (Wendel Rep.) at 19-20. Gillers admits that he too is unaware of any authority in Massachusetts that says a referral fee can be deemed clearly excessive under 1.5(a) on the basis of the time and labor expended. Ex. K (Gillers 3/21/18 Dep.) at 386:9-16.

[32] *See also* Ex. 227 (Joy Dep.) at 167:18-22 ("I don't think the court would even . . . address the issue, because in *Saggese*, he gets $90,000 from what sounds to be like ten minutes worth of work, and the court didn't even blink an eye at it."); Ex. 230 (Green Dep.) at 98:17-22 ("Obviously, it's capped by the total fee and the total fee has to be reasonable, but it does not limit the amount that's paid out of the total share to the lawyer who made the introduction."); Ex. 228 (Lieberman Dep.) at 103:12-104:10 ("First of all, there's no authority for that notion, that I'm aware of. And, secondly, it doesn't make any sense . . . It wouldn't matter. You can say 99.9 percent, Judge. I wouldn't change my opinion.").

1 states that a factor "to be considered" is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." These considerations cannot be applied to a bare referral fee. *See In re Fordham*, 423 Mass. 481, 490-91 (1996) (focusing extensively on the hours an attorney spent working on a case and the types of work he did in determining whether a fee was clearly excessive). Prof. Gillers' construction would render MRPC 1.5(a)(1) a nullity in some cases and must be rejected. *See United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

Simply put, the text of MRPC 1.5(a) and MRPC 1.5(e), the history of their application in Massachusetts, and common sense all require rejecting any suggestion that MRPC 1.5(a) applies here.

IV. LABATON WAS NOT REQUIRED TO DISCLOSURE TO CHARGOIS AGREEMENT TO THE COURT.

A. The Master Ignores Controlling Federal Rules.

Rule 23 and Rule 54 specifically govern the information regarding fees that must be disclosed to the court. Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d). Their plain language makes clear that fee allocation agreements need not be disclosed unless ordered by the court. *See id.* Contrary to the Master's position, Rule 23(e)(3) does not say otherwise. Despite these clear Rules, the Master attempts to create his own disclosure standard from whole cloth, purporting to rely on general background principles to argue that attorneys must disclose "all available information when seeking a fee award." *See* R&R at 304 n.248. This vague position has no

basis in – and is directly contrary to – the Federal Rules of Civil Procedure, applicable precedent, and custom and practice in the District of Massachusetts.

Given that the Master creates unprecedented disclosure obligations that are contradicted by the Federal Rules of Civil Procedure and other authority, his findings that a Rule 11 violation is "supportable" and that Labaton violated MRPC 3.3 and MRPC 8.4 are incorrect as a matter of law. The Court must reject them.

B. As the Master Appears to Concede, The Federal Rules of Civil Procedure Do Not Require Disclosure of Fee Allocation Agreements.

The Federal Rules of Civil Procedure specifically address a party's obligation to disclose fee agreements in connection with an award of attorneys' fees. Federal Rule of Civil Procedure 23(h) provides that a "claim for an award must be made by motion under Rule 54(d)(2)." In turn, Federal Rule of Civil Procedure 54(d)(2)(B) provides that a motion or petition for attorneys' fees must "disclose, ***if the court so orders***, the terms of any agreement about fees for the services for which the claim is made" (emphasis added).[33] The Rule's Advisory Notes make clear that this provision includes fee-division agreements: "*[i]f directed by the court*, the moving party is also required to disclose any fee agreement, including those between . . . attorneys sharing a fee to be awarded . . . ." Fed. R. Civ. P. 54, 1993 Notes of Advisory Committee, ¶ 8 (emphasis added). This language is unequivocal: disclosure of fee agreements is not required unless the court orders it. Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d)(2); *see also* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:11 (5th ed. 2016) (Ex. L) ("The third prong of Rule 54(d)(2)'s motion requirement – concerning disclosure of fee agreements – is discretionary with the court."); Ex. 234 (Rubenstein Rep.) at 5 ("Rule 23(h) and Rule 54 are therefore clear in

[33] Fed. R. Civ. P. 23(h)(1) requires that motions for attorneys' fees in a class action be brought pursuant to Rule 54(d)(2), such that the general disclosure requirement – i.e., disclosure if the court asks – is expressly incorporated into class actions.

mandating the submission of fee agreements – including those concerning the allocation of fees among counsel – only upon court order."); 10-54 *Moore's Federal Practice - Civil* § 54.154 (2018) (Ex. M) ("If the court so directs, the fee motion must also disclose the terms of any fee agreement with respect to the services implicated by the motion."); *see also* Ex. 241 (Joy Rep.) at 31-35.[34]

Accordingly, courts applying Rules 54 and 23 have adhered to their plain terms. For example, in *Pierce v. Barnhart*, the Fifth Circuit Court of Appeals applied Rule 54 and held that the district court abused its discretion in denying attorney's fees where the plaintiffs' attorney did not submit information regarding "whether attorney's fees had been paid or were due to other counsel for representation," because she had "complied with the local rules and the district court never directed her" to disclose additional information. 440 F.3d 657, 660-61, 664-65 (5th Cir. 2006). Likewise, in the class action context, the Second Circuit's decision in *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP* is directly on point. 814 F.3d 132, 137-38 (2d Cir. 2016). There, a fee petition filed in a class action did not disclose a fee-sharing agreement with (or the presence of) an attorney in Mississippi, who allegedly was paid for unnecessary and irrelevant work, nor did the petition disclose four other law firms who shared in the fee award. *Id*. The Second Circuit explained that Fed. R. Civ. P. 23(h) "does not mandate automatic disclosure of all fee-sharing arrangements in class actions" in the absence of a local rule. *Id.* at 137 n.2. It is well-settled – and the Master appears to agree – that Rule 54(d) and Rule 23(h),

[34] Prof. Rubenstein expanded on this point during his deposition, in no uncertain terms: "From my point of view . . . it's not complicated. The judge should have ordered that the fee agreements be released. He didn't do that. And absent him doing that, I just don't think there was an obligation to make public any of the fee agreements." Ex. 235 (Rubenstein Dep.) at 66:13-19. Prof. Rubenstein explains the Rule embodies deliberate choices made by class action experts. Ex. 234 (Rubenstein Rep.) at 9-12 (noting that "the class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill.").

which govern fee petitions, do not require the automatic disclosure of fee allocation agreements. *See id.*

C. Rule 23(e) Did Not Require the Disclosure of the Chargois Agreement.

The Master asserts that Rule 23(e)(3) mandated the disclosure of the Chargois Agreement, a requirement "separate and apart" from Rule 23(h). R&R at 306-07. The Master's position appears unprecedented and is incorrect as a matter of law.

1. The Master's Reading of Rule 23(e)(3) is Unsupported by Case Law.

The Master concedes that "he is cognizant that courts generally do not read Rule 23(e)(3)'s disclosure requirement as requiring disclosure of fee agreements among counsel," and that he has "found no First Circuit cases squarely holding that disclosure is required under that Rule." R&R at 317.[35] He does not cite such a case from any other circuit, either. *Id.* It appears that none exist. *See, e.g.*, Declaration of William B. Rubenstein In Support of Lieff Cabraser Heimann & Bernstein, LLP's Response and Objections to the Special Master's Report and Recommendations, dated June 20, 2018 (hereinafter, "Rubenstein Response Dec.") at 5 ("No court has ever read Rule 23(e)(3) to apply to fee allocation agreements, to the best of my knowledge.").[36]

Indeed, the only directly applicable case the Master cites is *Hartless v. Clorox*, 273 F.R.D. 630 (S.D. Cal. 2011). *See* R&R at 308 n.251. In *Hartless*, the court rejected an objector's argument that Rule 23(e)(3) requires disclosure of fee allocation agreements. *Hartless*, 273 F.R.D. at 646. The court explained that the "agreement as to the amount of

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[35] The Master includes this crucial piece of information about the interpretation of Rule 23 in his discussion of "Sucharow's and Labaton's Obligations Under Fed. R. Civ. P. 11," rather than noting it in in his discussion of "Rule 23 Requirements." *See* R&R at 317.

[36] Prof. Rubenstein is an expert offered by Lieff. Labaton understands that Lieff is submitting this Declaration in support of its forthcoming Response and Objections to the Special Master's Report and Recommendations.

attorneys' fees could affect the class members. The allocation of those fees amongst class counsel does not affect the monetary benefit to class members." *Id.*[37] Likewise, in this case, the fact that class counsel split a portion of their fee award with Chargois did not affect the monetary benefit to the class members, because the payment was taken from the 25% total fee awarded to counsel (and, more specifically, the payment to Chargois was made from Customer Class Counsels' discrete share of the 25% fee award). *See id.*; *see also In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1062 (S.D. Tex. 2012) *and* 4:09-md-02046, ECF 57 (S.D. Tex. Dec. 18, 2009) (Ex. N) at 23-24 (settlement agreement that described total fee award, but allowed Co-Lead Settlement Class Counsel to allocate fees from that award "in their sole discretion," complied with Rule 23(e)(3)); *Bernstein*, 814 F.3d at 137-38 (although an unknown attorney received portion of class counsel's fee award, the court did not mention Rule 23(e)(3) – only Rule 23(h)).[38]

2. The Master's Novel Interpretation of Rule 23(e)(3) is Contradicted by the Rule's Text and its Advisory Notes.

The text of Rule 23 does not support the Master's construction. On its face, Rule 23(e) addresses settlement approval, rather than fee awards. *Compare* Fed. R. Civ. P. 23(e)

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[37] In *Hartless*, the parties filed their stipulated settlement agreement with the Court, which stated that: "Co-Lead Counsel shall make, and Clorox agrees not to oppose, an application for an award of attorneys' fees and expenses not to exceed a total of $2,250,000 . . . Class Counsel, in their sole discretion, shall allocate and distribute the award of attorneys' fees and expenses among Class Counsel." *Hartless v. Clorox*, 3:06-cv-02705, ECF 77 (May 21, 2010) (Ex. O) at ¶¶ 11-12, 16-17. An objector challenged the settlement on the basis that Rule 23(e)(3) requires "production of all fee agreements regarding sharing fees with clients, incentive promises to clients, splitting fees with co-counsel, and any other financial arrangement touching the class action." *Id.* at ECF 98. The court rejected this interpretation. *See Hartless*, 273 F.R.D. at 646.

[38] This Court appears to have interpreted Rule 23(e)(3) the same way, although it never expressly made such a finding. The Stipulated Settlement Agreement in this case contained similar language regarding fees as that at issue in *Heartland*. *Compare* Ex. N (*Heartland*) at 23-24 *and* Ex. 114 (Settlement Agr.) at 26-28. Although the Court was aware that the class attorneys would be allocating their fees in some fashion, the agreement to do so was never disclosed, and the Court did not raise an issue of compliance with Rule 23(e)(3).

("Settlement, Voluntary Dismissal, or Compromise") *with* Fed. R. Civ. P. 23(h) ("Attorney's Fees and Nontaxable Costs"). Rule 23(e)(3) – referring to "any agreement made in connection with the [settlement] proposal" – applies to agreements between the parties that are tied to and bear upon the actual settlement agreement. *See, e.g.*, *Office & Prof'l Emps. Int'l Union, Local 494 v. Int'l Union*, 311 F.R.D. 447, 459 (E.D. Mich. 2015) (in the context of Rule 23(e)(3), the Court addressed an agreement to restructure health plans made concurrently with a settlement agreement, and then discussed class counsel fees in a separate part of its opinion.); Rubenstein Response Dec. at 6 (Rule 23(e)(3) applies to agreements that impact "settlement terms"); Fed. R. Civ. P. 23, 2003 Advisory Notes (Rule 23(e)(3) "aims at" agreements related to the settlement "that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others").[39] For instance, in this case, the parties disclosed a "Supplemental Agreement Regarding Requests for Exclusion," made in connection with the settlement, and discussed that supplemental agreement with the Court at the August 8, 2016 preliminary settlement hearing. Ex. 111 (8/8/16 Hr'g Tr.) at 30; Ex. 114 (Settlement Agr.) at ¶ 49(a).[40]

The upcoming 2018 amendment to Rule 23 makes clear that Rule 23(e)(3) agreements and attorney's fee agreements are treated as distinct subjects. In pertinent part, the amended

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[39] By material contrast to this straightforward reading of Rule 23(e)(3), the Master's construction makes little sense. The Master's interpretation suggests that agreements regarding the division of the total fee award must be disclosed in connection with settlement approval, but need not be disclosed when the Court actually scrutinizes the proposed fees, whether or not there is a settlement. *See* R&R at 306-307.

[40] As another example, in this case, the total attorney's fee award was referenced in the settlement agreement between the plaintiffs and defendant and was disclosed. Ex. 114 at 26. It also bears noting that the initial agreement between Customer Class Counsel to pay a portion of their fee to Chargois originated in 2013, long before the settlement. *See* Ex. 140 (LBS025771); Ex. 41 (Chiplock 9/8/17 Dep.) at 105:19-106:4. Although the specific 5.5% term was finalized during the fee allocation process, the agreement amongst the three firms to pay Chargois predated the settlement and differs from agreements that are made between the parties ancillary to the settlement negotiation process which affect settlement terms – i.e., the agreements that Rule 23(e)(3) contemplates. *See* Rubenstein Resp. Dec. at 6.

Rule will direct courts to consider several express factors in evaluating a settlement, including whether "the relief provided for the class is adequate, taking into account: . . . (iii) the terms of any proposed award of attorney's fees, including the timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." 2018 US Order 0020.[41] The separate enumeration of the "terms of any proposed award of attorney's fees," on one hand, and Rule 23(e)(3) agreements, on the other, makes clear that these two categories of information are distinct. *See id.*

The 2018 Advisory Notes confirm this distinction because they treat attorney's fee agreements and Rule 23(e)(3) agreements separately. *See* Fed. R. Civ. P. 23, 2018 Advisory Notes (Ex. P) ("The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court . . . *Another topic* that normally should be considered is any agreement that must be identified under Rule 23(e)(3).") (emphasis added); *see also id.* ("The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class . . . Examination of the attorney-fee provisions *may also* be valuable in assessing the fairness of the proposed settlement.") (emphasis added). These Notes confirm that "attorney-fee provisions" are not "any agreement identified under Rule 23(e)(3)." *See id.* Otherwise, the repeated, separate references to each would be redundant. The Court should adopt the clear intent of the current and amended Rule 23, as further explained by the Advisory Committee: agreements to allocate the fee award are separate and distinct from Rule 23(e)(3) agreements.

[41] In the Master's view, this express enumeration of Rule 23(e)(3) agreements as a factor to consider "reaffirms that the Chargois Arrangement should have been disclosed to the court." R&R at p. 309 FN 252.

3. The Master Misstates Professor Rubenstein's Opinions.

The Master attempts to support his novel reading of Rule 23 by cherry-picking statements made by Prof. William Rubenstein, who authored *Newberg on Class Actions* and has offered opinions as an expert in this case. R&R at 307-08. Specifically, the Master clings to *Newberg's* observation that, while courts "generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel," some fee agreements that "impact settlement terms" possibly "should be disclosed to the class." *See* R&R at 307-308; 355-56; *see also* 5 *Newberg on Class Actions*, § 15.12 at 36 (5th ed. 2015) (Ex. L).[42] While eager to rely on Prof. Rubenstein's statement that there *potentially* could be exceptions to how courts apply Rule 23(e)(3), the Master ignores the fact that Prof. Rubenstein reached the opposite conclusion based on the specific facts of *this case*: "Rule 23 does not require disclosure of fee allocation agreements absent judicial order, courts rarely so order, and Judge Wolf did not do so in this case." Ex. 234 (Rubenstein Rep.) at 31; *see also id.* at 29 n.94 ("Courts have not read [Rule 23(e)(3)] to encompass fee allocation agreements . . ."). In other words, the Master relies on a high-level paragraph in Prof. Rubenstein's treatise, but brushes aside his concrete opinion. The Court should reject the Master's selective citation of Prof. Rubenstein.

In an attempt to justify his slanted reliance on Prof. Rubenstein, the Master attacks the professor's credibility. R&R at p. 307 n.250 ("Professor Rubenstein's deposition testimony and Report are curious in light of the positions he has taken in his treatise, particularly as emphasized

[42] *Newberg* provides no case citation, but offers the following hypothetical example: "For example, if one set of counsel's fee allocation was capped at a certain amount, that counsel would have less interest in pushing further on behalf of the class once her cap was met." In that situation, the fee agreement could affect the timing (and thus the terms) of the settlement, because counsel would have no incentive to continue litigating once the fee was capped. Here, regardless of the division of fee with Chargois, every Customer Class and ERISA attorney were incentivized to litigate toward the largest possible settlement, from which they would request a 25% fee.

in this quote [regarding the possible 23(e)(3) exception regarding fee agreements].").[43] The Master's insinuations are unfair. Despite nearly a full day of deposition – during which Prof. Rubenstein testified repeatedly and emphatically that Rule 23 does not require disclosure of fee allocation agreements – the Master did not ask him a *single* question about whether Rule 23(e)(3) required disclosure of the Chargois Agreement to the Court.[44] The Master also claims that Prof. Rubenstein's statements regarding his preference for transparency "ring hollow given the positions he has taken in this case." R&R at p. 307 n.250. This, too, is unfair. Prof. Rubenstein has been consistent, prior to and during this case, that he views transparency regarding fees as beneficial – but not required without a court order. *E.g.*, Rep. at 30. As such, he will not retroactively "make up a rule" for the purposes of this case. *Newberg*, § 15.12 at 34 ("While Rule 54(d)(2)(B)(v) makes disclosure of such [fee] agreements dependent on a judicial order, there are at least two reasons that courts should regularly order disclosure."); Ex. 234 (Rubenstein Rep.) at 30 ("I have similarly argued that fee allocation agreements should be made known to the class, but I do so within the terms of the governing legal regime: I contend that, using their authority under Rule 54(d)(2), courts should require greater disclosure of fee

[43] The Master may feel such an insinuation is appropriate because Prof. Rubenstein is a retained expert witness who is being paid for his work. Whatever Prof. Rubenstein's bill is, it is dwarfed by the $3.8 million that the Master has collected to act as an adversary.

[44] Prof. Rubenstein's initial report regarding Customer Class Counsels' duty to disclose the Chargois Agreement to the Court and/or class was submitted as a rebuttal to Prof. Gillers' initial expert report. *See* Ex. 234 (Rubenstein Rep.); Ex. 232 (Gillers Rep.). Prof. Gillers' did not mention Rule 23(e)(3) in his report or during his deposition. *See* Ex. 232 (Gillers Rep.); Ex. 253 (Gillers 3/20/18 Dep.). Nor did the Special Master ask Prof. Rubenstein during his deposition whether Rule 23(e)(3) required disclosure of the Chargois Agreement to the Court. *See* Ex. 235. The Master's silence on this issue is difficult to explain, especially when considering that he is (purportedly) "curious" about Prof. Rubenstein's position. R&R at 307 n.250. Perhaps the Master did not want Prof. Rubenstein to explain why Rule 23(e)(3) does not apply here, or perhaps he only decided that Rule 23(e)(3) requires disclosure very late in the investigation, after realizing that the law does not otherwise support his aspirational views.

allocation agreements.").[45] Unlike the Master, Prof. Rubenstein has demonstrated an ability to separate aspirational best practices from the actual rules and what they require. Ex. 235 (Rubenstein Dep.) at 63:7-24 ("[Y]ou want to make up a rule after the fact . . . I'm not making up a rule for one case.").

4. The Master's Position on Fee Allocation Disclosure is Incorrect and Inconsistent.

The Master repeatedly claims that Rule 23(e)(3) required disclosure of the Chargois Agreement because it "allocated money that the class may have received elsewhere." *See, e.g.*, R&R at 278, 307, 308, 355.[46] As Prof. Rubenstein explains, the Master's interpretation of Rule 23(e)(3) is contrary to other authority, which construes Rule 23(e)(3) to require the disclosure of agreements that impact the actual settlement terms. Rubenstein Response Declaration at 5-6. However, even using the Master's formulation of Rule 23(e)(3), his argument is (1) incorrect and (2) inconsistent with the positions he has taken in this case.

First, the payment to Chargois did not allocate money away from the class. It was taken from a portion of Customer Class Counsels' fee award, which was part of the total award the Court had already determined was fair and reasonable and had already allocated away from the class. *See* Ex. 235 (Rubenstein Dep.) at 23:16-24:4. It did not affect the amount received by the class. *Hartless*, 273 F.R.D. at 646 ("The agreement as to the amount of attorneys' fees could

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[45] *See also id.* ("Although I support such an approach on policy grounds, I am transparent in conceding that, absent a court order, Rule 23 contains no requirement that fee allocation agreements be disclosed to the court nor therefore provided to the class in the court's notice.").

[46] Although the Master suggests that this phrase is quoted from the Manual for Complex Litigation, *see* R&R at 308, it does not appear in that resource. Instead, the Manual explains that Rule 23(e)(3) (previously 23(e)(2)) is intended "to reach agreements that might have affected the interests of class members by altering what they may be receiving or foregoing." *Manual for Complex Litigation* at § 21.631; *see also* Fed. R. Civ. P. 23, 2003 Advisory Note (explaining that 23(e)(3) requires disclosure of agreements that "may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others.").

affect the class members. The allocation of those fees amongst class counsel does not affect the monetary benefit to class members.").

Second, the Master's position is inconsistent because he focuses solely on the Chargois payment while ignoring the fact that no information regarding any fee allocations was provided to the Court, except for the fact that fees from the ERISA Settlement Allocation were capped at $10.9 million. *See* Ex. 3 (Sucharow Decl.) at 32; Ex. 111 at 39 (8/8/16 Hr'g Tr.).[47] The allocations among the Customer Class firms or the ERISA firms do not qualitatively differ from the allocation between the Customer Class firms and Chargois – in any of those situations, lawyers are splitting up and sharing the total fee. By the Master's circular logic, an allocation of part of the total award to any of these firms "allocates money that the class could have received elsewhere." *See* R&R at 308. There is no basis for the Master's arbitrary decision that Rule 23(e)(3) only applies to the Chargois Agreement.

D. The Court's Fiduciary Duty to the Class Does Not Create an Independent Disclosure Obligation.

Lacking on-point procedural rules or case law, the Master resorts to an ill-defined and overarching argument premised on the Court's role as a fiduciary at the class action settlement stage. *See* R&R at 138-141, 303-305. According to the Master, the Court's role as a fiduciary means that "Labaton had a legal and ethical duty to provide the Court with all information it needed to make an informed decision as to the award of attorneys' fees out of the *State Street* settlement fund," including "what the share of each attorney would be." *Id.*[48]

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[47] The Master incorrectly discusses this figure in relation to allocation. *See* pp. 10-12, *supra.*

[48] *See also see also id.* at 140 ("The fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function full and completely advised of all factors and agreements that impact the allocation of attorney's fees . . ."); *id.* at 304 n.248 ("We agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court *all available information* when seeking a fee award in class actions.") (emphasis added).

The sweeping duty imposed by the Master to provide "all information" finds no basis in the law and does not supersede the specific procedural rules that provide otherwise. *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 54; Ex. 234 (Rubenstein Rep.) at 13 ("Background Principles Do Not Reverse the Language of Rules 23/54"). The precedent relied upon by the Master may have influenced, but has nevertheless been subsumed by, the specific Rules that govern fee disclosures. *See* Ex. 234 (Rubenstein Rep.) at 14 (explaining that Prof. Gillers' argument, parroted by the Master, "ignores the facts that the framers of Rule 23(h) were well aware of the principles set forth in his random set of snippets [of case law], yet chose to have Rule 23(h) cross-reference Rule 54(d). In other words, the class action law experts who wrote the rule after study and public input balanced the principles at stake by authorizing class counsel to keep fee-sharing arrangements confidential absent an explicit judicial order to the contrary.").

The Master also claims, again with no support, that as part of Labaton's boundless disclosure obligation, it had a legal duty to provide "the identity of all attorneys – including Damon Chargois – who would be sharing in the award and what the share of each attorney would be." R&R at 303; *see also id.* at 313 (same).[49] This is simply incorrect, as a matter of law and practice:

> [I]n nearly 40% of class action cases, courts are not provided the names of lawyers who worked on the case and who might, on that ground be in line to receive a portion of the award. Moreover, class action fee awards are sometimes allocated to other lawyers . . . There are, therefore, a variety of situations in which the identities of counsel sharing in a fee award are routinely unknown to the class action court . . . [T]he class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless

[49] None of the firms provided any information about the size of their individual shares. The Court, obviously aware that the attorneys would share the fee award, never asked. Yet, the Master seems to suggest that the failure of Labaton to disclose the size of its own share, or of Lieff's share, or of any other firm's share, violated a "legal and ethical duty." *See* R&R at 303. The Master has created this requirement out of thin air, without any controlling legal support.

> chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill.

Ex. 234 (Rubenstein Rep.) at 10-11. The Master's purported disclosure obligations simply are not the law. They reflect his own aspirational views on how attorneys *should act*, not how they *do act* or – more importantly – how they *must act*.

Moreover, the Court's role as a fiduciary to the class does not change the lawyers' disclosure obligations. Although a *court* acts as a fiduciary during the settlement stage and may be interested in reviewing fee agreements, it does not follow that it is the *attorneys'* obligation to disclose information regarding fees in the absence of a court request. *See id.* Rather, as a fiduciary, it rests with the Court to decide whether a disclosure of fee allocation agreements would be helpful to its evaluation of the fee award, and, if so, to order the disclosure of those agreements. *See* Fed. R. Civ. P. 54(D)(2)(b) (petition for attorneys' fees must "disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made") (emphasis added); Ex. 235 (Rubenstein Dep.) at 135:8-12 ("Number one, when I see that the Court is a fiduciary for the class members, I immediately think that means the Court has a responsibility to do something. I don't immediately think that means the parties have a responsibility to do something."); *see also* Fed. R. Civ. P. 23, 2003 Advisory Committee Notes ("Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. . . the court bears this responsibility.").

The cases cited by the Master do not support the limitless disclosure duty that he proposes. Most offer nothing beyond the general principle that the court acts as a fiduciary and may be interested in fee allocations. *See* R&R at 303-304, and cases cited therein.[50] Meanwhile, the Master (and Professor Gillers) afford far too much weight to *Agent Orange* and *Lewis*

[50] The Master also incorporates Prof. Gillers' legal citations by reference. R&R at 303-304.

Teleprompter. R&R at 304, citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) *and Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980); Ex. 233 (Gillers Supp. Rep.) at 82-83 (same).

First, those decisions predate Rule 23(h), which makes unequivocally clear that automatic disclosure of fee agreements is *not* required. *See* Fed. R. Civ. P. 23(h). Second, in the more recent *Bernstein* case, the Second Circuit explained without qualification that information regarding attorneys' fees was not required to be disclosed even where attorneys collecting fees were unknown to the Court. *Compare In re "Agent Orange"*, 818 F.2d at 223, *with Bernstein*, 814 F.3d at 137 n.2. Third, as Prof. Rubenstein thoroughly explains, when *Agent Orange* was decided, a local rule required disclosure of fee agreements; the Second Circuit's commentary regarding the disclosure of fee agreements related to that local rule, rather than an overarching common law duty (which, to the extent it ever did exist, was superseded by the amended Rule 23(h)). *See* Ex. 234 (Rubenstein Rep.) at 16 n.42; Ex. 227 (Joy Dep.) at 128:20-129:1; *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 869 (E.D.N.Y. 1984) (deciding not to apply "Rule 5 of the U.S. District Court for the Southern and Eastern Districts of New York"). Fourth, as Prof. Gillers concedes, the Chargois Agreement did not conflict with the interests of the class in litigating the case to its most favorable resolution, unlike the agreements in *Agent Orange*. *See* Ex. 233 (Gillers Supp. Rep.) at 82 n.87; Ex. 235 (Rubenstein Dep.) at 55:23-56. [51] Finally, even if *Agent Orange* and *Lewis Teleprompter* fashioned some mandate that survived

[51] "Second, when I look at Chargois' involvement, I don't see anything like in the *Agent Orange* case where anyone's worried that the payment to Chargois conflicted with the class' interest in litigating the case." Ex. 235 (Rubenstein Dep.) at 55:23-56:3

both the amendments to the Federal Rules and the dispositive *Bernstein* decision, they do not impose an obligation in this Circuit.[52]

In sum, neither the Master nor Prof. Gillers have cited any legal authority that required disclosure of fee sharing agreements in District of Massachusetts in 2016. Their sweeping generalizations, contradicted by specific Rules, are not enough.[53]

E. The Master's Fundamental Dislike of Referral Fees Does Not Nullify the Federal Rules of Civil Procedure in This Case.

Starting with the premise that referral fees are wrong, the Master views the fact that the Chargois Agreement was not disclosed as objectively harmful and thus deserving of "blame." R&R at 306 ("Professor William Rubenstein places the entire blame for the nondisclosure of the Chargois payment in this case upon the Court."); *id.* at 355 (same). In fact, there is no "blame" here. Referral fees are permissible. *See Mass. Legal Ethics* at 185 (Ex. E). Labaton was not required to disclose the fee agreement with Chargois, just as the Court was not required to ask about fee agreements. *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 54; *see also, e.g.*, Ex. 227 (Joy Dep.) at 92:2-15 ("Is the absence of having all those rules [requiring disclosure of fee agreements] an indication that the judge is not fulfilling his or her fiduciary obligation? Absolutely no.").

Because the Master believes that the Chargois Agreement was wrong and should have been disclosed, he treats the contrary Federal Rules of Civil Procedure as inconvenient obstacles standing in the way of his desired result. *See*, *e.g.*, R&R at 342-43 (in the context of discussing

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[52] There is no District of Massachusetts local rule that requires the automatic disclosure of fee allocation agreements.

[53] If the attorneys truly were required to disclose "all the facts," then they would have been obligated to disclose all of the fee-sharing agreements in this case. *See* R&R at 303-304. Yet the Master is singularly focused on the Chargois agreement. *See* R&R at 303-309. A finding that the Chargois Agreement required disclosure, but the other fee sharing agreements did not, is too arbitrary and subjective to withstand scrutiny.

disclosure obligations to the Court and the class, claiming that the Rules "ignore the realities of class action litigation"); *id.* and *id.* at 280 n.231 (referring to the Rules as "unsatisfactory" and expressing his "frustration" with how they operate); *id.* at 280 n.231 (arguing that the plain language of Rule 23 "seems to stand common sense and the realities of class action litigation upon its head," and noting his belief that the Rule reflects "a misapprehension of the responsibilities of the respective players in the class action process.").[54] For example, he is palpably skeptical of the notion that the Rules do not require disclosure of fee agreements without a court order. *E.g.*, R&R at 279 n.230 ("Rubenstein conceded this is a lot to ask of the judge."); *id.* at 306 (noting Prof. Rubenstein's contention that Rule 23 "places the burden on the Court to order disclosure of a fee agreement or payment"). But, despite the Master's admitted frustration, the Rules plainly make disclosure of fee agreements discretionary with the Court – and the Court is more than capable of asking for them, if it believes such disclosure necessary.[55]

The Master goes so far as to claim that Labaton has "erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." R&R at 362. To be clear, the "legalistic and formalistic excuses" he refers to are the Federal Rules of Civil Procedure, which

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[54] Contrary to the Master's gripes, the drafters of the Federal Rules understand what they are doing. The current Advisory Committee includes, among others: Prof. Edward Cooper, coauthor with the late C.A. Wright and A.R. Miller of the original, second, and third editions of *Federal Practice and Procedure: Jurisdiction*; Prof. Richard Marcus, a lead author of *Complex Litigation* (5th ed. 2010) and *Civil Procedure: A Modern Approach* (6th ed. 2013), published by West Academic Publishing, as well as several volumes of *Wright and Miller*; Prof. A. Benjamin Spencer, author of *Civil Procedure: A Contemporary Approach* (2d ed. 2007) and several volumes of *Wright and Miller*. The list goes on, including at least ten judges, several preeminent litigators, and several more academics. Ex. Q (Advisory Committee on Civil Rules).

[55] With all due respect to the Court, Labaton does not subscribe to the Master's paternalistic belief. *See* Ex. 234 (Rubenstein Rep.) at 12 (opining that "it is really not much of an imposition for a court to ask, 'How are the fees being allocated?' as Rule 54(d)(2) proposes."). Indeed, the Court has recently demonstrated its ability to readily inquire about fee sharing agreements, as Rule 54 contemplates: "Is there one or more other attorneys that would benefit, get money from the settlement of this case?" *Arkansas Teacher Retirement System v. Insulet Corp.*, No. 15-cv-12345 (D. Mass. March 9, 2018) (Wolf, J.) (Ex. R).

(of course) govern litigation in federal court, regardless of the Master's derision. *See, e.g.*, *In re Bos. Reg'l Med. Ctr.*, 328 F. Supp. 2d 130, 151 (D. Mass. 2004) (Wolf, J.) ("If a Federal Rule of Civil Procedure governs a question, the court must apply it unless the rule violates the Rules Enabling Act or the Constitution."). Plainly, the Master disagrees with the payment to Chargois, and he appears determined to make the law fit his desired outcome, even if that means stretching or ignoring the Rules. As Prof. Rubenstein observed:

> Rule 23 clearly sets out a process and the structure for the fee process in class action cases. It's the governing rule. In the case we're talking about it has a specific subpart directly on point . . . I feel like you all [The Special Master and his team] are trying very hard to find a way around that specific law . . . from where I sit there's a specific[] rule directly on point. Just doesn't happen to say what you want it to say, but it's there.

Ex. 235 (Rubenstein Dep.) at 149:2-15; *see also id.* at 73:18-19 (explaining his view that Prof. Gillers' position that an attorney must disclose information regarding fee allocations to the Court "was made up after the fact to fit the facts of this case."). This Court should reject the Master's end-run around the law and instead apply the Rules as written.

F. Labaton Did Not Violate Rule 11.

As the foregoing makes clear, the Federal Rules of Civil Procedure do not require the disclosure of fee allocation agreements. Therefore, the Special Master has proffered the untenable argument that complying with the disclosure obligations set forth in Rule 54 and Rule 23 simultaneously constitutes a non-disclosure that violates Rule 11. In other words, by the Special Master's logic, the Federal Rules of Civil Procedure are internally inconsistent and directly contradict each other. Such a conclusion would necessarily be premised on the notion that the drafters of the Rules, wittingly or through extraordinary carelessness, laid a trap for attorneys who followed the requirements of Rules 54 and 23 but failed to divine a particular judge's desire for information that he had not requested. This reading of the Rules cannot be

squared with their essential purpose. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . They should be construed, administered, and employed by the court and the parties to secure the *just* . . . determination of every action and proceeding") (emphasis added).[56]

Beyond a common-sense reading of the Rules, the First Circuit's interpretation of Rule 11 also precludes a finding that the Labaton violated it. Any alleged "omission" regarding the Chargois Agreement from the Sucharow Declaration does not approach the level of a Rule 11 violation, because the "omission" was perfectly permissible under the Federal Rules of Civil Procedure and class action practice. Without any notice that disclosure of the Chargois bare referral fee was required, Rule 11 simply does not apply.

Finding a violation of Rule 11 requires "culpable" conduct by the attorney. As the First Circuit has repeatedly admonished, a "lawyer who makes an inaccurate factual representation must, at the very least, be *culpably* careless to commit a violation [of Rule 11]." *Young v. City of Providence*, 404 F.3d 33, 39 (1st Cir. 2005) (emphasis added); *see also Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 437 F.3d 140, 142 (1st Cir. 2006) (explaining that "some degree of fault is required" to find a violation of Rule 11); *see also McGee v. Town of Rockland*, 11-cv-10523, 2012 U.S. Dist. LEXIS 180197, at *2 n.2 (D. Mass. Dec. 20, 2012) ("Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps."). Moreover, the First Circuit has recently explained that whether an attorney violates Rule 11 "depends on the objective

[56] The Special Master deflects this common-sense conclusion by relying on Rule 23(e)(3). R&R at 317 n.256 ("Labaton, however, does not mention, let alone discuss in its Memorandum, the separate and independent obligation imposed on Labaton by Rule 23(e)(3) . . ."). This is unavailing. As described in § IV.C, *supra*, Rule 23(e)(3) does not require – and has never been interpreted by a court to require – the disclosure of fee sharing agreements.

reasonableness of the [attorney's] conduct under the totality of the circumstances." *Eldridge v. Gordon Bros. Grp., LLC*, 863 F.3d 66, 87-88 (1st Cir. 2017) (internal citations omitted).

Here, Labaton is not culpable, and its attorneys acted exactly as reasonable lawyers would. Everything known to Labaton indicated that disclosure was *not* required. At the time that Mr. Sucharow submitted the fee petition: (1) the Federal Rules of Civil Procedure did not require disclosure; (2) this Court did not have a standing order requiring disclosure; (3) this District's local rules did not require disclosure; (4) this Court did not order disclosure; and (5) referral fees were a "time-honored practice" in Massachusetts and perfectly permissible. *Saggese*, 445 Mass. at 442. Moreover, the following facts further support the reasonableness of Labaton's conduct: (1) no judge in the District of Massachusetts had ordered disclosure of fee agreements in well over a hundred class action cases since 2011 (*see* Ex. 234 (Rubenstein Rep.) at 6); (2) no case within the First Circuit (or elsewhere, as far as Labaton's research has revealed) had found a violation of Rule 11 for non-disclosure of fee agreements; and (3) no Boston Bar Association and Massachusetts Bar Association ethics opinions, or Massachusetts Board of Bar Overseers ethics decisions, contained analogous guidance relative to the disclosure of fee agreements in connection with the Massachusetts Rules of Professional Conduct.[57]

In short, there was no notice that disclosure was required. In fact, the opposite was true, i.e., the applicable rules stated that disclosure *was not* required in the absence of inquiry or an order. Viewing the circumstances in their totality, a reasonable attorney – trained to rely on the

[57] Even if this Court agreed with the Master's strained interpretation of Rule 23(e), such a reading would be unprecedented in this Circuit. Respectfully, this would still be an insufficient basis for a finding of a Rule 11 violation. *See* Rubenstein Resp. Dec. at 8 ("The Special Master's Report concludes that Lead Counsel derogated its duties because it did not interpret [Rule 23(e)(3)] (a) in a way that no court before had ever interpreted it (b) according to a standard never before articulated (c) on a factual record lacking any evidence that the payment impacted litigation of the case (d) in a circumstance where the class's interest in the pay was, according to the Report's own conclusions, equivalent to about 0.23% of the settlement value.").

Federal Rules of Civil Procedure, precedent, and standard practice – would not believe that disclosure was required. *See Eldridge*, 863 F.3d at 87-88 (courts must assess the objective reasonableness of the attorney's conduct); *see also Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003) (explaining that in the Rule 11 context, "courts determine whether a reasonable attorney in like circumstances could believe his actions were factually and legally justified."). This is far from the "culpable" and "egregious" conduct that courts in the First Circuit require before finding a Rule 11 violation. *See Young*, 404 F.3d at 39; *McGee*, 2012 U.S. Dist. LEXIS 180197, at *2 n.2.[58]

G. Labaton's Non-Disclosure of the Chargois Agreement Did Not Violate the Massachusetts Rules of Professional Conduct.

1. Labaton Did Not Violate MRPC 3.3(a) or 8.4.

The Master contends that Labaton, in complying with Rules 23 and 54, violated MRPC 3.3(a) and MRPC 8.4(c). *See* Mass. R. Pro. C. 3.3(a) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."). The Master offers no meaningful analysis for this finding. R&R at 318-19. Instead, he cites a collection of inapposite cases and decides, in wholly conclusory fashion, that "[c]ompliance with Rules 3.3(a) and 8.4(c) required Sucharow to

[58] And, as the Master concedes, the First Circuit has never found a Rule 11 violation based on a "material omission." Moreover, the group of out-of-Circuit cases that the Master has cobbled together are inapposite. *See* R&R at 314, *citing In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988) (firm requested continuance because it needed time to prepare for a hearing, but did not mention that it had previously represented a creditor in the same case and had previously evaluated and requested discovery on the subject matter of the hearing); *Gurman v. Metro Housing and Redevelopment Auth.*, 842 F. Supp. 2d 1151, 1154 (D. Minn. 2011) (blatantly misrepresenting facts, such as referring to an already-decided appeal as "current," and dramatically mischaracterizing the content of a housing authority order); *Campmor, Inc. v. Brulant*, LLC, 2:09-cv-05465, 2014 U.S. Dist. LEXIS 150299, at *17-18 (D.N.J. Oct. 21, 2014) (declining to find a Rule 11 violation); *Lamon v. Amrheign*, No. 1:12-cv-00296, 2014 U.S. Dist. LEXIS 111787, at *14 (E.D. Cal. Aug. 12, 2014) (factual allegation changed substantially between original complaint and amended complaint; no finding of a Rule 11 violation).

disclose Chargois and his fee arrangement" because it was "highly relevant to the Court's exercise of its fiduciary duty." *Id.*[59]

The Master is incorrect. In light of the lack of an obligation to disclose the Chargois Agreement to the Court, the Master's arguments regarding MRPC 3.3(a) and MRPC 8.4(c) miss the mark. As noted by Profs. Joy and Wendel, those Rules require a "knowing" misrepresentation or omission on the part of the attorney. Mass. R. Prof. C. 3.3(a); *see also* Ex. 241 (Joy Rep.) at 43; Ex. 243 (Wendel Rep.) at 20. Thus, "[f]or there to be an ethical duty for Labaton to disclose to the Court its fee sharing agreement with Chargois & Herron under Mass R. Prof. C. 3.3(a) or 8.4(c), the ethical duty would have to be based on Labaton *knowingly* engaging in impermissible conduct." Ex. 241 (Joy Rep.) at 43. Because there was no legal obligation to disclose the Chargois Agreement, and no inquiry from the Court, it cannot be that Labaton lawyers "knowingly" made some kind of unethical omission. *See* Ex. 227 (Joy Dep.) at 88:3-8 (explaining that Rule 3.3 applies "[o]nly in a situation where you have a duty to speak.").[60]

2. Comment 14A Does Not Change the Analysis.

Late in his investigation, the Master suggested that Comment 14A to MRPC 3.3 applies here and supports finding that Labaton violated MRPC 3.3(a).[61] Comment 14A provides that:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a

[59] The cases relied upon by the Master and Prof. Gillers Prof. do not resemble the facts in this case. R&R at 318-19; Ex. 233 (Gillers Supp. Rep.) at 85; *see also* Ex. 241 (Joy Rep.) at 47-49. In none of those cases did a rule of procedure specifically govern the disclosure. *Id.*

[60] To be clear, there was no omission in the first place, but – assuming solely for the sake of argument that nondisclosure of the Chargois Arrangement could be called an omission – it certainly was not knowingly made in violation of an obligation. *Id.* at 44. ("For an omission to be the equivalent of a misrepresentation, the omission has to occur where there is a duty to speak.").

[61] Professor Gillers initially did not address this comment, but added it in his supplemental report. Compare Ex. 232 (Gillers Rep.) with Ex. 233 (Supp. Gillers Rep.) at 87.

> minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

At the outset, this comment is inapposite, because the fee petition submitted by plaintiffs' counsel was not submitted jointly with an adversary. ECF 102 at 5 ("State Street takes no position on the relief sought in the motion [for fees]"). Indeed, during the final settlement hearing, the Court specifically asked whether the plaintiffs and defendant discussed attorney's fees as part of their settlement negotiations, and counsel responded that they did not. Ex. 78 (11/2/16 Hr'g Tr.) at 20. This, clearly, is not a "joint petition to approve a settlement" that two parties present together. *See* Mass. R. Pro. C. 3.3 cmt. 14A.

The Master also ignores Comment 14, which states that "Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law." Mass. R. Pro. C. 3.3, cmt 14. The disclosure standards for fee petitions in a federal class action are specifically governed by Rule 23 and Rule 54. *See* Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d). Therefore, even if MRPC 3.3(d) were relevant here, it would not override the governing rules addressing the issue (by contrast, the Massachusetts Rules of Civil Procedure do not address fee-related disclosures in class actions, *see* Mass. R. Civ. P. 23).

More importantly, even if Comment 14A applied here, it would not have required disclosure of the Chargois Agreement because it did not appear to be "material" information to the Court's decisionmaking. *See* Mass. R. Pro. C. 3.3(d); *see also* Ex. 227 (Joy Dep.) at 99:2-3 ("I don't believe it's a material fact."). Nearly all the fee-related discussion at the Final Settlement Hearing relating to fees focused on the whether the *total* fee award was fair. Ex. 78 (11/2/16 Hr'g Tr.) at 22-38. In fact, the Court, acting well within its discretion, did not ask a single question regarding how the fee award would be shared among Customer Class Counsel.

Id. Accordingly, information about how Customer Class Counsel planned to divide their portion of the award did not appear material to the Court's decision-making process. *See id.*

The Court's willingness to let the plaintiffs' counsel decide how to divide up the total fee award is not surprising. As demonstrated through an empirical review conducted by Professor Rubenstein, out of 127 recent class actions that reached a settlement in the District of Massachusetts, the Court did not order the disclosure of fee agreements in a single one. Ex. 234 (Rubenstein Rep.) at 6.[62] Therefore, it would be reasonable for an attorney appearing in this district to conclude that information regarding attorney's fee allocations among plaintiffs' counsel is not viewed as material by this Court.[63]

Finally, and perhaps most significantly, the Rules do not require disclosure. Every class action may become non-adversarial at the fee petition stage. *See* R&R at 140-41 and cases cited therein. Nevertheless, the drafters of the Federal Rules – who surely understand this concept – chose to condition the disclosure of fee agreements on the Court's order. *See* Fed. R. Civ. P. 23(h). This reflects a deliberate judgment that fee allocation information is *not* material (and, if a particular court does view it as material, it can order the information disclosed). *See* Ex. 234 (Rubenstein Rep.) at 11.[64]

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[62] This is consistent with the experience of Camille Sarrouf, who has practiced in Boston for over five decades. *See* Ex. 252 (Sarrouf 3/21/18 Dep.) at 35:23-36:7 (testifying that he tried hundreds of cases as the attorney paying a referral fee, and that he "never had a Court ask [him] what is your referral fee. Never. It never comes up.").

[63] The Master makes much of the fact that the payment to Chargois was a referral fee that required "no work." However, it bears repeating that Massachusetts permits bare referral fees. Thus, even knowing that attorneys are permitted to pay and receive referral fees, this Court has, as a matter of course, not ordered the disclosure of any such agreements. *See* Ex. 234 (Rubenstein Rep.) at 6.

[64] Instead, Rule 23, through its reliance on Rule 54, only requires that "the judgment and the statute, rule, or other grounds entitling the movant to the award" and "the amount sought or . . . a fair estimate of it" be disclosed – i.e., material information at the fee petition stage. *See* Fed. R. Civ. P. 54(d)(2)(b).

In short, in his argument regarding Comment 14A and MRPC 3.3(d), the Master has not cited anything indicating the Chargois Agreement was "material" to the Court beyond his own subjective and conclusory opinions. On the other hand, there is abundant objective evidence suggesting otherwise, including this Court's questions at the final settlement hearing, the general practice in this district, and the Rules themselves.

3. No sanction or Discipline is Warranted Based on a Purported Finding That Labaton Violated MRPC 3.3(a).

During his deposition, Professor Gillers conceded that finding a violation of MRPC 3.3 under these circumstances would be novel, if not unprecedented. *See* Ex. 253 (Gillers 3/20/18 Dep.) at 144:24-145:1 ("I know of no authority that applies 3.3 to the duty to disclose a fee agreement."). Both the Master and Prof. Gillers attempt to maneuver around this inconvenient truth by arguing that the Chargois Agreement, *specifically*, was required to be disclosed because it was "highly relevant." R&R at 319; Gillers Supp. Report at 86-87 ("It is not necessary to conclude that class counsel must inform the Court, or the class, of every lawyer who seeks a fee in a matter for the work he or she performed."). In doing so, the Master seeks to find an ethical violation based on a completely subjective and *ad hoc* judgment, and thus to punish Labaton even though it followed a clear rule without notice of purported wrongdoing. *See*, *e.g.*, Ex. 235 (Rubenstein Dep.) at 75:2-3 ("I am adamantly saying the rules were clear."); *id.* at 126:20-22 ("I think that lawyers have the right to rely on the rules, and the rule is the Court can ask for the fee agreements if they want."); *id.* at 198:6-10 ("[Y]ou know, the law is clear here, and the lawyers have reason to rely on the clearness, the clarity of the law. Rule 23 and Rule 54 could not be more clear . . .").

The Master's *ad hoc* finding of a MRPC 3.3(a) violation is impermissible. "Due process requires that attorneys, like anyone else, not be subject to laws and rules of potential

random application or unclear meaning." *In re Discipline of an Atty.*, 442 Mass. 660, 668 (2004); *see also* Ex. 241 (Joy Rep.) at 52 ("Courts and ethics authorities do not impose sanctions on or discipline a lawyer or law firm when a legal or ethical duty is unclear."). The Master appears to acknowledge this – at least with regard to MRPC 1.5(e). *See* R&R at 337 ("[T]his goes to the question of notice to the practicing bar . . . [B]ecause this appears to be an issue of first impression and not one of which the profession might have been well-advised in advance, it would not be appropriate to impose professional discipline in these circumstances.").

Nevertheless, the Master presses forward with a finding of a MRPC 3.3(a) violation, which is contradicted by the governing Federal Rules of Civil Procedure and appears unprecedented. The Master's decision that the Chargois Agreement, unlike other fee allocation agreements, possesses some unique and subjective combination of characteristics requiring disclosure should be rejected. *See* R&R at 319. As Prof. Rubenstein explained, there "is nothing that the lawyers did here that was unusual." Ex. 235 (Rubenstein Dep.) at 104:5-6. Thus, discipline is unwarranted. *See, e.g.*, *In re Discipline of an Atty.*, 442 Mass. at 668, citing with approval *In re Ruffalo*, 390 U.S. 544, 554-556 (1968) (White, J., concurring) (discipline inappropriate "on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct").[65]

[65] "The Special Master claims that the intent of the Special Master's investigation 'has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and harm.' This statement is contradicted by the Special Master's own conclusion that the alleged violation of Mass. R. Prof. C. 1.5(e), without which the Special Master could not find an alleged violation of Mass. R. Prof. C. 7.2(b), was a 'close call.' In my forty years of practice as a lawyer, my experience researching and writing on various legal ethics issues, and more than thirty years of experience teaching legal ethics to law students, lawyers, and judges, I have never found any lawyer disciplinary authority or court equate a 'close call' with 'true and unmistakable professional misconduct.' The Special Master's statement of the intent of the investigation is also contradicted by the Special Master's unprecedented findings of legal ethics violations of Mass. R. Prof. C. 1.5(e), 7.2(b), 1.2, 1.4, 3.3, and 8.4, for which the Special Master cites to no controlling authority in Massachusetts or the First Circuit, because there is no such law to support the Special Master's conclusions." Ex. S (Joy 6/28/18 Dec.) at 13 (citations omitted).

H. The Master's "General Candor to the Court" Argument Also Fails.

The Master contends that Labaton violated its "broad duty of candor" to the Court. R&R at 322-26; 360-362. The factually extreme cases cited by the Master are inapposite. In *Pearson v. First NH Mortg. Corp.* – the only First Circuit case cited by the Master – an attorney submitted a statement to the Bankruptcy Court, as required by Fed. R. Bankr. P. 2014(a), stating that he had "no connections" with the creditors or "any party in interest, their respect attorneys, and accountants." 200 F.3d 30, 33 (1st Cir. 1999). In fact, the attorney had "serious conflicts of interest": specifically, his firm represented the bank that was being sued by the attorney's current client, who sought to have loan documents (which were likely drafted by members of the attorney's firm) declared void. *See id.* at 36-37. The firm's representation of the bank also presented several other serious conflicts. *Id.* The First Circuit found that the attorney violated his duty of candor to the court, explaining that the attorney "submitted the verified statement required under Fed. R. Bankr. P. 2014, which unequivocally asserted that there were no conflicts of interest." *Id.* at 38.

The Master and Professor Gillers also rely heavily on *United States v. Schaffer Equip*., 11 F.3d 450, 457 (11th Cir. 1994). Their nearly-identical descriptions of the case are quite understated: "In *Shaffer*, the government failed to disclose false testimony at the deposition of its expert witness in a civil environmental case, and then moved for summary judgment without relying on his opinion." R&R at 323; s*ee also* Gillers Supp. Rep. (Ex. 233) at 89. In fact, the government's deception was much more extensive: the individual in question, the EPA's "on-scene coordinator" for the clean-up site, misrepresented his academic credentials (he had not

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Ex. S (Joy 6/28/18 Dec.) at 13.

graduated from college).[66] *Id.* at 460. After learning of his misrepresentations, and despite concluding that his credibility was relevant to the litigation as matter of law, the government did not update interrogatory responses regarding his credentials. *Id.* at 455. Moreover, far from merely moving "for summary judgment without relying on his opinion" (R&R at 323), the government's summary judgment motion was "dependent on the administrative record" compiled (and tainted) by the coordinator. *Id.* at 461. Litigating the case in reliance on this administrative record, while concurrently obstructing the defendant's discovery regarding the coordinator's credentials, comprised the violation of the government attorneys' duty of candor. *See id.*

This case is nothing like *Pearson* or *Shaffer*. In *Pearson*, the attorney at issue was required by rule to submit a statement and flatly lied about serious conflicts of interest in doing so. *See Pearson*, 200 F.3d at 38. In *Shaffer*, the government litigated a case in reliance on a fraudulent record and discovery misconduct.[67] By material contrast, in this case, the applicable rules did not require any disclosure, Labaton did not make any affirmative misrepresentation, and the underlying referral fee was permissible, rather than an "irreconcilable" conflict of interest.

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[66] The coordinator eventually pled guilty to perjury. *Id.* at 452 n.1.

[67] Prof. Gillers also relies on *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). *See* Ex. 233 at 90. *Rodriguez* is irrelevant. It involved undisclosed incentive awards that uniquely incentivized the class representatives to settle, rather than risking trial. *See id.* Labaton disclosed the class representatives' service awards to the Court in this case, and included information about them in the class notice. *See* Ex. 78 (11/2/16 Hr'g Tr.) at 31; Ex. 81 (Notice of Pendency of Class Actions) at 5. *Rodriguez* did not involve fee sharing agreements, which are specifically addressed by Rules 23 and 54.

V. DISCLOSURE TO THE CLASS WAS NOT REQUIRED.

A. The Payment to Chargois Came From Customer Class Counsels' Share of the Fee Award.

The Master premises his argument regarding Labaton's disclosure obligations to the class on the false notion that the payment to Chargois was made from "the class fund." *See* R&R at 277. The Master's position ignores the mechanics of class action fee awards:

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

Ex. 235 (Rubenstein Dep.) at 23:16-24:4. The payment to Chargois came during the "allocation phase," after the Court had already determined that the amount of attorneys' fees payable from the total settlement fund was fair. *See id.* That Customer Class Counsel paid a portion of their own fee award and allocated it to Chargois had absolutely no effect on the amount the class received. *Hartless*, 273 F.R.D. at 646.

Moreover, the Master's argument is illogical. In a state where bare referral fees are permissible, there is no basis to distinguish the fee paid to Chargois from the other fee allocations among class counsel (which also were not disclosed to the class). A member of the class could challenge the payment to Chargois, just as a member of the class could challenge the amount received by another of the firms as not being commensurate with its performance. Yet, inconsistently, the Master only believes that the Chargois Agreement required disclosure. *See* R&R at 273-74.

B. The Federal Rules of Civil Procedure Do Not Require Disclosure to the Class of the Fee-Sharing Agreement With Chargois.

The Master admits, as he must, that Rule 23 does not require disclosure to the class in the settlement notice of attorney fee agreements. *See* R&R at 280-81 & n.231.[68] Rule 23(h)(1) governs notice to the class in connection with attorney's fees.[69] The Rule says nothing regarding disclosure of fee agreements in the settlement notice. Rather, it provides that claims for attorneys' fees be made by motion with notice of the motion served on all parties and class members "in a reasonable manner." *Id.* Thus, Rule 23 relies on the fee motion to provide information regarding fees to the class, and as such, is dependent on the Court to order disclosure. *See* Fed. R. Civ. P. 23(h)(1); Fed. R. Civ. P. 54(d)(2); *see also* § IV.B, *supra*; *Bernstein*, 814 F.3d at 137-38 n.2 (explaining that Fed. R. Civ. P. 23(h) "does not mandate automatic disclosure of all fee-sharing arrangements in class actions"). As Prof. Rubenstein explained:

> Class action law generally does not put fee allocation information in the class notice . . . I would say it's not an expected part of the notice process in a class action that the allocations as to what each lawyer's getting is put in the notice . . . If the class members want to know that information, they can come forward and ask the Court to release it. I hope the Court would. But it's not expected in a class action that the allocation as to what each lawyer is getting is ever in the notice to the class.

Ex. 235 (Rubenstein Dep.) at 188:6-20.[70]

In short, as the Master recognizes, there is no requirement that information regarding fee agreements or allocations be described in the class notice.

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[68] The content of a settlement notice under Rule 23(e) "is committed to the discretion of the trial judge." 3 William B. Rubenstein, *Newberg on Class Actions* § 8:17 (5th ed. 2013) (Ex. T).

[69] As Professor Green testified, "[i]n my view the kinds of notice you give to a class is governed by Rule 23 and case law that develops under Rule 23." Ex. 230 (Green Dep.) at 152:12-14.

[70] *See also* Ex. 234 (Rubenstein Rep.) at 27-30 (Prof. Gillers' argument that "class counsel must disclose fee-sharing agreements in the class's notice . . . is not supported by the text of Rule 23, nor the cases interpreting it."); *see also* Ex. 241 (Joy Rep.) at 50-52.

C. The Rules of Professional Conduct Do Not Require Disclosure.

Simply put, because there was no requirement to disclose fee allocation agreements to the class, failure to do so is not an ethical violation. Rule 23 provides the standards relating to class counsel's duties to the class. *See* Fed. R. Civ. P. 23(g)(4) ("*Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class."). Courts view counsels' duties toward the class as "coextensive" with the requirements of Rule 23. *See* Ex. 235 (Rubenstein Dep.) at 154:16-20 ("What the Court found [in other cases] was that there was not a breach of fiduciary duty because Rule 23 had been complied with and hence in some ways what the Court's saying is that whatever fiduciary duty the lawyer had was co-extensive with its Rule 23 duties."); Ex. S (Joy Decl. 6/28/2018) at 11 ("Labaton's ethical obligations to keep class members reasonably informed as to the proposed settlement are shaped by its legal obligations under the Rules of Civil Procedure, which the Special Master found as a matter of law Labaton had met."). And, with regard to fee agreements in particular, Rule 23 provides that they must only be disclosed upon the court's order. As Prof. Joy explained, "[w]ithout a disclosure obligation to the Court and without a clear obligation to disclose how fees would be divided to the class, there was no obligation for Labaton to disclose [] the fee sharing agreement with Chargois & Herron to the class members." Ex. 241 (Joy Rep.) at 50.[71]

Yet the Master argues that class counsel's role as a fiduciary created an obligation to disclose the Chargois Agreement to "at least the[] named plaintiffs/class representatives." *See* R&R at 284-85. As with many of his other legal findings, the Master's conclusion is unsupported by any case law and appears unprecedented. *See* Ex. 241 (Joy Rep.) at 51; Ex. 253

[71] Professor Joy explained further during his deposition: "It was sufficient to notify class members about the fees. It didn't have to describe the division of fees because the court did not use Rule 54(d) to order that the terms of any agreement about fees for which the claim is being made be disclosed." Ex. 227 (Joy Dep.) at 145:14-19.

(Gillers 3/20/18 Dep.) at 150:3–7.[72] Lacking any legal authority and ignoring that Rule 23 provides the applicable standards in the class action context, the Master turns to MRPC 1.2 and 1.4. However, his reliance on MRPC 1.2 and 1.4 is misguided and does not withstand scrutiny.[73] Neither Rule mentions anything about attorney's fees or appears to have any bearing on this situation.[74] Stating the obvious, MRPC 1.5 addresses the requirements for communications with

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[72] "Q: Sir, you list some cases in this section, but none of the cases you cite hold that counsel must disclose fee allocations to class members, do they? A: No." *See also id*. at 150:17–22 ("Q: Can you cite us to a case that says that class counsel has the obligation to notify the unnamed class members; that is, the non-named plaintiffs, of a referral fee that's going to come out of class counsel's fee? A: No."); *id*. at 156:20–157:1 ("You're seeking to impose a duty of disclosure of a fee division that no Court has yet imposed in any written decision, right? A: So far as I know, but it's not -- it's an analysis under the Massachusetts rules. It's not an analysis under Rule 23.").

[73] As the Master explained, "the class is not a client for all purposes." R&R at 284; *see also See* 5-23 *Moore's Federal Practice - Civil* § 23.120 (2018) ("[T]he post-2003 appointment procedures probably sharpen the differences in ethical obligations between class-action attorneys and the 'customary obligations of counsel to individual clients.'"); *see also* Ex. 235 (Rubenstein Dep.) at 151:19-21 (explaining that members of the certified class are "clients for some purposes, and they're not clients for other purposes."). Moreover, as courts have recognized, class actions are legally unique situations that do not always neatly fit within the standard framework of ethical rules. *See Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991) ("We conclude that DR 5-103(B) is inconsistent with Rule 23 and therefore may not be applied to class actions."). For example, conflicts rules – which are suited to individual clients – are "much laxer" in the class action context. *See* Ex. 235 (Rubenstein Dep.) at 151:23-153:10.

[74] MRPC 1.2 provides:

> a. A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
>
> b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.
>
> c. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> d. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel

clients regarding fee agreements. *See* Mass. R. Prof. C. 1.5; *see also* § III.B, *supra.* But the Master does not mention MRPC 1.5 when discussing the fee-related information that he suggests Labaton was required to convey to the class (presumably, the Master realizes that applying MRPC 1.5(e) to a class situation is unworkable, so he instead relies on general principles from other rules.); *see* Ex. 227 (Joy Dep.) at 154:9-14 (explaining that Labaton had a fiduciary duty to the class, "but not one that encompassed disclosing the fee-sharing arrangement").[75]

In sum, the "Special Master's finding that Mass. R. Prof. C. 1.2 and 1.4 imposed additional ethical obligations on Labaton where there were no legal obligations, and no ethical guidance in Massachusetts reaching a similar conclusion, is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority." Ex. S (Joy Dec. 6/28/2018) at 11.

> or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

MRPC 1.4 provides:

> a. A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[75] The Master's argument is also illogical: he contends that MRPC 1.2 and 1.4 required disclosure of the "Chargois Arrangement," which he defines as the agreement to pay Chargois 20% of fees earned in cases where ATRS was a plaintiff. Thus, because MRPC 1.5 does not require disclosing the size of a referral fee unless the client asks, the Master essentially argues that Labaton was obligated to convey more information to the class than it was required to disclose to ATRS, its direct client. *See* MRPC 1.5 cmt. 7A ("The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.").

The Court should reject the Master's attempts to cast ill-fitting rules – which do not govern fee disclosures – as the controlling standards in this situation. Instead, the Court should apply Fed. R. Civ. P. 23, which specifically addresses fee disclosures in class actions and did not require disclosure of the Chargois Agreement. *See* Fed. R. Civ. P. 23(h)(1).

D. The Court Has Endorsed the Notice Provided by Labaton.

The Master's arguments regarding the Notice of Pendency of Class Actions (the "Notice") ring especially hollow when considering recent actions taken by this Court. In *Arkansas Teacher Retirement System v. Insulet Corp.*, in which Bernstein Litowitz represents ATRS, the parties conducted a preliminary settlement hearing on March 9, 2018, at which the Court reviewed the draft settlement notices provided by the parties and provided guidance and instruction as to how they should be revised. 1:15-cv-12345 (D. Mass) (Wolf, J.). Although the Bernstein attorneys explained that two law firms which had not appeared in the case would be receiving fees in the form of expenses, the Court did not direct Bernstein to include this information in their class notice. *See* March 9, 2018 Hearing Tr. at 12 (ECF 120) (Ex. R); *see also* p. 9, *supra*. Instead, the Court explained that the notice regarding the fee petition need only include the aggregate amount of fees being requested: "[i]f it's your intention to ask for 25%, all you have to say is the lawyer is going to ask for 25%." *Id*.

Notably, in *Insulet*, the Court directed the parties to use the notice sent by ATRS in this case as a "template." *See* March 9, 2018 Hearing Tr. at 29-30 (Ex. S). Apparently, at that point, the Court may have been aware of the Chargois Agreement.[76] Nevertheless, although the Notice did not describe or mention the Chargois Agreement or any other fee allocation information among any of the counsel in the case, the Court held it up as a model for other law firms. *See id.*

[76] *See* Ex. U (5/30/18 Hearing Tr.) at 73 (the Court, in response to a statement about *Insulet*, explained that it has been "educated" by the State Street case).

The Court's endorsement of ATRS' Notice demonstrates that it provided sufficient information to the class.

VI. LABATON DID NOT BREACH ANY DUTIES TO CO-COUNSEL.

The Master labors to conclude that Labaton breached a duty that it owed to the other firms. The Master claims that Labaton's supposed "breaches of duty to its co-counsel spring from two separate but related sources": (1) its role as Lead Counsel and (2) "settled principles of contract law." R&R at 347. The Master is incorrect. Labaton had no such duties.

A. Labaton Did Not Breach an Ethical or Legal Duty by Not Disclosing the Chargois Agreement.

The Master contends that Labaton, as class counsel, had a general duty to disclose the Chargois Agreement to the other plaintiffs firms in the *State Street* litigation. He does not explain or define the duty that he references, other than stating that Labaton had "a duty to act fairly, efficiently, and economically," and was required to meet a "demanding standard of trustworthiness." R&R at 287-295, 347. The Master describes these generalities as reflective of "important duties," but offers no meaningful analysis or explanation. *Id.* at 287; 289. Nevertheless, he determines (in entirely conclusory fashion) that "general principles of fairness and professional responsibility toward co-counsel, and toward the Court, strongly suggest that Labaton was required to disclose the Chargois agreement." R&R at 290.

Leaving aside the Master's general statements, Labaton had no legal duty to disclose or further describe the Chargois Agreement to the other firms. There was no requirement imposed by the law governing class actions. Ex. 235 (Rubenstein Dep.) at 47:13-15 ("I don't know of anything in class action law that addresses this directly."). Moreover, it is clear that Labaton did not owe any such duty under the Massachusetts Rules of Professional Conduct. Ex. 229 (Wendel Dep.) at 172:1-12 (agreeing that "there is nothing in the Massachusetts Rules of

Professional Responsibility that would require Labaton to fully disclose the nature of its relationship with Chargois . . . to Lieff and Thornton."); Ex. 240 (Green Rep.) at 24 ("The Professional Conduct Rules are meant to protect clients and the public, not to protect lawyers from over-reaching by their colleagues.").

Accordingly, the fact that Labaton or the other Customer Class Counsel did not disclose the payment to Chargois to the ERISA firms was not a violation of the Massachusetts Rules of Professional Conduct or any duty of candor imposed by class action law. *See* Ex. 229 (Wendel Dep.) at 172:1-12; Ex. 240 (Green Rep.) at 24; Ex. 235 (Rubenstein Dep.) at 47:13-15.[77] Likewise, the fact that Labaton did not disclose the full parameters of the Chargois Agreement (i.e., that it was a bare referral fee) to Lieff did not violate any ethical duty or duty of candor. *See id.*[78]

[77] Although the Master relies heavily on Labaton's role as Lead Counsel and the purported duties that flow from that position, ERISA counsel was not forthcoming about their own fee arrangements. Not one of the three lead ERISA Firms who received a distribution of fees from the Lead Counsel Escrow Fund disclosed complete information to the ERISA plaintiffs regarding their own fee sharing arrangements. *See* Ex. 27 (Keller Rohrback L.L.P.'s Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories) at 7 (explaining that the named plaintiffs approved ERISA counsel receiving 9% of the aggregate award and approved the 25% award being sought, but that "[t]he specific dollar allocations of fees to individual class law firms from the gross fee award was not detailed in any written disclosure to the ERISA named plaintiffs, other ERISA class members, or the ERISA counsel," nor was the amount paid by Keller Rohrback to Hutchings Barsamian disclosed to the other firms); Ex. V (McTigue Law LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories to McTigue Law) at 4-5 (contending that the filing and posting of lodestars operated as disclosure to the ERISA class, but conceding that neither the agreements with Customer Counsel nor agreements among ERISA attorneys about the sharing of fees were disclosed to ERISA class members, nor was the "division of fees among *Henriquez* Counsel" disclosed to Customer Class Counsel); Ex. W (Zuckerman Spaeder LLP's Answers to Special Master's Second Supplemental Interrogatories) at 4 (claiming that ERISA class members had "constructive notice" that other firms might receive some amount of the fees, but conceding that actual payments by Zuckerman Spaeder to three different law firms were never disclosed to the ERISA class or the other firms).

[78] The Master found that Garrett Bradley was aware of the Chargois Agreement. R&R at 353. Other evidence in the record indicates that TLF was generally aware that Chargois was being paid for a referral fee. *See* Ex. X (TLF-SST-033911).

B. Labaton Did Not Breach a Contractual Duty.

The Master's contract analysis, which he uses to justify reallocating an additional $3.4 million to ERISA counsel, should be rejected. At the outset, Labaton is not interested in litigating a contract dispute among the other counsel involved in the *State Street* litigation based on claims instigated by the Master.[79] Nevertheless, because he has injected this element into the case, Labaton is constrained to respond to the Master's faulty reasoning.

As to ERISA counsel, the Master relies on a non-disclosure theory. *See* R&R at 297-99. This is unavailing. It is well-settled that "[i]n the absence of an affirmative misrepresentation, an action for fraud requires 'both concealment of material information and a duty requiring disclosure.'" *Smith v. Zipcar, Inc.*, 125 F. Supp. 3d 340, 344 (D. Mass. 2015) (*quoting Sahin v. Sahin*, 435 Mass. 396, 758 N.E.2d 132, 138 n.9 (Mass. 2001)). In other words, without a duty to disclose, there is no actionable omission. *Id.*

Labaton did not owe a duty to disclose to the ERISA firms. Such a duty arises only in "discrete situations." *See Wolf v. Prudential-Bache Sec.*, 41 Mass. App. Ct. 474, 476, 672 N.E.2d 10, 12 (1996). One such situation is where "there is a fiduciary or other similar relation of trust and confidence" between the parties. *Stolzoff v. Waste Sys. Int'l*, 58 Mass. App. Ct. 747, 763 (2003).[80] Beyond a strictly legal fiduciary relationship (e.g., trustee-beneficiary or attorney-

[79] The Master acknowledges that he is, in effect, creating this dispute, rather than adjudicating one raised by the parties. R&R at 296 ("Cognizant of the limitations of contract principles in this particular context – outside a typical dispute between bargaining parties – contract principles nevertheless inform the Special Master's assessment of the equitable implications of the nondisclosure to co-counsel, and consideration of a court's fiduciary duty to safeguard class settlement funds and its equitable authority to modify and unfair and unreasonable fee allocation among class counsel.").

[80] The Master relies on *DeMarco v. Granite Sav. Bank* for the proposition that a duty to disclose may arise "where the relationship of the parties creates a particular legal or equitable obligation to communicate all facts." 1993 Mass. App. Div. 122, 124 (Mass. App. Ct. 1993). However, that case involved a bank that owed a fiduciary duty to its client. *See id.* ("[T]he Bank assumed the role of the plaintiffs' agent , and all duties incident to such fiduciary role, including the duty of full disclosure to the plaintiffs.") (internal citations omitted).

client), Massachusetts courts recognize a relationship of "trust and confidence" requiring disclosure in the limited circumstance where one party is "dependent on another's judgment in business affairs or property matters," such that the relationship effectively is a fiduciary one. *See Markell v. Sidney B. Pfeifer Found., Inc.*, 9 Mass. App. Ct. 412, 443-44 (1980) (recognizing relationship of "trust and confidence" and attendant fiduciary responsibilities where elderly aunt "had the utmost trust and confidence" in her nephew, who was an attorney, and relied on his "judgment and integrity in committing to him the management of her securities"); *see also Smith v. Jenkins*, 626 F. Supp. 2d 155, 171 (D. Mass. 2009) ("Whether a relationship of trust and confidence exists is a question of fact. . . . The relationship may be found on evidence indicating that one person is in fact dependent on another's judgment in business affairs or property matters."). Neither of these circumstances applies to Labaton.

As the Master notes, Labaton was not the ERISA firms' fiduciary. *See* R&R at 298 n.245. This Court, in the context of a class action fee dispute, found that counsel did not owe a fiduciary duty to an attorney challenging his share of the fee award. *Sobran v. Millstein*, 148 F. Supp. 3d 71, 72 (D. Mass. 2015) ("This Court agrees that the Defendants do not owe Sobran any sort of fiduciary duty."). As noted in that decision, the Massachusetts Court of Appeals has "suggested that there was no 'direct duty of care between co[-]counsel.'" *Id.* (*quoting Bartle v. Berry*, 80 Mass. App. Ct. 372, 379 (2011)). Although the Massachusetts Court of Appeals did not decide in *Bartle* the issue of whether a fiduciary duty exists between co-counsel, it explained that courts in other jurisdictions have "flatly rejected any imposition of a duty of care owed by

one attorney to another to protect an attorney's prospective interest in contingency fees." *Bartle*, 80 Mass. App. at 379.[81]

Nor did Labaton and the ERISA firms share a relationship of "trust and confidence" creating a fiduciary-like duty on Labaton's part. Although the Master notes that Labaton was expected to act "fairly" and demonstrate "trustworthiness" as lead counsel, the relationship between Labaton and the ERISA firms does not resemble the dependent and one-sided dynamic necessary to create a fiduciary-like duty under Massachusetts law. *See, e.g., Markell*, 9 Mass. App. Ct. at 444. Stating the obvious, the ERISA firms – comprised of attorneys and actively negotiating for their share of the fee – were not dependent on the judgment of Labaton to care for them in the way that Massachusetts law requires. *See id.*; *see also, e.g.*, *Adley v. Burns*, No. 16-12265-WGY, 2018 U.S. Dist. LEXIS 81899, at *13 (D. Mass. May 15, 2018) ("While Adley may have trusted in the Defendants' judgment . . . Adley, a fully independent adult and then-active federal agent, was fully capable of making his own business decisions and thus was not dependent on the Defendants' judgment in the same way as the individuals in *Rood* and *Markell*.").

To the contrary, the fee-sharing agreement between Customer Class Counsel and the ERISA firms was a bargained-for contract that (according to Lynn Sarko) was negotiated during a period of "distrust between certain ERISA lawyers and certain customer class lawyers." *See* Ex. 37 (Sarko 9/8/17 Dep.) at 82:8-14; *see also* Ex. 159 (McTigue 9/8/17 Dep.) at 23:18-23; 29:22-24 (discussing "leverage" and "bargaining power" in fee negotiations with Customer Class

[81] *See also Scheffler v. Adams & Reese, LLP*, 950 So. 2d 641, 653 (La. 2007) ("Accordingly, we hold that, as a matter of public policy, based on our authority to regulate the practice of law pursuant to the constitution, no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's prospective interests in a fee."); *Beck v. Wecht*, 28 Cal. 4th 289, 298 (Cal. 2002) ("The better approach, we conclude, is a bright-line rule refusing to recognize such a fiduciary duty."); *Mazon v. Krafchick*, 158 Wash. 2d 440, 448 (Wash. 2006) (adopting "a bright-line rule that no duties exist between cocounsel that would allow recovery for lost or reduced prospective fees.").

Counsel). Simply put, there was nothing like a fiduciary duty on Labaton's part (or the other Customer Class Counsel) in the fee negotiations with the ERISA firms. Thus, there was no contractual duty to volunteer information about the Chargois Agreement. *See* Ex. 162 (4/13/18 Hr'g. Tr.) at 275 (Lieff's attorney explaining that the Chargois Agreement should not have been disclosed to the ERISA firms because they "have no business in that"); *Sobran*, 148 F. Supp. 3d at 72 (finding no duty of care between co-counsel in a class action); *see also Frontier Mgmt. Co. v. Balboa Ins. Co.*, 658 F. Supp. 987, 990 (D. Mass. 1986) ("[A]n arms length business relationship generally will not give rise to fiduciary duties").[82]

VII. OBJECTIONS TO MASTER'S PROPOSED REMEDIES.

A. The Master's Double-Counting Remedy Should Be Rejected.

Labaton objects to the Master's recommended remedy for Customer Class Counsels' double-counting error on their lodestar petitions – specifically, that the Customer Class Counsel disgorge in equal amounts the entire double-counted time ($4,058,000). R&R at 363-64. The Master acknowledges that the error was "inadvertent," yet the Master concludes that a remedy is nevertheless necessary. *Id.* at 363. The Master is entirely without legal support for his recommendation. *See id.* at 363-64. In fact, the law in the First Circuit is quite clear and for the reasons explained below no disgorgement is appropriate in these circumstances.

First, the Master lauds the work done by Labaton and its team of attorneys. The billing rates for Labaton partners, associates and staff attorneys were reasonable. R&R at 174, 176, 180.[83] Labaton kept contemporaneous time records and the hours presented on its fee petition

[82] The Master's contractual analysis regarding disclosures to Lieff is also incorrect as a matter of law. However, given Lieff's position that it is not seeking relief from Labaton (*see* R&R at 352), Labaton will not press this point.

[83] Unlike Lieff and Thornton, Labaton did not use contract attorneys and its staff attorneys "performed substantive and valuable work beyond simple document review." R&R at 172.

were reasonable. *Id.* at 202, 210. The time spent by Labaton's team running the litigation "was commensurate with its role as Lead Counsel as well as with the complexity and extremely hard-fought nature of the five-year long litigation." *Id.* at 213.

Second, the lodestar submission provided by Customer Class Counsel was a cross-check, not the basis for payment. *See, e.g.*, Rubenstein Resp. Dec. 19. Thus, the roughly $4 million double-counting error did not result in a $4 million higher fee for Customer Class Counsel. Instead, it merely altered the cross-check that the Court used in determining whether a 25% fee was reasonable. As such, "the critical question is the effect that the lodestar error had on the cross-check." *Id.*

In this case, the double-counting error did not materially affect the cross-check. Correcting for the double-counting error increases the lodestar multiplier from 1.8 to approximately 2.0. Ex. Y (Rubenstein Decl. in Support of Customer Class Counsels' 8/1/17 Consolidated Response) ("Rubenstein 7/31/17 Dec.") at 30-31. As Prof. Rubenstein explains, his empirical analysis demonstrates that a "2 multiplier is consistent with multipliers that courts have previously approved in similar circumstances." *Id.* It also is still well within the acceptable range in this Circuit. *See*, *e.g.*, *Harden Mfg. v. Pfizer, Inc (In re Neurontin Mktg. & Sales Practices Litig.)*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (describing a multiplier of 3.32 as well within the appropriate range), *citing* 4 Newberg on Class Actions § 14:7 (4th ed. 2002) ("Generally, multipliers from 1-3 are the norm."). Thus, while the double-counting error was an unfortunate mistake, its effect on the multiplier "in the context of this case was not significant." Ex. Y (Rubenstein 7/31/17 Dec.) at 12.

The Master does not even attempt to explain the basis for his proposed remedy, which has no grounding in law or fact. *See id.* at 363-64. Moreover, the substantial disgorgement

proposed by the Master is disproportionate to Labaton's conduct, which the Master found was unintentional. The Court should reject his illogical and unsupported recommendation that an inadvertent mistake on Customer Class Counsels' lodestar submissions, which did not materially affect the multiplier, should result in a loss equal to the double-counting amount. Courts routinely reduce lodestars (based on attorney rates or other factors) and still conclude that the percentage fee was reasonable based on the adjusted multiplier. *See* Rubenstein Resp. Dec. at 19-21 and cases cited therein. Here, the 25 percent fee award to Customer Class Counsel is well within the range of reasonable and customary in the First Circuit even when cross-checked against a multiplier of 2. As a result, the Court should reject any disgorgement remedy based on the double-counting mistake.

B. The Master's Chargois Payment Remedy Should Be Rejected.

Labaton objects to the Master's recommendation that the Firm on its own disgorge $4.1 million reflecting the payment to Chargois. *See* R&R at 368-71. For the reasons set forth above, no remedy is appropriate against Labaton for its payment of a referral fee to Chargois as permitted by long-standing Massachusetts law, as consented to by ATRS, and as in compliance with the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct.

Labaton further objects to the Master's recommendation that the vast majority of such payment ($3.4 million out of $4.1 million) be provided to ERISA counsel. This recommendation is unwarranted and inconsistent with the Master's positions during this investigation and in his Report. *See, e.g.*, R&R at 313 ("The Court had the authority . . . to deny any part of the recovery to Chargois . . . and instead to direct that the money intended for Chargois should instead go to the class.").

C. The Master's Recommendation of Ongoing Ethical Supervision By the Court Or Otherwise Should Be Rejected.

Labaton objects to the Master's recommendation that the firm "work with the Court to establish a consulting process that will ensure consistent ethical compliance." R&R at 373. This is both unnecessary and inappropriate.

First, for the reasons explained herein, Labaton complied with the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct and the custom and practice in the First Circuit as confirmed by its five expert witnesses and by Lieff's expert Professor Rubenstein. Professor Gillers is a lone outlier, propounding arguments regarding fee-sharing that are unprecedented, incorrect, and not "believable."[84] Moreover, because the Master correctly concluded that the double-counting mistake was inadvertent, there is no reason for any ongoing ethics supervision.

Second, it would be highly inappropriate for the Court to inject itself in an ongoing way into an out-of-state law firm's practices and procedures. This would implicate serious attorney-client privilege concerns, among other things. The Master is unsure whether the Court has such authority beyond the present case. *See* R&R at 373. Perhaps as a result of this uncertainty, and in keeping with the profession's tradition of regulating itself, Labaton has not located an example where a federal district court was appointed to have an ongoing role in the conduct of a law firm in circumstances such as these. Nothing in this case warrants the recommendation made by the Master.

[84] See Ex. 235 (Rubenstein Dep.) at 73:7-19 ("I think it was made up after the fact to fit the facts of this case.").

VIII. CONCLUSION

Labaton requests that the Court, following its *de novo* review, reject the Master's factual findings and legal conclusions as objected to herein and also reject to the Master's proposed remedies relating to Labaton.

Dated: June 28, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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 August 8, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

TRANSMITTAL DECLARATION OF JUSTIN J. WOLOSZ IN SUPPORT OF LABATON SUCHAROW LLP'S OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Justin J. Wolosz, on oath, depose and say as follows:

1. I am an attorney at Choate, Hall & Stewart, LLP. I am one of the counsel of record representing Labaton Sucharow LLP in this matter.

2. I submit this declaration for the sole purpose of transmitting true and accurate copies of documents in support of Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations. I have personal knowledge of the facts set forth in this declaration.

3. Attached hereto as Exhibit A is a true and correct copy of an email from Lawrence Sucharow to Lynn Sarko dated August 28, 2015 (TLF-SST-O43022 – 043024).

4. Attached hereto as Exhibit B is a true and correct copy of the Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Labaton Sucharow LLP dated May 18, 2017. Attached hereto as Exhibit C is a true and correct copy of the Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP dated May 18, 2017. Both of these documents were served by email on May 18, 2017.

5. Attached hereto as Exhibit D is a true and correct copy of a list of document requests and interrogatories that the Special Master struck in their entirety. One of the Special Master's attorneys handed this document to counsel for Labaton at a meeting on May 22, 2017.

6. Attached hereto as Exhibit E is a true and correct copy of the Board of Bar Overseers, *Massachusetts Legal Ethic: Substance and Practice* (2017).

7. Attached hereto as Exhibit F is a true and correct copy of *The New Massachusetts Rules of Professional Conduct: An Overview*, 82 Mass. L. Rev. 261 (1997), by Chief Justice Herbert P. Wilkins.

8. Attached hereto as Exhibit G is a true and correct copy of the deposition transcript of Camille R. Sarrouf dated March 24, 2018.

9. Attached hereto as Exhibit H is a true and correct copy of the fourth edition of *Ethical Lawyering in Massachusetts* § 1.1, MCLE, by James S. Bolan.

10. Attached hereto as Exhibit I is a true and correct copy of *Attorney Fee Rules Undergo Revisions in Massachusetts* by Christina Pazzanese, published in Massachusetts Lawyers Weekly on January 12, 2011.

11. Attached hereto as Exhibit J is a true and correct copy of a December 22, 2010 Order of the Supreme Judicial Court regarding SJC Rule 3:07.

12. Attached hereto as Exhibit K is a true and correct copy of excerpts of the deposition of Professor Stephen Gillers, dated March 21, 2018.

13. Attached hereto as Exhibit L is a true and correct copy of excerpts from the fifth edition of *Newberg on Class Actions*, Volume 5, chapters 15-17.

14. Attached hereto as Exhibit M is a true and correct copy of 10-54 *Moore's Federal Practice - Civil* § 54,154 (2018).

15. Attached hereto as Exhibit N is a true and correct copy of the Settlement Agreement in *In re: Heartland Payment Sys. Inc. Customer Data Security Breach Litigation*, No. 4:09-MD-2046, ECF 57 (S. D. Tex.) filed on December, 18, 2009.

16. Attached hereto as Exhibit O is a true and correct copy of the Stipulation of Settlement in *Hartless v. Clorox Company*, No. 06-CV-02705, ECF 77 (S.D. Cal.) filed on May 21, 2010.

17. Attached hereto as Exhibit P is a true and correct copy of the USCS Federal Rules of Civil Procedure Rule 23, including the 2018 Advisory Notes.

18. Attached hereto as Exhibit Q is a true and correct copy of excerpts of the Advisory Committee on Civil Rules dated April 10, 2018.

19. Attached hereto as Exhibit R is a true and correct copy of excerpts of the transcript of a hearing in the case *Arkansas Teacher Retirement System v. Insulet Corp.*, 1:15-cv-12345, ECF 120, before the Honorable Mark L. Wolf dated March 9, 2018.

20. Attached hereto as Exhibit S is a true and correct copy of the Declaration of Peter Joy dated June 28, 2018.

21. Attached hereto as Exhibit T is a true and correct copy of excerpts of the fifth edition of *Newberg on Class Actions*, Volume 5, Chapters 7-10.

22. Attached hereto as Exhibit U is a true and correct copy of excerpts of the transcript of a hearing in the case *Arkansas Teacher Retirement System v. State Street Corp.*, before the Honorable Mark L. Wolf dated May 30, 2018.

23. Attached hereto as Exhibit V is a true and correct copy of McTigue Law LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories dated October 6, 2017.

24. Attached hereto as Exhibit W is a true and correct copy of Zuckerman Spaeder LLP's Answers to Special Master's Second Supplemental Interrogatories dated August 6, 2017.

25. Attached hereto as Exhibit X is a true and correct copy of an email from Christopher Keller to Garrett Bradley dated May 23, 2011 (TLF-SST-033910 – 033913).

26. Attached hereto as Exhibit Y is a true and correct copy of the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thorton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission dated July 31, 2017.

Signed under the penalties of perjury this 28th day of June 2018.

/s/ Justin J. Wolosz
Justin J. Wolosz

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 8, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A

From: Lynn Sarko <lsarko@KellerRohrback.com>
Sent: Sunday, August 9, 2015 3:51 PM
To: Garrett Bradley; Chiplock, Daniel P.; Sucharow, Lawrence; Lieff, Robert L.; Michael Thornton; Goldsmith, David; Lynn Sarko
Cc: ckravitz@zuckerman.com; Brian McTigue (bmctigue@mctiguelaw.com); Lynn Sarko
Subject: RE: State Street FX-- CONFIDENTIAL-- CLASS COUNSEL ONLY

Dear all

I wanted to share a few thoughts prior to Tuesday's call with the DOL.

1. The DOL wants to talk about the amount of Atty Fees in the ERISA portion of the case only. They don't want to discuss the rest of the recovery.
2. They view the ERISA portion of the case as being $60 million--- they don't care what Atty Fee percentage we request on the other $240 million.
3. When I refer to the DOL—I'm referring to the Boston DOL folks who were at the final afternoon mediation session in Boston. They are also the DOL folks that State Street had been talking to. Paine confirmed to me that he has never had any discussions with the WDC DOL folks. Similarly- as we discussed- I have not spoken with the WDC DOL folks about the attorney fee issues in the case—so the only discussions have been with the Boston DOL folks.
4. Suzanne and Nate are the DOL lawyers who handled the Boston investigation. Marjorie Butler is their boss in the Boston office. When they will talk about their client—this will mean Marjorie in Boston—and her superiors at EBSA (the DOL's Employee Benefits Security Administration)—that is the division that handles ERISA,
5. As we had discussed—we had told the DOL that no firm decisions had been made as to what attorney fees we were going to request—but we floated the potential number 30 percent as a starting number.
6. Nate told me that the DOL would never agree to 30%-- and wouldn't even agree to 27 or 28%---- and on a later conversation he suggested that they would even find 25% too high. He mentioned that the Boston DOL folks thought the Madoff case was a good comparator where the requested/awarded atty fees was something like 18%.
7. I have pointed out to Nate that in the Madoff case the DOL had been involved in the heavy lifting of litigating the case—unlike in this case where the DOL has acted more like a Vulture- waiting until the prey was captured before they swooped in and tried to steal the credit. I've spent some time beating him up about this and he keeps telling me that the DOL doesn't want to fight with us.
8. I've also plainly said that in my opinion that State Street would have paid $300 million without the DOL's involvement—and I didn't think the DOL contributed anything to that result. Their only involvement was in the plan of allocation issue- and the bottom line was that it was a $300 million class settlement (with or without the DOL's involvement)— I've also pointed out that the class lawyers have collectively spent years working on this case and that it was the DOL who chose not to share anything with us—so it is hard for them to claim that they contributed anything to the end result- other than being a pain in the rear. The last few calls with Nate- he has been more careful not to push back too hard.
9. At first the DOL seemed to want to argue that they were responsible for the last $10 million--- but they seem to have walked that back and are not only trying to influence the atty fee request on the $60 million. I don't know what position they will take on Tuesday's call. My thought is that they are a little worried what the

mediator will say as to what he told them—as they have heard from both Paine and us- that it was clear that the entire $300 million was subject to class atty fees.
10. There are many ERISA cases where courts have awarded atty fees of between 25% and 30%. Some even 33%. As you would expect- there are also many other cases where the fee percentage is between 20 and 25%. It usually depends on the court, the judge, the lodestar multiplier—just as in other class cases—so the statistics are all over the board. I do think we should be ready to argue why the Madoff case is not an appropriate case for comparison.
11. We also need to consider whether we are going to request the same fee across the whole $300 million—or is it feasible to request a different percentage in the $60 million than the other $240 million--

I do think a call Tuesday with Class counsel—prior to the DOL call would be helpful.

Expect the DOL to ask:
1. Are the attorneys planning on filing one fee application – or separate application son the $240 million and the $60 million. (I've suggested one fee application)
2. Are there deals/arrangements on how to divide the fees between the class lawyers—and are we willing to tell the DOL what those arrangements are (I have stayed away from commenting on this- and have always changed the subject or ignored their question—as I feel it is none of their business).
3. Do we know what the total lodestar is of the firms working on the case.
4. what credit do we think the DOL should have for the result—I have suggested zero.
5. would we agree to limit our fee request to some number.

Brian and Carl, is there anything that I have missed.

Lynn

From: Goldstein, Nathan - SOL [mailto:Goldstein.Nathan@dol.gov]
Sent: Friday, August 07, 2015 9:12 AM
To: Lynn Sarko; Brian McTigue (bmctigue@mctiguelaw.com);ckravitz@zuckerman.com
Cc: Butler, Marjorie - SOL; Reilly, Suzanne - SOL
Subject: State Street FX

Lynn, next Tuesday at 3:00 would work for us for a call with the various class counsels regarding attorneys' fees. Since you're probably in a better position on who should attend, would you mind circulating a dial-in and list of participants? We're also available to discuss any further logistics at your convenience.

Thanks,

Nathan P. Goldstein
Trial Attorney
U.S. Department of Labor, Office of the Solicitor
JFK Federal Building, Suite E-375
Boston, MA 02203
W (617) 565-2500
F (617) 565-2142

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS TO LABATON SUCHAROW LLP

Pursuant to Rule 53(c) of the Federal Rules and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen's (Retired), by his undersigned counsel, hereby requests that Labaton Sucharow LLP produce the documents described below for inspection and copying at the offices of Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108, within fourteen (14) days from the date of service hereof.

DEFINITIONS

1. The term "you", "your", "the Firm", and "the Law Firm" refer to Labaton Sucharow, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

2. The term "Thornton" refers to Thornton Law Firm, LLP, formerly known as Thornton & Naumes, LLP, and all employees, agents, counsels, attorneys, and representatives.

3. The term "Lieff" or "Lieff Cabraser" refers to Lieff Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton, Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

5. The term "ERISA firms" or "ERISA counsel" refers to Brian McTigue and/or the McTigue Law Firm, the Law Offices of Keller Rohrback, LLP, Zuckerman Spaeder, LLP, Beins Alexrod, P.C., and any firms retained by one or more of the above, and all employees, agents, counsels, attorneys, and representatives.

6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

8. The term "State Street Document Review", "SST Document Review" or "Document Review" refers to the Law Firm's review of hard copy and electronic documents produced as part of discovery in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* (Docket #104), and Exhibits 1-32 attached thereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses

incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

13. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

14. The term "Final Settlement" refers to the Stipulation and Agreement of Settlement dated July 26, 2016 (Docket #89).

15. The term "Fee Award" refers to a certain award of attorneys' fees of $74,541,250.00 and expenses and costs of $1,257,697.94, as approved by the Court in the Lawsuit by Order dated November 2, 2016.

16. The term "November 10, 2016 Letter" refers to the letter from David Goldsmith to Judge Wolf dated November 10, 2016 (Exhibit A to Docket #117), advising the Court of inadvertent errors in the Fee Petitions and Fee Order.

17. The term "December 17, 2016 Article" refers to the Boston Globe article entitled *Critics hit law firms' bills after class-action lawsuits*, published on or about December 17, 2016.

18. The term "hourly rates charged" refers to the hourly billing rates corresponding to work of an individual attorney or staff member of the firm, appearing on a fee petition submitted to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

19. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

20. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

21. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

22. Any word written in the singular also includes the plural and vice-versa.

23. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

24. The term "any" and the term "all" are intended to mean "any and all."

25. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

26. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized, generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

27. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

28. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

29. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 28 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or

non-identical copy is a separate "document." The word "document" also includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

30. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Unless otherwise specified, these requests seek documents for the period from January 1, 2010 until the present.

B. This document request ("Request") requires you to produce all documents called for herein that were created or originated by you, or that came into your possession, custody or control, from all files or other sources that contain responsive documents, wherever located and whether active, in storage, or otherwise.

C. This Request shall be deemed to include any document now or at any time in your possession, custody, or control. A document is deemed to be in your possession, custody, or control if it is in your physical custody, or if it is in the physical custody of any other person and you: (i) own such document in whole or in part; (ii) have a right, by contract, statute, or otherwise, to use, inspect, examine, or copy such document on any terms; (iii) have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or (iv) as a practical matter, have been able to use, inspect, examine, or copy such document when you sought to do so. If any requested document was, but no longer is, in your control, state the disposition of each such document.

D. The obligation to produce the documents specified below is of a continuing nature; your production is to be supplemented if at any time you acquire possession, custody, or control of any additional responsive documents, or otherwise discover additional responsive documents, between the time of initial production and conclusion of the investigation, to the fullest extent required by the Federal Rules of Civil Procedure, the March 8, 2017 Court order, and the Local Rules of this Court.

E. Where only a portion of a document relates or refers to the subject indicated, the entire document is to be produced nevertheless, along with all attachments, appendices and exhibits.

F. Each document produced in response to the Requests below should be clearly categorized to indicate which Request(s) it is responsive to.

G. If any document or portion thereof is withheld under a claim of privilege, you shall produce so much of the document as is not subject to the possible claim of privilege, and shall furnish a statement, signed by an attorney representing you, which identifies each document or portion thereof for which a privilege is claimed, including the following information:

(i) The date of the document;

(ii) The name and title of the person who sent, authored, prepared, signed, or originated the document, or of the person who knows about the information contained therein;

(iii) The name and title of the recipient of the document;

(iv) All persons to whom copies of the document were furnished, along with such persons' job titles or positions;

(v) A brief description of the subject matter or nature of the document sufficient to assess whether the assertion of privilege is valid;

(vi) The specific basis upon which the privilege is claimed;

(vii) With respect to any claim of privilege relating to an attorney, or action or advice or work product of an attorney, the identity of the attorney involved; and

(viii) The paragraphs of this request to which such document responds.

H. All documents shall be produced as they are kept in the ordinary course of business and in their original file folders with any identifying labels, file markings, or similar identifying features. If there are no documents responsive to a category specified below, you shall so state in a writing produced at the time and place that documents are demanded to be produced by this request.

I. Documents created or stored electronically must be produced in their original electronic format, and not printed to paper or PDF. All electronically stored information ("ESI") shall be produced in electronic form (the "production set"). Each document will have its own unique identifier ("Bates number"), which must be consistently formatted across the production, comprising of an alpha prefix and a fixed length number of digits (e.g., "PREFIX0000001"). The production set shall consist of, and meet, the following specifications:

1. Image Files. All ESI will be rendered to single-page, black and white, Group IV *tagged image file* (".tif" or ".tiff") images with a resolution of 300 dpi, the file name for each page is named after its corresponding Bates number. Records in which a color copy is necessary to interpret the document (e.g., photographs, presentations, AUTOCAD, etc.) will be rendered to higher resolution, single-page *joint photographic experts group* (".jpg" or ".jpeg") format. Endorsements must follow these guidelines:

    a. Bates numbers must be stamped on the lower right hand corner of all images.

    b. Confidentiality must be stamped on the lower left hand corner of all images.

    c. Other pertinent language may be stamped on the bottom center, or top of the images, as deemed necessary.

2. Load Files. All ESI must be produced with appropriate data load files, denoting logical document boundaries. The following files should be included within each production set.

    a. A Concordance delimited ASCII text file (".dat").

i. The .dat file will contain metadata from the original native documents, wherein the header row (*i.e.*, the first line) of the .dat file must identify the metadata fields.

ii. The .dat file must be delimited with the standard Concordance delimiters (the use of commas and quotes as delimiters is not acceptable):

ASCII 020 [¶] for the comma character;
ASCII 254 [þ] for the quote character; and
ASCII 174 [®] for new line.

iii. All attachments, or *child* records, should sequentially follow the *parent* record.

iv. The following fields and metadata will be produced:

Beginning Bates; Ending Bates; Beginning Bates Attachment; Ending Bates Attachment; Custodian; File Name; From; Recipient; CC; BCC; Subject; Date Sent; Time Sent; Last Modified Date; Last Modified Time; Author; Title; Date Created; Time Created; Document Extension; Page Count; MD5Hash; Text Path; and Native File Path.

b. Image cross-reference files, *Opticon* image file (".opt") and *IPRO View Load* file (".lfp"), which link images to the database and identifies appropriate document breaks.

J. If any document requested herein has been lost, discarded, or destroyed, that document so lost, discarded, or destroyed shall be identified in writing (produced at the time and place that documents are demanded to be produced by this request) as completely as possible, together with the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

DOCUMENTS REQUESTED

1. The Catalyst and Relativity document databases created or used in the SST Litigation, as annotated, compiled and used in the course of the litigation and/or document review, including instructions, software, and anything else necessary to access and analyze the data therein.

2. All so-called "hot docs," as understood or identified by the Law Firm, and any other documents or information identified during the SST Litigation bearing on the material issues in the Litigation, including but not limited to liability and damages.

3. All engagement letters, fee agreements, retention letters, and/or other documents referring to, relating to, or evidencing terms of the Law Firm's representation of class representatives, including but not limited to ARTRS, George Hopkins, Esq. in the SST Litigation.

4. All agreements, other than those listed in Request No. 3, relating to Mr. Hopkins' role as a class representative in the SST Litigation, including his duties, obligations, and responsibilities as a class representative on the SST Litigation.

5. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of hourly clients, from 2008 to the present.

6. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of non-hourly clients, from 2008 to the present.

7. All documents and/or communications relating to how the Law Firm records, accounts for and/or seeks reimbursement for hours billed by Staff Attorneys in other class action or contingency cases, including the hourly rates the Law Firm would charge if successful, from 2010 to the present.

8. Copies of all billing rate tables, spreadsheets, fee binders, or other collection of the Law Firm's annual billing rates, from 2010 to the present.

9. All minutes, notes, recordings, memoranda or other documents relating to or created by the Law Firm's Executive Committee during meetings to determine annual billing rates, from 2008 to the present.

10. All minutes, notes, recordings, memoranda or other documents relating to or created by the Law Firm's Rate Sub-Committee during meetings to determine annual billing rates, from 2008 to the present.

11. All documents and/or communications between and among members of the Rate Sub-Committee and Executive Committee relating to review and adjustment of annual billing rates, from 2008 to the present.

12. All documents and/or communications relating to the Law Firm's internal classification of costs and expenses, including but not limited to any ethical, legal, or factual opinions solicited by the Firm of third parties regarding the classification of Staff Attorneys as fees vs. expenses.

13. A complete set of time records for all attorneys, including Staff Attorneys, and other Law Firm staff who worked on or contributed to the SST Litigation, including but not limited to hand-written time sheets/ledgers, emails, electronic entries, pre-bills, and/or client bills, including the hourly rate billed and/or corresponding to the hours recorded.

14. All documents referring to, relating to, evidencing or constituting the basis for and amounts of any costs and expenses billed, incurred or charged by the Law Firm for legal or other services rendered in connection with the SST Litigation including but not limited to documents pertaining to the terms under which Staff Attorneys and/or third parties provided services to the Law Firm in the Lawsuit.

15. All documents and/or communications relating to or evidencing the Law Firm's use of Catalyst in connection with the SST Document Review, including all records of time spent in the Catalyst database, costs incurred, and coding of electronic documents.

16. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm attorneys and non-legal staff assigned to or who contributed to the SST Litigation, for work performed on the Litigation.

17. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm's Staff Attorneys assigned to or who contributed to the SST Litigation, for work performed on the Litigation.

18. All documents referring to, relating to, evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review.

19. All agreements, contracts, or memorialization of an arrangement to allocate and/or share the cost of certain of the Law Firm's Staff Attorneys to Thornton, including the compensation, reimbursement, and/or invoicing of costs associated with the same.

20. All documents referring to, relating to, evidencing or constituting discussions with Thornton regarding Thornton's plan or intention to include Staff Attorney time as part of Thornton's Fee Petition and/or Lodestar calculation.

21. All expert reports, factual or legal opinions, or other work product solicited from a third-party by the Law Firm in connection with factual and/or legal issues arising in the SST Litigation, including but not limited to the foreign-exchange market, foreign-exchange trading practices, and custodial management of retirement funds.

22. All documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms, and/or ERISA counsel regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award.

23. All documents and/or communications relating to discussions between and among the Plaintiffs' Law Firms and ARTRS/George Hopkins regarding the substantive allegations and progress of the SST litigation, including but not limited to the filing of the complaint/amended complaint, court orders, mediation, and/or the agreement to settlement in principle.

24. All documents and/or communications with ARTRS/George Hopkins regarding the Final Settlement, including but not limited to the fairness of the total award for the class, payment of service award, and the Fee Award, including any allocation of those fees among counsel.

25. Current CVs or resumes for all Staff Attorneys who worked on or contributed to the SST Litigation/Document Review.

26. All written guidance, training manuals, policies/procedures, search criteria, other documents provided to the Firm's Staff Attorneys relating to the SST Document Review, including but not limited to materials related to use of Catalyst database.

27. All other documents relating to the SST Litigation, other than those responsive to Request No. 26 above, that the Law Firm provided to its Staff Attorneys, including but not limited to case pleadings, mediation reports, legal memoranda.

28. All written work product produced by Staff Attorneys assigned to the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries.

29. A complete copy of the binder(s) containing discursive memoranda pertaining to the SST Litigation/SST Document Review, including all attachments.

30. All presentations, memoranda, or other submissions, including potential exhibits, any plaintiffs' counsel prepared for or submitted to the mediator, including all exhibits thereto.

31. All communications between the Law Firm and counsel for State Street relating to the SST Litigation, including but not limited to document productions, mediations, and settlement.

32. All communications with the U.S. Department of Labor, including all local field offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission relating to the SST Litigation.

33. All documents and/or communications between and among Danette MacKenzie, Todd Kussin, and other members of the Law Firm relating to selecting and staffing Staff Attorneys on the SST Litigation/SST Document Review.

34. All documents and/or communications relating to the allocation of Staff Attorneys to Thornton under the cost-sharing agreement entered in or about 2014 or 2015.

35. All documents relating to, referring to or evidencing a secondary review or quality control process of the SST Document Review performed by the Law Firm, including but not limited to any emails between and among Mike Rogers, Todd Kussin, and the Staff Attorneys.

36. All documents and/or communications between and among the Law Firm and its accounting and/or billing personnel relating to the accounting for, recording, and/or invoicing of Staff Attorneys for whom Thornton had agreed to share the costs.

37. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs, including but not limited to all emails between and among David Goldsmith, Nicole Zeiss, Ray Politano, and/or Howard Goldberg discussing such nullification or removal.

38. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from a fee petition or report of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs in other class actions or litigation matters.

39. All invoices, requests for payment, and/or similar documents sent to or requested by Thornton pursuant to the cost-sharing agreement between the Firm and Thornton to share the costs of certain Staff Attorneys, including all emails or other communications related to the same.

40. All documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records.

41. All documents, other than those requested in Request No. 40 above, reviewed or considered by the Law Firm in calculating the Firm's Lodestar calculation, including all materials reviewed by Nicole Zeiss.

42. All documents relating to, referring to, or constituting the Law Firm's Fee Petition, including all drafts, spreadsheets, outlines, notes, emails.

43. All documents relating to, referring to, or constituting the Motion for Attorneys' Fees, including all drafts, spreadsheets, outlines, notes, emails.

44. All documents relied upon by the Law Firm in preparing and filing the Motion for Attorneys' Fees.

45. All documents and/or communications relating to the Law Firm's preparation of a draft or sample small fee declaration, copies of which were circulated to other law firms for completion and submitted to the Court as part of the firms' respective Fee Petitions.

46. All communications between and among the Law Firm, the Plaintiffs' Law Firms, and the ERISA firms, relating to preparation of the Motion for Attorneys' Fees and/or the Fee Petitions filed in the SST Litigation.

47. All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.

48. All documents, including notes, outline, drafts and exhibits, explaining or attempting to correct any part of the Fee Petition(s).

49. All documents illustrating, demonstrating, or establishing any errors you or anyone identified in any part of the Fee Petition(s).

50. All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence.

51. All documents and/or communications relating to, referring to or evidencing corrective actions or subsequent review taken by the Law Firm after discovery of the billing errors disclosed in the November 10, 2016 Letter.

52. All documents and/or communications relating to the December 17, 2016 Article, including but not limited to communications between and among the Law Firm, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.

53. All documents relating to Michael Bradley's involvement in the SST Litigation/SST Document Review, including but not limited to communications with Mr. Bradley and all documents relating to or referring to an agreement between Mr. Bradley and Thornton to participate in the SST Document Review.

54. All documents relating to, referring to or evidencing payments made to Michael Bradley in connection with his work on the SST Litigation/SST Document Review.

55. All written work product produced by Michael Bradley as part of his involvement in the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries.

56. All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far.

Date: May 18, 2017

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his Attorneys,

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

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Joan A. Lukey, Esquire, Choate, Hall & Stewart, LLP, Two International Place, Boston, MA 02110, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.

William F. Sinnott

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES TO LABATON SUCHAROW LLP

Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen (Retired), by his undersigned counsel, hereby propounds the following Interrogatories upon Labaton Sucharow LLP. The Special Master requests that Labaton Sucharow LLP answer the Interrogatories herein under oath and provide responses within fourteen (14) days from the date of service hereof, to: William F. Sinnott, Esq., Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108.

DEFINITIONS

1. The term "you", "your", "the Firm", and "the Law Firm" refer to Labaton Sucharow, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

2. The term "Thornton" refers to Thornton Law Firm, LLP, formerly known as Thornton & Naumes, LLP, and all employees, agents, counsels, attorneys, and representatives.

3. The term "Lieff" or "Lieff Cabraser" refers to Lieff, Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton, Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

5. The term "ERISA firms" or "ERISA counsel" refers to Brian McTigue and/or the McTigue Law Firm, the Law Offices of Keller Rohrback, LLP, Zuckerman Spaeder, LLP, Beins Alexrod, P.C., and any firms retained by one or more of the above, and all employees, agents, counsels, attorneys, and representatives.

6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

8. The term "State Street Document Review", "SST Document Review" or "Document Review" refers to the Law Firm's review of hard copy and electronic documents produced as part of discovery in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* (Docket #104), and Exhibits 1-32 attached thereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses

incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

13. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

14. The term "Final Settlement" refers to the Stipulation and Agreement of Settlement dated July 26, 2016 (Docket #89).

15. The term "Fee Award" refers to a certain award of attorneys' fees of $74,541,250.00 and expenses and costs of $1,257,697.94, as approved by the Court in the Lawsuit by Order dated November 2, 2016.

16. The term "November 10, 2016 Letter" refers to the letter from David Goldsmith to Judge Wolf dated November 10, 2016 (Exhibit A to Docket #117), advising the Court of inadvertent errors in the Fee Petitions and Fee Order.

17. The term "December 17, 2016 Article" refers to the Boston Globe article entitled *Critics hit law firms' bills after class-action lawsuits*, published on or about December 17, 2016.

18. The term "hourly rates charged" refers to the hourly billing rates corresponding to work of an individual attorney or staff member of the firm, appearing on a fee petition submitted to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

19. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

20. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

21. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

22. Any word written in the singular also includes the plural and vice-versa.

23. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

24. The term "any" and the term "all" are intended to mean "any and all."

25. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

26. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized, generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

27. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

28. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

29. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 28 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or non-identical copy is a separate "document." The word "document" also

includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

30. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), you are required to answer the following Interrogatories under oath and within 14 days, or within the time otherwise required by Court order.

B. For each of the Interrogatories listed below, please include the full name(s) of all persons from the Law Firm (attorneys, staff, agents, consultants, or affiliates) who have knowledge of the information provided.

C. These Interrogatories are deemed to be continuing and to require supplemental responses, if you obtain additional, contradictory, or different information. Such supplemental answers shall be filed promptly upon the discovery by you of such supplemental information. Each Interrogatory is to be answered separately and as completely as possible. The fact that an investigation is continuing and discovery is not complete shall not be used as a reason for failure to answer any Interrogatory as fully as possible.

D. If you refuse to answer any Interrogatory or any part thereof on the grounds of privilege, please identify the claimed privilege (i.e., attorney-client) and the nature of any information you refuse to disclose, referring specifically to the Interrogatory or any part thereof to which the claimed privilege applies, the form in which said information exists, and the grounds for the claimed privilege.

E. If the answer to all or any part of an Interrogatory is not presently known by or available to you, include a statement to that effect, specifying the portion of the Interrogatory which cannot be completely answered.

INTERROGATORIES

1. Describe each of the Law Firm's practice area(s), including areas of specialty, special services offered, the total number of attorneys and staff, and a brief description of any representative matters.

2. Identify all other class actions or other litigations in which the Firm has been or is currently engaged in relating to the foreign-exchange market, mismanagement of retirement funds, and/or any other subject matter overlapping the allegations in the SST Litigation. Please include all such matters on which the Firm has worked, as counsel of record or otherwise, the complete case caption, the docket number, and the outcome.

3. Identify all other class actions or other litigation in which the Firm was engaged during the pendency of the SST Litigation. For each action:

   a. Please identify the timekeepers who worked on the matter and provide their hourly rate(s);

   b. Please provide the detailed, itemized hourly billing entries for each timekeeper.

4. Explain how and when the Law Firm became involved in the SST Litigation, including any conversations between and among the Firm and ARTRS, the Plaintiffs' Law Firms, and/or the ERISA firms.

5. Describe the role played by the Law Firm in filing the substantive claims alleged in the SST Litigation, including the filing of the Complaint (Docket #1) and/or the Amended Complaint (Docket #10), a description of any legal or factual research performed, consultations

with State Street, legal drafting and/or review of pleadings.

6. Summarize the factual basis for State Street's liability and your/plaintiffs' contention that State Street was legally liable for damages to the class members.

7. Describe the Firm's theory of damages, including an estimate of total damages to the customer and/or ERISA classes, whether this theory changed throughout the course of the SST Litigation, and if so, what factors affected the Firm's theory and total calculation of estimated damages.

8. Identify and describe all risk factors you considered prior to getting involved in the SST Litigation, including any "bad facts," meritorious defenses and/or unsettled legal issues, or other circumstances that affected the potential outcome and total damages recoverable in the case.

9. Describe the frequency and nature of communications with the Plaintiffs' Law Firms over the course of the Litigation. Please specify the attorneys with whom you dealt and the basic substance of those conversations.

10. Describe the role of the U.S. Department of Labor, including any field divisions or offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission, in the SST Litigation and the basic substance of the Law Firm's communications with each agency through the course of the Litigation.

11. Explain the role played by ARTRS and/or George Hopkins in the SST Litigation, including Mr. Hopkins' substantive contributions to the pleadings and/or case strategy, and what, if any, role he had in the negotiation and mediation of the Final Settlement.

12. Describe the frequency and nature of communications with ERISA counsel over the course of the Litigation. Please specify the attorneys with whom you dealt and the basic substance of those conversations.

13. Explain the Law Firm's litigation strategy in pursuing the claims raised in the SST Litigation, including the strategy employed in mediation. Identify and describe all events that impacted or caused the Firm to change that strategy.

14. Explain any tensions and/or adversarial positions assumed between the ERISA counsel, on the one hand, and the Plaintiffs' Law Firms, on the other, including differences in litigation strategy, legal theories, damages, and/or theories of liability asserted during the SST Litigation.

15. Explain how the adversarial positions described above impacted or did not impact the Law Firm's strategy, including its discovery, mediation, and/or the settlement of the SST Litigation.

16. Describe in detail all agreements between the Firm/Plaintiffs' Law Firms, on the one hand, and the ERISA firms, on the other, to allocate to the ERISA firms a fixed percentage of the total Fee Award rendered by the Court in the SST Litigation. As to any agreement that did not represent the final agreement for allocation of the Fee Award, explain the reason for modifying a previous agreement, including all persons involved in these discussions and their affiliation/firm.

17. Describe in detail the nature and the scope of the SST Document Review, including the total number of pages and/or size of the productions, the nature and date of each document production(s) received from State Street, all other document production(s) received in connection with the Litigation, and a general description of the information contained in each production.

18. Describe in detail how the Law Firm conducted the SST Document Review, including how it selected and/or staffed Staff Attorneys, a description of all training binders/protocols or search terms used for Document Review, and a brief description of the tasks assigned to Staff Attorneys and any other individuals who participated, and how those tasks

furthered the Firm's overall litigation strategy.

19. Describe how the Law Firm utilized the Catalyst database, including all persons who had access to the database, any electronic and/or technical training provided to those individuals, and a description of the information maintained in the Catalyst database during the course of the SST Document Review.

20. Describe in detail all documents destroyed and/or deleted from the Catalyst database, including the date, and explain why each document was deleted/destroyed.

21. Identify and describe any training the Firm provided to Staff Attorneys relating to the substantive allegations in the SST Litigation/SST Document Review, including addressing all legal issues, key witnesses, theories of liability, damages, and critical topics raised in the case.

22. Please list all class actions or other litigations in the past five years in which the Firm has assigned Staff Attorneys to work on the matter. For each matter, please list the full case caption, the docket number, the outcome of the case, and the hourly rates charged, if any, for each Staff Attorney who worked on the matter, and the nature of the work performed by the assigned Staff Attorneys.

23. Please list the full name of each Staff Attorney who worked on the SST Litigation/Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition.

24. For each of the Staff Attorneys listed above, please describe all compensation paid to the Staff Attorney and the total number of hours recorded for work on the SST Litigation/Document Review.

25. Identify any other individuals who worked on the SST Document review who were not Staff Attorneys and explain their affiliation with the Law Firm, their employment status, and how they were compensated for their time.

26. Explain how Staff Attorneys working on the SST Litigation recorded, including through handwritten and/or interim measures, and subsequently reported their time to the Firm and what, if any, steps were taken by the Firm to review or scrutinize those hours.

27. Explain how the Firm supervised and/or performed quality control of the work performed by the Staff Attorneys and others who participated in the SST Document Review, including the name, title, and tasks performed by any supervising individual.

28. Explain in detail the job responsibilities and tasks performed by the Staff Attorneys assigned to the SST Document Review, including those Staff Attorneys allocated to Thornton, including but not limited to, coding, deposition preparation, creation of witness kits and similar work.

29. Describe the process for assigning and reviewing factual, legal, and/or discursive memoranda prepared by Staff Attorneys, including how such memoranda were relevant to, used as part of the SST Litigation, and/or shared among counsel.

30. Describe the Firm's understanding of how fees, costs and/or expenses associated with performance of discovery in the SST Document Review would be shared among the Firm, the Plaintiffs' Law Firms, and/or the ERISA firms, including but not limited to who would be responsible for: compensating Staff Attorneys for hours worked; hosting Catalyst and/or other electronic database(s); compiling "hot docs" and other documents relative to the liability and/or

damages theories; and/or other expenses associated with the SST Document Review.

31. For each of the categories listed above, explain the Firm's understanding of how those fees, costs and/or expenses would be reported to the Court in the event of a successful verdict and/or settlement.

32. Explain the origin of the cost-sharing agreement with Thornton through which the Firm agreed to allocate the costs associated with a certain number of Staff Attorneys to Thornton, including the names and descriptions of all other matters in which the Firm entered into similar arrangements (whether or not documented) to share costs with other firms, prior to or after the SST Litigation.

33. Describe the Firm's understanding, in or about early 2015, as to how Thornton would account for the allocation/sharing of costs for certain of the Firm's Staff Attorneys in its Fee Petition, including the Firm's understanding as to which firm was responsible for reporting the total number of hours worked by those Staff Attorneys on its Fee Petition and/or Lodestar calculation.

34. Please state whether the Firm's understanding of how Thornton would account for the sharing of Staff Attorney costs has changed since 2015, and if so, when, and explain what prompted that change.

35. Explain the Firm's current understanding of the all cost-sharing agreements (formal or informal) between the Law Firm and Thornton to allocate and/or share costs for certain of the Firm's Staff Attorneys assigned to work on the SST Litigation.

36. Explain what knowledge, if any, the Firm had about the existence of a cost-sharing agreement(s) (formal or informal) between Lieff Cabraser and Thornton to allocate and/or share costs for certain of Lieff's Staff Attorneys assigned to work on the SST Litigation.

37. Describe in detail the process through which the Law Firm invoiced or otherwise sought reimbursement from Thornton for costs of those Staff Attorneys allocated to Thornton as part of the SST Litigation/Document Review.

38. Identify and describe all communications between the Firm and Thornton relating to the firms' cost-sharing agreement to share the costs of certain Staff Attorneys, including discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.

39. Identify and describe all communications between and among the Firm, Lieff Cabraser, and Thornton relating to cost-sharing agreement(s) between any of the firms, including discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.

40. Describe what knowledge, if any, the Firm had in early 2015 about Michael Bradley's involvement in the SST Litigation, including any knowledge of Thornton's agreement to pay Mr. Bradley an agreed-upon rate of $500/hour.

41. Identify and describe all communications relating to Michael Bradley's participation in the SST Litigation/SST Document Review from 2010 through November 2016, including relating to compensation or an hourly billing rate that Thornton would charge for Mr. Bradley's time spent on the matter.

42. Explain how the Firm supervised and/or performed quality control of the work performed by Michael Bradley in the SST Document Review, including the name, title, and nature of any supervising individual.

43. Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Firm engaged in a fee dispute with a client or class representative prior to the conclusion of the representation. For each such matter, explain how that

fee dispute was resolved and any hourly rate/quantum meruit applied for work performed.

44. Explain how the Law Firm determines annual billing rates for all attorneys, including Staff Attorneys. Please identify and describe all factors considered and/or resources relied upon in making these determinations.

45. Please explain how the process described above does or does not vary in determining billing rates charged to hourly clients and why.

46. Please list all of the Firm's hourly rates charged to hourly clients for each of the years 2010-2016. For each attorney, please list the relative experience level.

47. Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level.

48. Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level.

49. Please list all members of the Firm's Executive Committee and describe their respective roles in that Committee.

50. Please list all members of the Firm's Rate Sub-Committee and describe their respective role in that Committee.

51. Explain how the Firm adjusts its hourly rates for cases brought outside of New York. If the Firm does not adjust its rate, explain why not.

52. Identify and describe all instances in which the Firm has billed an attorney at a lesser or higher rate than the annual rate determined by the Executive/Rate Sub Committees for a particular year and explain why that decision was made.

53. Describe in detail the process for finalizing the term sheet and Final Settlement in the SST Litigation, including the role of the U.S. Department of Labor, U.S. Attorney's Office, U.S. Department of Justice and/or the U.S. Securities and Exchange Commission in the negotiations.

54. Describe in detail how the Firm prepared the Fee Petition and identify all individuals who assisted in the preparation and the nature of their contribution(s).

55. Describe in detail any review or steps taken to scrutinize or verify the time reported by the Law Firm prior to submitting the Firm's Fee Petition/Lodestar calculation. If the answer is none, explain why.

56. Describe what, if any, steps the Law Firm took to review, verify, or compare the Fee Petitions and/or Lodestar calculations prepared by the Plaintiffs' Firms or ERISA firms with the Firm's Fee Petition prior to filing its Fee Petition with the Court. If no action was taken, explain why not.

57. Identify and describe all communication the Firm had with the Plaintiffs' Law Firms and/or ERISA counsel relating to the Firm's preparation of the Fee Petition, including but not limited to preparation of the Lodestar calculation, the inclusion of Staff Attorneys for whom Thornton had paid costs, calculation of a Lodestar multiplier, and reasonableness of attorneys' fees.

58. Identify all individuals at the Firm who reviewed, assisted or contributed to the preparation and submission of Thornton's Fee Petition and describe the nature of their contributions.

59. Describe how the Law Firm and/or the Plaintiffs' Law Firms arrived at a total fee percentage roughly equal to 25% of the final Fee Award. Please explain whether the Firm prepared its Lodestar calculation to achieve a 25% award of the total settlement amount.

60. Identify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor.

61. Explain the significance of the statement made in Paragraph 7 of Exhibit A to the *Declaration of Lawrence A. Sucharow* (Docket #104-15), affirming that the hourly rates included in Exhibit A are the Firm's "regular rates charged for their services, which have been accepted in other complex class actions." Please describe any other instances in which the Firm has submitted a Fee Petition with the same or similar language.

62. Do you contend that the rates listed in the Firm's Fee Petition represent the prevailing rates in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation for each of the respective tasks performed? Why or why not?

63. Identify, in detail, each error in your Fee Petition, and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

64. Describe when and how the Law Firm first learned about the Boston Globe's inquiry into the Fee Award, and underlying billing practices employed by the Firm and other counsel in the SST Litigation, that preceded the publication of the December 17, 2016 Article.

65. Describe when and how the Law Firm first identified duplicative billing entries reflected in the Firm's Fee Petition and describe all actions taken by the Firm to review, confirm and/or correct those errors.

66. Describe in detail how the Law Firm drafted the November 10, 2016 Letter, including the full names of all individuals who contributed to the Letter, the nature of any internal review by the Firm, and all individuals outside the firm who reviewed and/or contributed

to the Letter and the nature of their contribution(s).

67. Identify and describe all documents relied upon by the Law Firm in drafting the November 10, 2016 Letter.

68. State the total number of class members and the estimated recovery or settlement amounts, net of fees and expenses, due to each class member.

69. Itemize the total estimated damages to the ERISA and non-ERISA plaintiffs and summarize the factual basis for the estimate.

70. Identify, in detail, any additional errors in your any communication with the Court or with the Special Master, since filing of the Fee Petition(s) and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

71. Identify and explain any mistakes you have identified in the Fee Petition, Motion for Attorneys' Fees, and/or Fee Award, not described above.

72. Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge.

73. Identify and describe the steps taken by the Firm to identify documents responsive to the corresponding Requests for Production of Documents served by the Special Master including, without limitation, the name and title of those involved, the process undertaken, the database and documents searched, and the parameters of any electronic search including date range, timekeepers and search terms.

74. Identify with specificity sufficient to constitute a valid response to a request for production of documents, any documents identified by you as responsive to the Special Master's Request for Production of Documents but withheld from production to the Special Master on grounds of any evidentiary or other privilege or otherwise including (a) the type of document; (b)

its date if any; (c) any identifying marks such as bates stamp or other numeric designation; (d) the reason you withheld it from production; and (e) the current location of the document. To the extent any such document or other responsive document has been destroyed, identify (a) the type of document; (b) its date, if any; (c) the date of its destruction; (d) the circumstance thereof; and (e) the persons involved therein. For each such person, please provide their name, current or prior title or position with the Law Firm, the date, if any, of termination of employment with the Law Firm and the reason therefor, and the last known residential and business address.

75. Identify the timekeeping, accounting, and billing software systems utilized by the Law Firm to record and bill attorney time charges, costs and expenses associated with legal and other services rendered by the Law Firm in connection with the SST Litigation and the persons within the Law Firm with the most knowledge and responsibility for the system and operation.

Date: May 18, 2017

Respectfully submitted,

SPECIAL MASTER HONORABLE
GERALD E. ROSEN (RETIRED),
By his Attorneys,

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Elizabeth J. McEvoy (BBO #683191)
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CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Joan A. Lukey, Esquire, Choate, Hall & Stewart, LLP, Two International Place, Boston, MA 02110, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.

William F. Sinnott

Exhibit D

Interrogatories Stricken

- 6
- 11
- 22
- 26
- 34
- 35
- 38
- 39
- 42
- 68
- 69

Interrogatories due June 1, 2017

- 1
- 4
- 5
- 7
- 8
- 17
- 18/21/28
- 19
- 20
- 25
- 28
- 29
- 32
- 33
- 37

Interrogatories due June 9, 2017

- 16
- 27
- 29
- 26
- 36
- 40
- 41
- 44
- 45
- 51
- 54/58
- 55
- 56
- 57
- 60
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Interrogatories due July 10, 2017

- 2
- 3
- 9
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- 12
- 13
- 14
- 15
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RFPs Stricken

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- 22
- 24
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- 35
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- 39
- 43
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RFPs due June 1, 2017

- 12
- 16
- 17
- 25
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- 27
- 28
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- 34
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RFPs due June 9, 2017

- 2- "hot docs"
- 3
- 4
- 8
- 9
- 10
- 18
- 19
- 20
- 40
- 41
- 42
- 45
- 47
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RFPs due July 10, 2017

- 1
- 5
- 6
- 21
- 23
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Exhibit E

Massachusetts Legal Ethics: Substance and Practice

Draft: December 2017

The Board's goal in preparing this treatise is to make Massachusetts legal ethics and the disciplinary system readily accessible to members of the bar and to the public. To this end, it has assembled the law on these topics in a single-volume reference work.

This PDF document is a draft of the treatise. The Board is posting it on its web site at this time to make it available as it finalizes the volume. The Board anticipates that a final version of the treatise will be published during 2018 in hard copy and as an e-book. Annual updates will keep this volume current.

Table of Contents

A. The Basics of Rule 1.5

Rule 1.5 expresses a straightforward obligation whose practical application can be remarkably ambiguous. The rule provides that a lawyer's fees must not be clearly excessive or illegal. It lists eight nonexclusive factors that help determine whether a fee is excessive or illegal. Those factors primarily require that a lawyer's fees must not exceed the prevailing market for the kind of work the lawyer provides, but also take into consideration the lawyer's skill level, the nature of the tasks the lawyer must perform (including how long the work will take), the demands and particular needs of the client (including how urgent the matter is), and, significantly, whether the fee is fixed or contingent.[353] Because those factors are not exclusive, other considerations may affect whether any given fee is permitted under the rule. Rule 1.5 also regulates contingent fees with great specificity, as described in a later section. The rule also prohibits a lawyer from "collect[ing] an unreasonable amount for expenses."[354]

Massachusetts requires that all fee arrangements as well as the scope of the representation be communicated to the client in writing, "except when the lawyer will charge a regularly represented client on the same basis or rate,"[355] or in single-meeting consultation, or when the engagement is for a total fee not exceeding $500.[356] The writing requirement, promulgated in 2012, is different from the practice in most jurisdictions,[357] and a signature of the client is not required unless the arrangement is for a contingent fee. Inclusion of the scope of the representation is not only required by the rule, but is essential for both parties' understanding of what the lawyer will address, and what she will not address, during the representation. Recall that Rule 1.2(c) requires the client's informed consent if the objectives of the representation are to be limited. The exception to the writing requirement for regular, repeated representation "on the same basis" most likely refers to arrangements where the lawyer offers services for a flat fee, discussed below.

One further aspect of Rule 1.5 deserves mention, because it is quintessentially a Massachusetts practice and tradition. Unlike almost every other jurisdiction in the nation, Massachusetts permits an attorney's fee to be divided with a lawyer who does not practice in the firm of the primary lawyer (i.e., a referral fee), even if the referring lawyer does nothing more than refer the matter.[358] The rules in most jurisdictions, however, provide that a lawyer may not pay a referring lawyer any fee unless the latter lawyer works on the matter or accepts responsibility for the representation, and even then the fee must be divided proportionately.[359] The Massachusetts rule permits a pure referral fee, as long as the client knows in advance that the fee will be divided with the referring lawyer

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353 MASSACHUSETTS RULES PROF. CONDUCT 1.5(a)(1)–(8).
354 Rule 1.5(a).
355 Rule 1.5(b)(1).
356 Rule 1.5(b)(2) ("The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500.").
357 The ABA's Model Rule, which most jurisdictions follow, states that the fee basis shall be communicated "preferably in writing." *See* MODEL RULES OF PROF. CONDUCT 1.5(b).
358 Rule 1.5(e).
359 *See* MODEL RULES OF PROF. CONDUCT 1.5(e).

and the client consents to the joint participation in writing, and as long as the total fee charged to the client is reasonable.

While a discussion of the provisions of Rule 1.5 as it pertains to the requirements of contingency fee agreements is beyond the scope of this treatise, the Office of the Bar Counsel has written several articles on fee agreements in general and contingency fee agreements in particular, which are available on its website.[360]

Other topics of interest to lawyers arising from Rule 1.5 concern payments in kind, and measures taken by lawyers to secure payments due in the future. These issues will be addressed in Part II.C.(4) below, along with more in-depth discussion of the requirements of a reasonable fee and a proper contingent fee.

B. Discipline for Violation of Rule 1.5

You Should Know

A lawyer who charges a client a clearly excessive fee typically receives a public reprimand. The discipline for a lawyer who charges a clearly excessive fee while misleading the client is a term suspension. On occasion, when a lawyer has refunded the excess fees and the client suffers little harm, the lawyer may receive an admonition. Disbarment has not been imposed for violation of Rule 1.5 alone.

1) Disbarment

If a lawyer intentionally charges or collects fees for work not actually performed it may be viewed as equivalent to misappropriation, or theft, of a client's funds. The presumptive sanction for misappropriation of client money is disbarment or indefinite suspension.[361] Ordinarily, charging a client a clearly excessive fee is not treated in the disciplinary reports in the same fashion as misappropriation of client funds or property.

You Should Know

In *Matter of Schoepfer*, the SJC established the following presumptive sanctions for misappropriation of client funds, which an excessive fee might represent:

> If . . . an attorney intended to deprive the client of funds, permanently

[360] *See, e.g.*, Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf (2015); Constance V. Vecchione, *FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements*, https://bbopublic.blob.core.windows.net/web/f/FAQs%201.5(b).pdf (2013); Constance V. Vecchione, *Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to Be in Writing* https://bbopublic.blob.core.windows.net/web/f/WriteItUp.pdf (2012); Constance V. Vecchione, *Fees and Feasibility: Amendments To Mass. R. Prof. C. 1.5 on Fees*, https://bbopublic.blob.core.windows.net/web/f/Fees2011.pdf (2011).

[361] Matter of Schoepfer, 426 Mass. 183, 185-188 & n.2, 13 Mass. Att'y Disc. R. 679 (1997).

> or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.[362]

In *Matter of Goldstone*,[363] the attorney charged and collected an excessive fee from his client, a national retailer, by intentionally and in bad faith charging fees to which he was not entitled. The corporation sued the lawyer for breach of contract and won a judgment against him.[364] Relying on the facts established conclusively in the civil action, the SJC disbarred the lawyer. The Court wrote, "[The respondent] intentionally overbilled and collected from his client hundreds of thousands of dollars in fees and costs to which he was not entitled, on both closed and active cases. Where an attorney lacks a good faith belief that he has earned and is entitled to the monies, such conduct constitutes conversion and misappropriation of client funds."[365] In *Matter of Smith*,[366] decided soon after *Goldstone*, an attorney filed an affidavit of resignation after Bar Counsel charged him with charging his client excessive fees. The attorney charged a widowed, elderly client a total of $60,000 for services that had a maximum value of $7,500. The single justice accepted his resignation. While many lawyers have been disbarred for intentional misappropriation of client funds held by the lawyers, *Goldstone* and *Smith* represent disciplinary matters where the bad faith charging of an excessive fee led to a disbarment.[367]

On other occasions, lawyers have been disbarred for misconduct involving excessive fees, although always with other serious misconduct as well. In *Matter of Pepyne*,[368] the single justice accepted the respondent's affidavit of resignation after reviewing six separate instances of misconduct, several of which involved the lawyer's imposing liens or accepting fees to which he was not entitled. He also neglected matters, was held in contempt of court, and was convicted of an unrelated crime. In *Matter of O'Connor*,[369] the single justice disbarred a lawyer for misconduct involving his collecting a higher fee in a worker's compensation matter than that provided for in the settlement and misleading his client about the true fee. He also engaged in separate misconduct where he neglected a matter and lied to his client about his carelessness.

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[362] 426 Mass. at 185–188 & n.2 (*citing* Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984)).

[363] 445 Mass. 551, 21 Mass. Att'y Disc. R. 288 (2005).

[364] *See* Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F. 3d 10 (1st Cir. 1997) (confirming that the attorney bears the burden of proof in a controversy with a client to establish that his fees were reasonable).

[365] 455 Mass. at 566.

[366] 21 Mass. Att'y Disc. R. 609 (2005).

[367] In Matter of Pomeroy, 26 Mass. Att'y Disc. R. 515 (2010), the respondent was retained by an elderly client to liquidate several bank accounts and turn the proceeds over to him. The lawyer converted over $812,000. When her conduct was discovered, she initially claimed this represented a contingent fee she was owed for these services. She later fabricated documents to conceal her activities. Ultimately the respondent submitted an affidavit of resignation and was disbarred. *See* Matter of Pomeroy, and 25 Mass. Att'y Disc. R. 507 (2009) (temporary suspension).

[368] 26 Mass. Att'y Disc. R. 502 (2010).

[369] 26 Mass. Att'y Disc. R. 458 (2010).

You Should Know

There is a difference between a *clearly excessive* fee and an *illegal* fee. An illegal fee is a fee not allowed by the contractual or regulatory terms under which the lawyer is to be paid, even if the actual amounts charged would not be deemed "clearly excessive." Lawyers have been disciplined under Rule 1.5 for charging an illegal fee in a workers' compensation matter[370] and a criminal defense matter,[371] among others.

2) Suspension

The lawyers who have been suspended for violating Rule 1.5 typically have overcharged a client intentionally, with some misrepresentation about the fee. For instance, in *Matter of Beaulieu*,[372] an attorney was suspended for four years and had to make restitution before submitting an application for reinstatement. The attorney billed the Committee for Public Counsel Services for his legal services and violated Rule 1.5(a) by submitting inaccurate and grossly inflated reports of his hours. In a recent disposition that ought to be of considerable interest to many private firm lawyers, *Matter of Murphy*,[373] an attorney was suspended for a year and a day where, in order to increase his billable hours, he knowingly spent more time on client matters than necessary. The attorney, an associate in a law firm, earned an annual salary with a bonus tied to his billings. The attorney billed his clients for extra hours when he should have delegated tasks to lawyers of lesser seniority, and for tasks that were duplicated and billed by others in his firm.[374]

In *Matter of Rafferty*,[375] the single justice imposed a four-month suspension on an attorney, with reinstatement conditioned on his passing the MPRE and making restitution, after he intentionally complied with the questionable instructions of his wealthy and overzealous client, litigating her matter excessively and collecting from her fees of $700,000. The fees were far in excess of any amount she could reasonably hope to win in the lawsuit. Because the lawyer collected an excessive fee through his failure to restrain his client's unreasonable litigation desires, the single justice determined that his

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370 *O'Connor*, *supra*.

371 Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014).

372 29 Mass. Att'y Disc. R. 33 (2013).

373 28 Mass. Att'y Disc. R. 643 (2012).

374 The misconduct present in *Matter of Murphy* has been, by many accounts, a very common phenomenon within competitive firm law practice, where associates experience intense pressure to meet billable hour quotas and partners encounter similar incentives to report high hours. For a discussion of this problem, see, e.g., Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619 (2011); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998).

375 26 Mass. Att'y Disc. R. 538 (2010).

sanction ought to be higher than the presumptive sanction for charging excessive fees, which would have been a public reprimand.

In *Matter of Beatrice*,[376] the respondent was suspended for two years for several instances of misconduct, including entering into and collecting a contingent fee in a criminal case. And in *Matter of Landry*,[377] the respondent was suspended for nine months after charging, and suing to collect, an excessive contingent fee for representation regarding the sale of corporate stock. The respondent also misled his client about the propriety of a contingent fee arrangement in that type of representation.[378]

3) Public Reprimand

"The typical sanction for charging an excessive fee is a public reprimand."[379] Many lawyers have received public reprimands for violating Rule 1.5, either after charging an hourly fee or where the arrangement involved a contingent fee arrangement. The most prominent SJC treatment of the discipline for an excessive fee has been *Matter of Fordham*,[380] discussed in more detail below. In *Fordham*, the SJC imposed a public reprimand for the respondent's having charged his unsophisticated client a clearly excessive fee (despite providing very high quality, and successful, legal services, and despite the fact that the excessive fee was not actually collected).

Other recent matters in which the lawyer received a public reprimand for violating Rule 1.5 include *Matter of Henry*,[381] where an attorney was reprimanded after representing a husband and wife in their petition to partition a two-family duplex. The attorney charged the clients more than $91,000, while the total reasonable amount, according to the Fee Arbitration Board, was $35,000. In *Matter of Tierney*,[382] an attorney received a public reprimand because the fees she charged and collected were disproportionate to the size and value of the estate on which she worked. The net proceeds from the real estate in question amounted to less than $98,000, and the attorney charged $22,500 for her work on the estate, which the Board concluded was clearly excessive under the circumstances.

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376 14 Mass. Att'y Disc. R. 56 (1998).

377 31 Mass. Att'y Disc. R. ___, 2015 WL 10322929 (2015).

378 *See also* Matter of Gibson, 27 Mass. Att'y Disc. R. 396 (2011) (single justice order suspending the respondent indefinitely, without reference to Rule 1.5, after the respondent entered into a grossly unfair contingent fee agreement, and misappropriated the funds held).

379 Matter of Rafferty, 26 Mass. Att'y Disc. R. 538, (2010). The ABA model standards for discipline apply a more flexible approach. Those standards recommend varying sanctions for "unreasonable or improper fees," depending on the mental state of the lawyer and the harm caused to the client. *See* ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 7.0 – 7.4 (2012).

380 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996), cert. denied, 519 U.S. 1149 (1997). Fordham charged but did not actually collect a clearly excessive fee. However, since then Bar Counsel has stipulated to public reprimands in cases where lawyers have both charged and actually collected clearly excessive fees, when the lawyer has made restitution. *See, e.g.*, Matter of Chignola, 25 Mass. Att'y Disc. R. 112 (2009) (restitution and other factors in mitigation); Matter of Olchowski, 24 Mass. Att'y Disc. R. 520 (2009) (restitution).

381 28 Mass. Att'y Disc. R. 450 (2012).

382 28 Mass. Att'y Disc. R. 850 (2012).

Lawyers who have failed to document a contingent fee in writing have usually received admonitions, as discussed below. There have been instances when the lawyers have received public reprimands, but in each case the lawyer also committed separate misconduct. (Indeed, in each case Bar Counsel seemingly would not have known of the absence of a written agreement but for the separate misconduct.) For example, in *Matter of Carroll*,[383] the respondent neglected a contingent-fee matter for which there was no written fee agreement, and caused the client's case to be time-barred through his lack of diligence, among other things. He received a public reprimand. In *Matter of Kelleher*,[384] the attorney ignored a previous lawyer's claim to a share of contingent-fee proceeds, and also did not prepare a written contingent fee agreement. In *Matter of Faria*,[385] the lawyer received a public reprimand after he entered into an oral contingent fee agreement, neglected the matter, and was responsible for the dismissal of the client's case. He had previously received an admonition for neglect, including missing a statute of limitations.[386]

4) Admonition

On occasion, lawyers who charged excessive fees or otherwise violated Rule 1.5 have received only an admonition. The admonitions tend to appear where the misconduct was not intentional and the client suffered little or no harm. For example, in AD 00-78,[387] the respondent charged his client, an elderly woman for whom he served as trustee, legal services rates for assistance that did not require legal skills. Because the lawyer "ha[d] also taken very good care of the client over the years that he has been her trustee" and made restitution to the trust, he received only an admonition. In AD 09-02,[388] an attorney failed to execute a written contingent-fee agreement with the client, leading to disagreement about its terms. The lawyer also offered less-than-competent services to the client, but made full amends to remedy any potential harm.[389] In AD 06-02,[390] the attorney charged his client for services that were unnecessary and redundant. He made

[383] 28 Mass. Att'y Disc. R. 130 (2012). *See also* Matter of Kelleher, 26 Mass. Att'y Disc. R. 281 (2010) (attorney also faced public reprimand*ed* for *conduct including* not having a written contingent fee agreement); Matter of Foley, 25 Mass. Att'y Disc. R. 207 (2009) (attorney faced three-month suspension, stayed for one year under probationary conditions, for, among other violations, entering into a contingent fee agreement without a written fee agreement).

[384] 26 Mass. Att'y Disc. R. 281 (2010).

[385] 25 Mass. Att'y Disc. R. 201 (2009).

[386] *See also* Matter of Neal, 19 Mass. Att'y Disc. R. 330 (2003) (public reprimand for misconduct including failing to maintain a copy of the contingent fee agreement).

[387] 17 Mass. Att'y Disc. R. 563 (2000).

[388] 25 Mass. Att'y Disc. R. 655 (2009).

[389] For a similar, if perhaps more surprising, example, see AD 08-18, 24 Mass. Att'y Disc. R. 895 (2008) (no written contingent fee agreement, plus neglect leading to dismissal of client's case; successor counsel obtained reversal of the dismissal, so ultimately no substantial harm to the client). *Compare* AD 00-12, 16 Mass. Att'y Disc. R. 467 (2000) (admonition solely for failure to have contingent fee agreement in writing).

[390] 22 Mass. Att'y Disc. R. 848 (2006).

restitution of the fees to which he was not entitled. In AD 04-05,[391] the attorney received an admonition after calculating his contingent fee on amounts (personal injury protection (PIP) benefits) that were not contingent at all. The attorney refunded that portion of his fee after his client filed a complaint with the Office of the Bar Counsel. Other examples of a similar nature exist in the disciplinary reports.[392]

In AD 99-58,[393] a lawyer received an admonition for failing to disclose to a client his receipt of a referral fee, in violation of DR 2-107(A)(1), the predecessor to Rule 1.5(e). The lawyer had referred a matter, received a contingent fee, but neither he nor the lawyer to whom he referred the matter disclosed the arrangement to the client.

In *Matter of the Discipline of an Attorney*,[394] the Supreme Judicial Court declined to admonish a lawyer for including in his contingent-fee agreement a provision stating that if the attorney were discharged prior to the conclusion of the representation, the attorney would be compensated for the fair value of his services or one third of any settlement offer that had been made at the time of discharge, whichever was greater. Because this specific provision could result in fee that exceeded the fair value of the work and could discourage the client from discharging the lawyer, the Court doubted whether a contingent-fee agreement should contain any such provision. But because the respondent had neither charged nor collected an unreasonable fee based upon that contract, the Court concluded that discipline was not warranted. (Because the respondent's conduct was not expressly prohibited by Rule 1.5, after that opinion the Court amended Rule 1.5 and included clause (6) of both versions of the Model Fee Agreement to limit such fees.) However, the SJC did admonish the lawyer for knowingly misrepresenting to insurers on several occasions the existence of a statutory lien in his favor, and for failing to notify his client promptly about his receipt of funds payable to the client.

C. Other Fee Issues

1) Determining Whether a Fee Is Clearly Excessive

Whether a lawyer's fee is "clearly excessive" cannot be determined formulaically. That determination calls for careful and nuanced judgment based on the many factors set forth in Rule 1.5(a). Most discussions use *Matter of Fordham*,[395] described earlier in Section B.3, as a benchmark for that assessment. In *Fordham*, an experienced and well-respected member of the Massachusetts bar with no history of any previous discipline received a public reprimand for charging a client an excessive fee for representation of a young man in a driving under the influence (DUI) criminal matter. The lawyer succeeded in the goal of the representation, achieving an acquittal for the client. The

[391] 20 Mass. Att'y Disc. R. 668 (2004).
[392] *See* AD 06-06, 22 Mass. Att'y Disc. R. 855 (2006); AD 05-17, 21 Mass. Att'y Disc. R. 706 (2005); AD 03-32, 19 Mass. Att'y Disc. R. 577 (2003); AD 02-55, 18 Mass. Att'y Disc. R. 745 (2002); AD 02-50, 18 Mass. Att'y Disc. R. 732 (2002); AD 00-34, 16 Mass. Att'y Disc. R. 501 (2000).
[393] AD 99-58, 15 Mass. Att'y Disc. R. 759 (1999).
[394] 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).
[395] 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (public reprimand), cert. denied, 519 U.S. 1149 (1997).

parties stipulated that the lawyer had worked diligently every hour he billed, and had billed the client at an acceptable hourly rate. However, the fee the lawyer charged (close to $50,000) was so far beyond what a typical DUI defense lawyer charged similar clients (almost never more than $10,000, according to even respondent's own experts) that it qualified as "clearly excessive." The Court was also critical of the fact that the lawyer had charged his client for the time he spent learning an area of the law he did not previously know. The Court wrote, "A client 'should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine.'"[396]

Fordham emphasizes the importance of the prevailing practices among lawyers in similar settings offering comparable services. *Fordham* also makes clear that a lawyer may not charge a client for the lawyer's own education in the law if that extra effort results in an excessive fee. In fact, however, in most of the discipline for violation of Rule 1.5, aside from contingent-fee matters, the lawyer charged fees for work that the lawyer never performed or performed poorly.

2) Contingent Fees

Rule 1.5(c) addresses the topic of contingent fees with great specificity. It is beyond the scope of this treatise to review in detail the logistics of charging and collecting a reasonable contingent fee. Useful resources exist for Massachusetts lawyers who charge contingent fees.[397] The requirements for continent fee agreements in Massachusetts are set forth in Rules 1.5(c) and (f), and Comments [3] and [3A]-[3D]. With few exceptions, a lawyer who charges a contingent fee in Massachusetts must enter into a written agreement signed by the lawyer and the client. The agreement must contain several mandated provisions. It must identify the contingency on which the fee award will be based, the rate used, whether the rate is based on the gross proceeds or the net proceeds after litigation expenses have been deducted, and whether the lawyer or the client will be responsible for those expenses. In addition, in a relatively new provision, the agreement must address the question of how the lawyer will be paid, if at all, should the representation end before the matter resolves. If the lawyer is a successor lawyer to a previous lawyer with a contingent-fee agreement who performed some work on the matter, the agreement must address who will pay the previous lawyer.[398] If the agreement is silent, the successor lawyer will be responsible for the previous lawyer's fees.

The revised Massachusetts rule offers lawyers two template versions of a contingent-fee agreement, Form A, which has standard, default provisions, and Form B,

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[396] 423 Mass. at 490 (quoting Matter of the Estate of Larson, 103 Wash.2d 517, 531, 694 P.2d 1051 (1985)).

[397] *See, e.g.*, Timothy Dacey III, *Fee Agreements*, in ETHICAL LAWYERING IN MASSACHUSETTS, Chapter 5 (James Boland ed. 2009 and 2013 Supp.); Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, *at* h https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf (2012).

[398] The Supreme Judicial Court in 2009 sought comments on the question of how to allocate the responsibility for paying the discharged lawyer in a successful contingent fee matter, responding to an issue decided by the SJC a few years before. *See* Malonis v. Harrington, 442 Mass. 692 (2004).

which offers elections for the lawyer to choose among certain provisions. Lawyers are not required to use those template forms, but if they choose to proceed with a different agreement, the lawyers "shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing."[399] In *Matter of Diviacchi*,[400] the lawyer was suspended for twenty-seven months for using a non-conforming contingent fee agreement and not explaining its terms to the client, among much other misconduct.

Several SJC decisions articulated the principles to be applied when a client discharges a contingent-fee lawyer before the final resolution of the matter. In *Salem Realty v. Matera*,[401] the SJC affirmed the Appeals Court determination that a discharged lawyer may not rely on the contingent fee agreement for his fees, but should be compensated on a *quantum meruit* basis for the value his work produced. In *Malonis v. Harrington*,[402] the SJC decided on the facts before it that the successor lawyer was responsible to pay for the discharged lawyer's fees. That decision triggered the ultimate revision to Rule 1.5 addressing the question of who will pay the discharged lawyer. In *Liss v. Studeny*,[403] the Court rejected a lawyer's effort to collect a *quantum meruit* fee in a contingent fee matter after he withdrew from the case before it was concluded, and after the former client had lost at trial. In so doing, the Court announced the general rule that there will be no *quantum meruit* recovery under contingent fee agreements when the contingency has not occurred, i.e., when the client has not obtained a recovery.[404]

3) Changing the Fee Agreement with a Client

A lawyer may alter an existing fee agreement with a client by giving the client notice of such changes in writing.[405] Most authorities agree that a lawyer may increase an hourly fee prospectively, or make comparable adjustments to the fee agreement, as time passes, as long as the client has received adequate notice of the change and the changes are reasonable and the fee agreement provides that the rates may be increased.[406]

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[399] Rule 1.5(f)(3).

[400] 475 Mass. 1013 (2016).

[401] 10 Mass.App.Ct. 571 (1980), *aff'd* 384 Mass. 803 (1981).

[402] 442 Mass. 692 (2004).

[403] 450 Mass. 473 (2008).

[404] 450 Mass. at 480–481. The Court noted, however that it was not categorically prohibiting *quantum meruit* recovery where the contingency does not occur; particularly compelling circumstances might permit recovery. The Court provided some indication of what such circumstances might be: "[T]here is no evidence that Studeny used Liss's services without intending that the contingency occur. That is, Studeny did not defeat Liss's reasonable expectation that he was using Liss's services to bring about the contingency on which Liss might be compensated." *Id.* at 481.

[405] Rule 1.5(b)(1) ("Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.").

[406] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(1)(a) (2000) (if a fee agreement or modification "is made beyond a reasonable time after the lawyer has begun to represent the client in the matter . . . the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client"). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981) (modification of an existing contract is enforceable without additional consideration only upon an unanticipated change of circumstances making a contractual task more onerous or more valuable, and the modification is fair and equitable).

In some circumstances, a material change to an existing contract might qualify as a business transaction between a lawyer and a client, triggering the requirements of Rule 1.8(a).[407] For example, in *Matter of Weisman*,[408] an attorney renegotiated his fee agreement with his organizational client in the middle of the representation in a manner that the hearing committee found was neither fair nor was preceded by sufficient informed consent of the client. That modification represented a business transaction with the client, and the respondent did not comply with Rule 1.8. For that misconduct, and his mishandling of the fees he received, he was suspended for one year.

4) Payment in Kind and Liens for Fees

Lawyers typically receive their compensation in the form of money, by cash, check, or credit card payment. However a lawyer may receive payment in kind, subject to some restrictions. As the Office of Bar Counsel has advised, "A lawyer may accept property instead of money as a fee, so long as the lawyer is not acquiring a proprietary interest in the subject matter of the litigation in violation of Mass. R. Prof. C. 1.8(j). A fee paid in property may constitute a business transaction with a client and be subject to Mass. R. Prof. C. 1.8(a)."[409] The ban on acquiring a "proprietary interest" in litigation means that a lawyer cannot accept ownership, aside from a contingent fee interest, in the property or matter that is the subject matter of the litigation for which the lawyer represents the client. In the words of one authority, "the lawyer's interest in the case cannot be that of a co-plaintiff."[410]

In some settings, accepting property as a fee will qualify as a business transaction between the lawyer and her client, triggering the strict requirements of Rule 1.8(a).[411] One common example of an attorney's fee being subject to the Rule 1.8(a) requirements

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[407] Note that while Rule 1.8(a), concerning business transactions between attorney and client, generally does not apply to the original fee agreement, *see* Matter of an Attorney, 451 Mass. 131, 139–140, 24 Mass. Att'y Disc. R. 824, 832-835 (2008), amendments to the fee agreement might fall within that rule. *See* Kaufman & Vecchione, *supra* note 397, at 7 ("If an attorney . . . changes the fee agreement, this is a business transaction with a client and the lawyer must comply with the requirements of Mass. R. Prof. Conduct 1.8(a), including that the transaction must be fair and reasonable and understood by the client, the client must be given an opportunity to consult independent counsel, and the client must consent in writing."). While this advice from the Office of Bar Counsel seems to indicate that *all* changes in a fee agreement require the protections of Rule 1.8(a), it seems very unlikely that a regular adjustment of an hourly fee rate made after a significant period of time would quality as a business transaction between a lawyer and her client, or that Bar Counsel would consider it as such. *See also* Matter of Murray, 24 Mass. Att'y Disc. R. 483 (2008) (respondent charged with violation of Rule 1.8(a) after demanding changes to a contingent fee agreement; that count rejected by the hearing committee and the board).

[408] 30 Mass. Att'y Disc. R. 440 (2014).

[409] Kaufman & Vecchione, *supra* note 397, at 7.

[410] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.8-10 (2012-2013 ed.) ("In other words, the client may not assign to the attorney part of his cause of action in a way that would allow the lawyer to prevent settlement. The client cannot waive his right to decide when to settle litigation.").

[411] According to Rule 1.8(a), a business transaction between an attorney and a client must be objectively fair, with all terms disclosed in writing, and the client must have the opportunity to consult with separate counsel, and must consent in writing to the transaction.

is when a lawyer accepts, as his fee, an award of stock in a corporate client.[412] Lawyers may accept such an equity interest in the client as the fee,[413] but, in addition to complying with Rule 1.8(a), the lawyer must ensure that the resulting fee is reasonable. In making that determination, the focus must be on the value of the stock at the time the transfer is made, not at a later time when the stock's value may be very different from what the parties had earlier predicted.[414] The sanctions for violations of Rule 1.8 are discussed in Part IV Section II.D.

If a client does not pay a lawyer the fees owed for the work the lawyer performed in a matter that goes to litigation, the lawyer is entitled to a lien on the claim or the proceeds of the claim, pursuant to a Massachusetts statute,[415] a device sometimes known as an "attorney's lien"[416] or a "charging lien"[417] If the relationship ends by the lawyer's withdrawing as counsel before final judgment, "[w]hether withdrawal works a waiver of the attorney's lien depends on whether the attorney had good cause to withdraw."[418] A lawyer may not withhold a client's papers and other materials in order to collect a fee,[419] but in a matter that is not a contingency-fee case, may properly withhold work product for which the client has not yet paid the lawyer,[420] except when doing so "would prejudice the client unfairly."[421]

Practice Tip

The Office of Bar Counsel hears often from clients whose former lawyers refuse to return or transfer the client's file. Most often, these matters resolve without formal proceedings through the intervention of Bar Counsel's Attorney and Consumer Assistance Program (ACAP). The resolution inevitably includes the attorney's return of the file to the former client.

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412 *See, e.g.*, Rubin v. Murray, 79 Mass. App. Ct. 64 (2011). For commentary about that practice, see John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002); Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Attorneys*, 1999 COLUM. BUS. L. REV. 330; Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569 (2010); Therese Maynard, *Ethics for Business Lawyers Representing Start-Up Companies*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401 (2011).

413 Rubin v. Murray, 79 Mass. App. Ct. 64 (2011).

414 *Id*., 79 Mass. App. Ct. at 75.

415 G.L. c. 221 § 50.

416 *See, e.g.*, Matter of King, 23 Mass. Att'y Disc. R. 352 (2007).

417 *See, e.g.*, Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 244 (1993).

418 Phelps Steel, Inc. v. Von Deak, 24 Mass. App. Ct. 592, 594 (1987). "A withdrawal occasioned by a breakdown in the lawyer-client relationship is sufficient reason for an attorney to remove himself from the case, and will leave the attorney's lien intact." Bartermax, Inc. v. Discover Boston Multi-Lingual Trolley Tours, Inc., 71 Mass. App. Ct. 1107 (2008) (unpublished opinion).

419 Rule 1.16(e).

420 Kaufman & Vecchione, *supra* note 397, at 7; *see* Rule 1.16(e)(4) and (6).

421 Rule 1.16(e)(7).

Exhibit F

The New Massachusetts Rules of Professional Conduct: An Overview

BY CHIEF JUSTICE HERBERT P. WILKINS

Herbert P. Wilkins is Chief Justice of the Massachusetts Supreme Judicial Court.

On Jan. 1, 1998, the new Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) will become effective, replacing SJC Rule 3:07, the Code of Professional Responsibility (Code), that has been in effect since Oct. 2, 1972. The new rules, slow in coming, are the product of extensive discussion and comment by bar associations, lawyers' groups with interests in specific areas of practice, individual lawyers, the justices' Committee on the Rules of Professional Conduct (committee), and the justices themselves. Although the new rules have been adopted within the framework of the American Bar Association's Model Rules of Professional Conduct (rules), the new rules depart in significant respects from the model rules. In some instances, the new rules preserve language that appeared in the ABA Code of Professional Responsibility but the ABA eliminated in the model rules. In others, special Massachusetts provisions are included, some from the code as Massachusetts adopted it and others newly drafted.

Background

It is an historical accident that Massachusetts came so late, compared to other states, to adopting its variation of the ABA model rules. It need not have been so, but an attempt more than ten years ago to have the justices proceed with the development of a Massachusetts version of the model rules foundered on a dispute over a seemingly innocuous provision in the model rules, a dispute that dominated the analysis. On Dec. 18, 1986, the Boston Bar Association petitioned the justices to amend SJC Rule 3:07 (Code) by substituting the ABA model rules. Among the model rules, in seeming innocence, was Rule 1.5 (e) which allows lawyers, not in the same firm to divide a reasonable fee only if (a) the client is advised and does not object or (b) the division of the fee is in proportion to the services to be performed by each lawyer or, with the client's written agreement, each lawyer assumes joint responsibility for the representation. This provision differs considerably from the special Massachusetts code provision on the division of fees then in effect. That provision, DR 2-107 (A), permits the division of fees between or among lawyers not in the same law office, if the total fee is reasonable and if the client "consents to the employment of the other lawyer after a full disclosure that a division of fees will be made." The new Massachusetts rule does not explicitly require disclosure of the proportionate share of the fee to be taken by each lawyer.

The Massachusetts Bar Association and various other groups of lawyers expressed strong disagreement with the change that ABA Model Rule 1.5(e) would make. The major portion of many written comments submitted to the justices on the BBA proposal dealt solely with the division of fees issue. If the BBA had proposed continuation of DR 2-107 (A) in substitution for ABA Rule 1.5(e), the focus of discussion would have been different, and perhaps the justices would have appointed a committee in 1987 to recommend Massachusetts rules based in large measure on the ABA model rules.

On Feb. 29, 1988, after the justices had received numerous written submissions, a majority of the justices (Liacos, Abrams, Nolan, Lynch and O'Connor) denied both the BBA's request for an evidentiary hearing and the BBA petition itself. They concluded that it does not "seem likely the expenditure of time and effort involved in evidentiary and other proceedings to consider the model rules would result in any significant gain in the standards regulating the conduct of the Bar." At that time only 16 states had adopted rules based on the ABA model rules.

In disagreement, Chief Justice Hennessey and the author of this article saw "no reasonable basis for foreclosing further, intensive analysis of the model rules at this time." He and I noted that ABA Model Rule 1.5(e) had moved toward the Massachusetts position (DR 2-107 [A]) from the position stated in the ABA code. We suggested that the justices could simply stand by their present rule. We also noted that the format of the model rules was superior to that of the code and that there were "numerous areas covered by the model rules, not touched by the Code, that would

provide guidance to the bar, bar counsel and the Board of Bar Overseers." We predicted that a majority of the justices will remain opposed even to a detailed study of the rules, unless bar associations were to express an interest in moving toward adoption of the model rules.

There the subject stood for many years, in spite of the efforts to reopen the issue by the late Robert W. Meserve, former president of the ABA and the BBA, who had succeeded Robert J. Kutak as chairman of the Kutak Commission. The Kutak Commission had proposed the original draft of the model rules to the ABA. Meserve thought it ironic that his own state was unwilling even to consider the model rules that had been adopted, with modifications, in over forty jurisdictions.

Finally, in 1994, the justices changed their position. The Board of Bar Overseers requested that the justices adopt the model rules with Massachusetts amendments. The Board of Bar Examiners advised the justices that soon the multistate professional responsibility examination, taken by bar applicants, would be based solely on the model rules, ignoring the Code. The justices inquired of the MBA as to its position, indicating that the justices would agree in advance that they would make no substantive change in the rule governing the division of fees. The MBA agreed. By 1994 more than forty jurisdictions had adopted rules based on the ABA model rules.

After considerable delay and discussion, the study project, rejected in 1986, began in 1994 with the appointment of the Supreme Judicial Court's Committee on the Rules of Professional Conduct. The glacial reluctance of a majority of the justices to recognize the merits of the adoption of new professional conduct rules was, I thought, embarrassing. One benefit from the delay in the adoption of the ABA model rules, however, is that the committee was able to take advantage of accumulated comments on and criticisms of the ABA model rules.

The Committee's Work

The committee was hardworking and meticulous. I had never served on a committee of such intellectual strength and sound judgment (except, of course, one made up exclusively of justices of my court). The committee had the practical experience of practicing lawyers, experience of persons dealing every day with disciplinary matters and an overview and independence of judgment from three nationally recognized legal scholars in the field of legal ethics. The MBA designated Elaine M. Epstein and Jeffrey L. McCormick as members. Until she was appointed to the United States Court of Appeals for the First Circuit, Sandra L. Lynch served as a BBA designated member. Thereafter, the Boston Bar Association was represented by Henry C. Dinger and John L. Whitlock, each of whom has an article in this edition of the *Massachusetts Law Review*. The justices also appointed Robert J. Muldoon Jr., who had had a major role on behalf of the BBA in the abortive proposal to adopt the model rules ten years earlier. Michael Fredrickson, general counsel to the Board of Bar Overseers and Arnold R. Rosenfeld, bar counsel, added to the committee the experience of disciplinary enforcement. From law schools were Daniel R. Coquillette of Boston College Law School, Andrew L. Kaufman of Harvard Law School and Susan Koniak of Boston University School of Law. Justice Abrams was an ex officio member of the committee. In the last phase of the committee's work, Justice Lynch and Justice Abrams who, with me, then constituted the rules committee of the court attended all meetings of the committee.

Notably, and unavoidably, absent from the committee was a representative of the consumer. My sense, self-serving as it may be, is that the committee was particularly alert to the public interest when an issue involved tension between the interests of lawyers and the interests of clients or the public in general. Many controversial issues fell squarely in this area of tension.

The committee commenced its task with the careful consideration of each ABA model rule with the view toward the publication of disciplinary rules adapted to Massachusetts needs and preferences. The committee occasionally concluded that the language of an ABA model rule was not as good as it might be, but the merits of uniformity among jurisdictions was a major factor in the committee's decision making. The tendency to favor uniformity, known as the Coquillette rule (after the committee member who first articulated it), placed the burden of persuasion on any exponent of a departure from the rules, except as to provisions that were already in considerable disagreement among other jurisdictions.

The committee completed its task in the latter part of 1994 and submitted its report to the justices. In Feb., 1995, the rules were published for comment. The time for comment was criticized by some as being too short. However, the justices allowed more than four months for comments.

I could not be more proud of the response of the bar of the commonwealth. The quality of the comments that the justices received was outstanding. Committees of the MBA and BBA prepared comprehensive comment on the rules, made concrete proposals for changes and advanced reasoning on various rules that was new and helpful. Not surprisingly, uniformity within and among bar groups was not attained. Many issues were controversial.

Once the comments were received from the public (which was in fact comment from lawyers and lawyers' groups), the justices referred the comments to the committee. From Sept., 1995, through April, 1996, the committee met more often than monthly, reviewing each controversial or questioned point. At one stage, Professor Kaufman persuaded the committee that the introductory material to and comments on the ABA model rules could not be ignored. Much credit is due to a hardworking drafting subcommittee

on comments, consisting of Professor Kaufman, John Whitlock and Michael Fredrickson, that reworked the ABA comments and drafted special Massachusetts comments. In May, 1996, the committee delivered its second report to the justices containing the rules as further revised and the new comment sections. The committee pointed to (a) areas that required the particular attention of the justices, (b) subjects for a recommended public hearing, and (c) topics that required further attention. Because of the revisions, the justices once again put the committee's recommendations out for public comment and announced that there would be a public hearing on certain of the rules.

The committee had not been of one mind on several issues. The committee by a wide majority preferred ABA Model Rule 1.5(e), concerning the division of fees among counsel, over the rule in effect and continued in substance in new Rule 1.5(e). Professor Kaufman wrote forcefully to that effect in dissent to the adoption of new Rule 1.5(e). In varying degrees, the committee's practicing lawyer members were unhappy with limitations of Rule 1.10 screening procedures when a lawyer, personally disqualified, joins a law firm. The committee, by a majority, excluded screening as a permissible device when the personally disqualified (moving) lawyer had substantial involvement or substantial material information relating to the matter in which the new firm seeks to become an adversary of the former client. The sense was that a former client would not feel assured that its confidences would be protected in such a situation.

The Hearing

The justices selected rules in four areas for comment at a hearir g on April 2, 1997. Because they were acting in an administrative capacity as justices, and not in an adjudicative one as a court, they did not wear robes at the hearing. For the same reason, I refer to rules action as taken by the justices and not by the court. The oral presentations were of a high quality, focused on intellectual concerns and not on emotional ones.

Rules were selected for the hearing if they concerned subjects as to which there was considerable controversy and as to which the justices were in doubt. A number of controversial provisions were not included on the agenda. For example, Rule 3.3(e) deals with the rare but difficult problem of what a criminal defense lawyer is to do when the lawyer knows that the client intends to testify falsely. There is no perfect answer to this problem. The committee was unanimous, however, in concluding that Rule 3.3(e), as ultimately drafted, was the best choice available. The justices agreed and decided that oral argument on the issue would not be beneficial.

I turn now to those rules that were the subject of the public hearing.

Rules 1.6, 3.3 and 4.1.

Probably the most challenging and controversial subject the committee, and then the justices, faced was the treatment of the confidentiality of information received from a client. The debate centered on which client confidences a lawyer may disclose, must disclose and may not disclose. The relevant ABA model rules governing the disclosure of client confidences are stated in the three separate Rules — 1.6, 3.3 and 4.1. The committee resisted the temptation to consolidate all relevant confidentiality provisions in one rule and followed the format of the model rules.

Rules 3.3 and 4.1 contain mandates to disclose confidential client information. Rule 3.3 concerns a lawyer's duty to take remedial measures when material evidence that the lawyer knows to be false has been presented to a tribunal by a client, a witness on behalf of a client or the lawyer. This obligation is universal without regard to the content of the confidential information, except in the case of a criminal defense lawyer who is guided by Rule 3.3(e) when the lawyer knows that the client intends to lie or has lied.

The debate concerning Rule 1.6, the rule permitting disclosure in certain circumstances, centered on the expansion of a lawyer's right to disclose confidential information relating to the representation of a client without the client's informed consent. DR 4-101 (C) (3) allows a lawyer to reveal a client's intention "to commit a crime and the information necessary to prevent the crime," any crime. It is this provision on which the lawyer relied to disclose a client's intention to commit a crime that led to *Purcell* v. *District Attorney for the Suffolk Dist.*, 424 Mass. 109, 111 (1997). Rule 1.6(b) of the ABA model rules, however, limits the scope of the permissible disclosure to reasonably expected criminal conduct that is likely to result in death or substantial injury. This is the respect in which ABA Model Rule 1.6 is clearly more limited than DR 4-101 (C).

Under the new Massachusetts Rule 1.6(b), a lawyer's discretionary right to disclose confidential information is otherwise expanded beyond DR 4-101 (C). Rule 1.6(b)(1) allows the disclosure of confidential information to prevent reasonably anticipated fraudulent (as well as criminal) conduct that is likely to cause substantial injury to the property of another or to prevent the wrongful execution or incarceration of another. Rule 1.6(b)(3) allows a lawyer to reveal confidential information that the lawyer reasonably believes necessary "to rectify client fraud in which the lawyer's services have been used."

It was argued that these expansions of a lawyer's discretionary right to disclose confidential information would chill the relationship between lawyer and client. Clients, it was claimed, would be unwilling to reveal information for fear of its disclosure and lawyers would consequently not have all the information nec-

essary to give proper legal advice. A client who has used a lawyer to commit fraud (Rule 1.6[b][3]) hardly should be heard to complain if the lawyer undertakes to protect himself or herself from a charge of his or her culpatory involvement, or at least undertakes to limit any harm caused by the fraud. The addition to the list of wrongs threatened by a client that a lawyer may reveal serves the public interest and seems to be a modest addition to the right under DR 4-101 (C) (3) to reveal the reasonable likelihood that the client will commit a crime. In practical terms, the apparent expansion of the right to disclose that Rule 1.6(b) sets forth adds few circumstances to the previously authorized right to disclose reasonably expected future criminal conduct. The lawyer's right to disclose expected noncriminal fraud is a modest intrusion on lawyer-client relations that most clients would not perceive as significant. It would be difficult to defend to the public a professional rule that barred, or at least inhibited, the disclosure of the kind of expected or past conduct that Rule 1.6 permits.

Rule 3.4.

The Code provided in DR 7-105 is that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The ABA rules did not retain this provision, and the committee, after discussion and in disagreement, decided not to carry that prohibition over into the new rules. Proof that someone acted "solely" to obtain an advantage seemed problematic. The principle stated, however, is sound, except as it might apply to a government lawyer who has both criminal and civil weapons in his or her arsenal.

The justices received strong requests for the preservation of the substance of DR 7-105. The attorney general opposed retention. After hearing both sides, the justices largely, but perhaps not entirely, allayed the concerns of the attorney general and other government lawyers when they re-established the substance of DR 7-105 but provided in Rule 3.4(h) that the advantage that may not be improperly sought is one in a *private* civil matter.

Rule 3.4(h) expands on DR 7-105 by prohibiting filing or threatening to file disciplinary charges, as well as criminal charges, solely to obtain an advantage in a private civil matter.

Rule 3.5(d).

Rule 3.5(d) is uniquely Massachusetts. It is carried over from DR 7-108 (D). The rule restricts lawyer access to a discharged juror, in a case with which the lawyer was connected, "without leave of court granted for good cause shown." It is ironic that the justices' decision in 1991 to adopt DR 7-108 (D) was made shortly after a case in which a lawyer's posttrial communication with a juror led to evidence that resulted in a new trial for a convicted defendant. *See Commonwealth* v. *Solis*, 407 Mass. 398 (1990). The lawyer's communication with the juror would have violated our special DR 7-108 (D), if that disciplinary rule had then been in effect.

Chief Justice Liacos and I opposed the adoption of special Rule 3.5(d). The ABA Code provision (*See Commonwealth* v. *Solis*, *supra* at 403) barring communications merely to harass or embarrass a juror or to influence the juror's actions in future jury service, was in effect in Massachusetts at the time of the *Solis* opinion. That seemed to us adequate protection against a problem that had not been shown to exist. There are, however, arguments for such a rule. *Id.* at 403-404. Some Federal District Courts have (but, as far as I know, no state court has) adopted a rule similar to our Rule 3.5(d).

The committee was unanimously opposed to rule 3.5(d). No member of the practicing bar or a bar organization advised the justices of support for Rule 3.5(d). District attorneys and some judges favored it. All my colleagues favored it, and, with no dissenting vote recorded on any other rule, I decided not to repeat my objections. I remain concerned, however, that, in particular circumstances, Rule 3.5(d) may contravene the rights, perhaps even the constitutional rights, of people like Daniel Solis.

Rule 4.2.

This rule, concerning communications with a person represented by another lawyer, is indefinite and has been an understandably controversial topic, in both criminal and civil matters. The justices tentatively included the ABA Model Rule 4.2 with modest additions to the ABA comment to that rule. The idea that a lawyer may not communicate with one known to be represented by another lawyer in the matter, except with the consent of the other lawyer and on occasions in which the law authorizes the communication, seems to reach too far.

Criminal prosecutors are concerned about limitations on their investigative activities, including undercover investigations, and in various postcharge communications, such as voluntary and knowing communications after Miranda rights have been given. Federal prosecutors also assert that a regulation of the attorney general allowing communications preempts any contrary state court disciplinary rule. That issue is on appeal to the United States Court of Appeals for the Eighth Circuit from a decision adverse to the attorney general's position in United States ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1294 (E.D Mo. 1997).

The tension between the United States Department of Justice and the Massachusetts Rules of Professional Conduct is more than simply a disagreement over Rule 4.2. The justices have included language in Rule 3.8(f)(2) that requires judicial approval, after an opportunity for an adversarial pro-

ceedin g, before a prosecutor may subpoena a lawyer to a grand jury or criminal proceeding to present evidence about a client. The ABA once had but repealed such a rule. That principle was expressed in SJC Rule 3:08, Prosecution Function (PF) 15, which is repealed on the effective date of the new rules. PF 15 was the subject of United States v. Klubock, 832 F.2d 649 (1st Cir. 1986), aff'd en banc by an equally divided court, 832 F.2d 664 (1st Cir. 1987).

The Conference of Chief Justices and the attorney general have had discussions concerning the resolution of their disagreement on Rule 4.2, and a tentative working draft has been prepared but not approved. Even if the matter of prosecutors' rights and obligations is resolved, the propriety of Rule 4.2 will remain as to civil litigants, particularly lawyers with claims or potential claims against an entity such as a corporation. I understand that the modification of Rule 4.2, tentatively agreed on in the working draft, has not been considered in its application to private civil actions (or by the ABA). A careful description is needed of just which employees of an entity are or are not out of bounds. A reasonable rule might provide that a lawyer may have contact with nonmanagerial corporate employees other than those who may be personally liable and those whose conduct is chargeable to the entity (and with former employees), but a lawyer may not inquire into attorney-client confidential communication with a corporation's lawyer.

Rule 8.3 – Reporting Disciplinary Violations

Under the code, adopted by the justices in 1972, no obligation, or even a statement of appropriateness, appeared concerning the disclosure to disciplinary authorities of a violation of a rule of professional conduct by another lawyer. ABA Rule 8.3(a) requires disclosure, that is, it is a disciplinary violation for a lawyer not to disclose knowledge that another lawyer has committed a rules violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The committee was sorely divided as to whether the rule should state that a lawyer "should" or "shall" make such a disclosure, and put the point to the justices. They favored "shall," although the committee submitted the rule and it was published with the word "should." The justices were inclined to reject arguments for "should" but did not include Rule 8.3(a) for discussion at the April, 1997, hearing. Because there was strong protest from bar associations against a mandatory rule, the Justices heard oral argument on Rule 8.3(a) on Sept. 9, 1997. As I write, the justices have not made a decision on the question.

Professional Rules and Professional Liability

One concern in disciplinary rule making is the extent to which a disciplinary rule may, in effect, amount to a rule of substantive law and thereby affect the rights and obligations of clients, lawyers and perhaps others. Paragraph [6] of the preliminary scope section of the new rules rejected the statement in paragraph [18] of the scope section of the ABA model rules that a rule violation does not give rise to liability or to a presumption that a legal duty had been violated. In Fishman v. Brooks, 396 Mass. 643 (1986), the court agreed that a violation of a disciplinary rule was not itself an actionable breach of duty to a client. If, however, a disciplinary rule was intended to protect a person in a client's position, scope paragraph 6 and *Fishman* v. *Brooks, supra* at 649, state that "a violation of that rule may be some evidence of the attorney's negligence."

How far then will conformity to a disciplinary rule protect a lawyer from liability? A lawyer who conforms to a disciplinary rule might, of course, be subject to adverse consequences other than professional discipline. But a disciplinary rule must on occasion have a significant effect on substantive law. For example, by their rule allowing contingent fee agreements the justices have obviously intended to bar a client from successfully asserting that a rule-conforming contingent fee agreement is unenforceable as champertous. There is, however, a clear distinction between the disciplinary standard concerning the level of legal fees and the substantive rule of law concerning proper legal fees. Rule 1.5 states, as DR 2-106 (A) did, that it is improper for a lawyer to enter into an agreement for, charge, or collect a clearly excessive fee. As comment [1A] to Rule 1.5 states, the stricter substantive law is "that fees must be reasonable to be enforceable against the client." In my view, that means that a lawyer may not collect an agreed-on contingent fee if that fee, although not clearly excessive, is unreasonable in the circumstances.

If a rule requires a lawyer to act, such as compelling disclosure of a client's confidential information (client perjury, for example), it would seem appropriate to conclude that the lawyer is not liable for harm caused to the client by the lawyer's rule-mandated conduct. Where, however, a disciplinary rule permits, but does not compel, the attorney to act in a particular way, it is less clear that the discretionary rule will protect the lawyer against liability. If a course of conduct is permissible under the rules, taking that permitted action should be at least evidence of the reasonableness of the lawyer's conduct (cf. *Fishman* v. *Brooks, supra*) and perhaps should be an absolute defense. If public policy considerations justify authorizing the disclosure that a client intends to commit a serious crime, it is not likely that liability would be placed on a lawyer who reveals the client's proposed conduct. To do so would chill the very disclosure that the disciplinary rule was designed to permit, if not encourage. On the other side of the coin, might a lawyer permitted, but not required, to reveal a client's confidential information be liable for failing to do so? It was not the function of the committee or of the justices in their rule making capacity to resolve these substantive law issues.

The committee declined to recommend detailed commentary that would have spelled out specifically permitted practices in the joint representation of clients by lawyers engaged in estate and trust practice. A respected group of lawyers engaged in estate and trust practice recommended language that, for example, would have defined acceptable conduct of a lawyer representing a husband and wife in preparing their wills or in dealing collectively with people having interests under a decedent's will. The committee and the justices deleted ABA Rule 2.2 concerning a lawyer acting as an intermediary between clients, concluding that a lawyer representing more than one client should be governed by the conflict of interest principles stated in Rule 1.7 and guided by [12F] to Rule 1.7. *See* Rule 2.2 cmt. [1]. Comment [12F] should be of assistance to lawyers engaged in estate and trust practice, although neither Rule 1.7 nor the special comment creates a safe harbor against liability for a lawyer engaging in a joint representation, absent client consent. The propriety of the joint representation of clients is a highly fact-oriented issue that requires case-by-case analysis.

Unfinished Business

Adoption of the rules in their present form is not the end of the matter. There is unfinished business, in addition to the already mentioned further attention that Rule 4.2 will require.

The treatment of lawyer advertising was deferred until the rules in other respects were largely in place. Restraints on lawyer advertising are controversial, and the permissible range of restraints is significantly limited by free speech considerations. The justices have appointed a committee to recommend what changes, if any, should be made in the current rules. The justices included ABA Model Rule 7.2 on advertising in the new rules without substantial change; former DR 2-103 on solicitation of professional employment as Rule 7.3; and former DR 2-105 on communication of fields of practice as Rule 7.4. The rule on the solicitation of clients (DR 2-103) was the product of the efforts of an able special committee. It is unlikely that the committee on advertising will make a unanimous recommendation to the justices, but rather, I suspect, it will offer arguments for various alternatives from among which the justices will have to make choices. In the areas of advertising and solicitation, the interests of the public, the prospective clients, are extremely important. Information on access to legal assistance that is informative, fair, and not overreaching should be encouraged. The difficulty lies in the effective implementation of this broad standard. I am inclined to agree that a sophisticated prospective client does not need the same protection as other prospective clients. The problem is whether there is a sound way of identifying sophistication in rule language.

Other unfinished business includes the upcoming appointment of a committee to consider the special circumstances of government lawyers. There may be good reason to state specific exceptions and provisions for government lawyers. The District of Columbia, which has a plethora of government lawyers, has adopted special rules which may or may not be appropriate for our disciplinary rules. The scope section of the introductory material to the rules, in paragraph [4], recognizes the substantive statutory and constitutional authority of the attorney general to control litigation and to make decisions that are contrary to the authority of a private lawyer. Comment [8A] to Rule 1.7 acknowledges that public policy considerations may permit a government lawyer to represent conflicting interests. More may be needed, or at least desirable, concerning government lawyers.

Also open for further consideration is the question whether the justices should adopt a rule concerning pro bono services. The new rules omit ABA Model Rule 6.1 that states an aspirational goal of voluntary pro bono services for every lawyer. The justices have appointed a committee to study the subject of voluntary pro bono services. There appears to be little sentiment for mandating the furnishing of free services to indigent individuals. Whether any benefit would flow from the adoption of a precatory rule remains an open question.

Rule 3.8 states special responsibilities of a prosecutor. There is no parallel new rule stating special responsibilities of criminal defense counsel. Perhaps there should be. There is also a question whether the justices should preserve their separate rules concerning the prosecution and defense functions. Those rules could be incorporated into the disciplinary rules. The justices have referred these issues for comment to their Standing Advisory Committee on the Rules of Criminal Procedure.

Finally, on the subject of unfinished business, there is the matter of the operation and soundness of the new rules themselves. It is likely that adjustments and clarifications will be needed. New problems will arise. The ABA itself is revisiting its rules. Requests for changes and additions are likely. For these reasons, the justices will establish a Standing Advisory Committee on the Rules of Professional Conduct.

Conclusion

The new rules were long in coming. They will serve the bar and the public better than the old Code of Professional Responsibility. They are a credit to the hardworking committee, to Robert Bloom, Esquire, of the staff of the court, to Justices Abrams and Lynch of the Rules Committee, and to all participants in the process.

Exhibit G

Volume: 2

Pages: 164-348

Exhibits: 4-8

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 CAMILLE F. SARROUF

March 24, 2018, 10:11 a.m.-3:10 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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the division of fees?
A. It may not have said anything in 2008.
Q. All right.
THE SPECIAL MASTER: It couldn't have because the Arkansas case hadn't been contemplated even, right?
THE WITNESS: Well, there certainly was a reason for filing joint representation submission at their request. Right? And they knew that sooner or later there was going to be a case.
BY MR. SINNOTT:
Q. Well, sir, that's not what --
A. In any event, the clients were not harmed, and the client says I was not harmed.
Q. You said that earlier. Where does 1.5(e) reference whether the client was hurt or not?
A. Well, what -- it is what the Court in this state has repeatedly said, and that is that the purpose of the statute is to protect the clients. And the client says I have not been harmed. Matter of fact, I think I've been tremendously well represented, and I agree with letting him pay from his fee a portion to someone else.
And that's what happened here. When you

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look at the equities throughout, there's been a tremendous representation. There has been a wonderful result. And the client has no -- has not been harmed in any way. And that's the purpose of the statute.
Q. So if I understand you correctly, your testimony is that whether 1.5(e) was complied with is of no matter; it's of no consequence --
MS. LUKEY: Objection.
Q. -- correct?
MS. LUKEY: Objection.
A. It has some but not to the point where Chargois in any way is -- has in their participation in any way harms the client. There's been no harm to the client.
Q. So if I understand you correctly, so long as the client retroactively says I wasn't harmed --
A. No.
Q. -- not complying with this rule doesn't matter? Is that your testimony?
MS. LUKEY: Objection.
A. No, I'm not saying that. It may matter to some extent.
Q. To some extent?

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A. In the cases -- and you have -- the case that still exists and the case that still repeatedly talks about the purpose of the rule which is the protection of the client, the Saggese versus Kelley case, is --
Q. All right.
A. -- that's what we're primarily interested in.
Q. I know that's what you're interested in, but let me just --
A. No, that's what the Court says it's interested in.
Q. Let me back up just a minute and direct your attention again to the exhibit in front of you, Exhibit 7 and 1.5(e).
Would you agree with me that the client was not told that a division of fees will be made at the time of the monitoring RFQ?
MS. LUKEY: Objection.
A. At what time?
Q. When the proposal was made to Arkansas, the monitoring request for proposal --
MS. LUKEY: Objection.
A. I think there was some evidence that it was

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a fee --
Q. What evidence do you have of that?
A. What?
Q. What evidence do you have of that?
A. There was -- I forget now. I saw something where the discussion was that it's all right to continue your relationship with Chargois. But when we execute our agreement, it can only be with one attorney.
Q. Okay. Once again, where does it say that "a division of fees will be made"?
A. It probably doesn't "a division of fees will be made."
Q. All right.
A. But they knew that Chargois was going to be in the picture.
Q. So you would agree with me that 1.5(e) was not complied with?
MS. LUKEY: Objection.
A. Back in 2008?
Q. Well, assuming that 2008 could be considered relevant to the engagement in the State Street case, and I submit you've already heard questioning -- you've already heard Judge Rosen indicate that in

Exhibit H

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This revised edition replaces the pages of the 2009 edition and all subsequent supplements in their entirety.

Ethical Lawyering in Massachusetts

EDITED BY

James S. Bolan

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NEW ENGLAND
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CHAPTER 1

Sources of Ethical Authority in Massachusetts

Gilda Tuoni Russell, Esq.
Studio City, CA

Scope Note

This chapter provides a historical perspective on the sources for ethical authority in the Commonwealth of Massachusetts. Beginning with the nature and origin of self-regulation within the legal community, the chapter goes on to acquaint the reader with the organization and scope of the Massachusetts Rules of Professional Conduct.

§ 1.1 SELF-REGULATION AND THE ROLE OF THE SUPREME JUDICIAL COURT

The legal profession in the United States is largely self-regulated. *See* C. Wolfram, *Modern Legal Ethics* 20–21 (West 1986). In Massachusetts, the ultimate authority in this self-regulated process is the Supreme Judicial Court. In this role, the court has promulgated rules regulating lawyer admission and conduct and is also the final adjudicator in cases of lawyer misconduct and discipline.

The exercise of the Supreme Judicial Court's regulatory power over the bar is said to be "inherent" and "exclusive." The court itself has described this power:

> It is inherent in the judicial department of government under the Constitution to control the practice of law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust.

Opinion of the Justices, 289 Mass. 607, 612 (1935). Further, the court has stated: "Permission to practise law is within the exclusive cognizance of the judicial department." *Opinion of the Justices*, 289 Mass. at 613.

The history of Supreme Judicial Court power in this area is substantial. More than seventy years ago, the court held that "[t]he determination by the judicial department of the appropriate procedure to be followed in review in proceedings for disbarment or in proceedings for admission to the bar necessarily must be made by the Supreme Judicial Court." *In re Keenan*, 313 Mass. 186, 207 (1943). The court has opined that such determinations "naturally must be made by the court that, under the Constitution, is the 'supreme' court, and that, by a statute of long standing, has general supervisory powers over other courts—so far as that court sees fit to make such determination. G.L. (Ter. Ed.), c. 211, § 3." *In re Keenan*, 313 Mass. at 208 (quoting *In re Keenan*, 310 Mass. 166, 182 (1941)).

Unlike the Supreme Judicial Court's superintendency power, the role of the Massachusetts legislature—the general court—in matters regarding the bar is limited. The court has pronounced as follows:

> Control of membership in the bar of the courts of the Commonwealth, both of admission thereto and removal therefrom, is exclusively in the judicial department of the government of the Commonwealth. Interference therewith by the legislative department would conflict with the provision of art. 30 of the Declaration of Rights that "the legislative department shall never exercise the executive and judicial powers, of either of them."

In re Keenan, 310 Mass. at 171. However, the legislature is empowered to enact statutes that "aid in the performance of" judicial department duties. One such statute was G.L. c. 221, § 37, which conferred jurisdiction for admission to the bar in the Superior Court as well as the Supreme Judicial Court. In *In re Keenan*, the court held that such enactment was not legislative interference with its constitutional power. *In re Keenan*, 310 Mass. at 173. Rather, the court interpreted the statute as "making provision in aid of the judicial department in reaching a proper selection of those qualified for admission as attorneys to practice in the courts." *In re Keenan*, 310 Mass. at 173 (quoting *Opinion of the Justices*, 279 Mass. 607, 610 (1932)). The court held further that it had not, through its rules, specifically excluded the Superior Court from jurisdiction in these matters. *In re Keenan*, 310 Mass. at 182–85.

However, it should be noted that, while G.L. c. 221, §§ 37 and 40 gave the Superior Court concurrent jurisdiction in bar admission and disciplinary matters and have not, as of this date, been explicitly repealed, it appears that the Supreme Judicial Court has now, by its own rules, given itself exclusive jurisdiction in these matters. *See Strigler v. Bd. of Bar Exam'rs*, 448 Mass. 1027 (2007) (finding that the Supreme Judicial Court retains the ultimate authority of an individual to

practice law); 1976 amendment of SJC Rule 3:01, *Opinion of the Justices*, 370 Mass. 895 (1976) (bar admission); 1974 adoption of SJC Rule 4:01, *Opinion of the Justices*, 365 Mass. 681 (1974) (bar discipline). Similarly, while other legislative enactments concern bar admission, discipline, and related matters, *see* G.L. c. 221, §§ 36, 38, 41–52, under the decisional authority discussed above, the Supreme Judicial Court rules that specifically cover the same areas would appear to be controlling.

The Supreme Judicial Court has adopted many such rules that govern attorneys in the Commonwealth. They can be characterized as "substantive" rules, which regulate conduct, and "procedural" rules, which regulate process. The substantive rules are contained within Chapter 3 of the Supreme Judicial Court Rules, entitled "Ethical Requirements and Rules Concerning the Practice of Law." They are as follows:

- Rule 3:01 concerns, among other things, petitions for bar admissions, petitions for admission by motion, qualifications for taking the bar examination, and qualifications for admission.

- Rule 3:02, entitled "Administration of Justice," concerns prohibitions against a disbarred attorney representing a corporation or association and against clerks of court, registers of probate, and the Land Court recorder, assistants, and employees practicing law.

- Rule 3:03 allows supervised senior law student practice on behalf of indigents and/or for the Commonwealth and its subdivisions in certain situations.

- Rule 3:04 allows attorneys from other jurisdictions who are engaged in certain graduate law studies or programs of legal assistance to practice within the context of such law studies or programs.

- Rule 3:05 addresses licensing of foreign legal consultants.

- Rule 3:06 concerns provisions regarding lawyers practicing in professional corporations, limited liability companies, or limited liability partnerships and requirements applicable to such entities.

- Rule 3:07 contains the Massachusetts Rules of Professional Conduct and comments.

- Rule 3:08 (which previously covered the special "Disciplinary Rule Applicable to Practice as a Prosecutor or as a Defense Lawyer") was stricken, effective January 1, 1999.

- Rule 3:09 contains the Code of Judicial Conduct.
- Rule 3:10 concerns the assignment of counsel.
- Rule 3:11 concerns the Committee of Judicial Ethics.
- Rule 3:12 contains the Code of Professional Responsibility for clerks of court.
- Rule 3:13 concerns the Committee on Professional Responsibility for clerks of court.
- Rule 3:14 concerns the Advisory Committee on Ethical Opinions for clerks of court.
- Rule 3:15 concerns the pro hac vice registration fee.
- Rule 3:16 establishes a mandatory one-day course on professionalism for attorneys newly admitted to the bar.

The procedural rules promulgated by the court are found in Chapter 4 of the Supreme Judicial Court Rules, entitled "Bar Discipline and Clients' Security Protection." They are as follows:

- Rule 4:01 concerns bar discipline.
- Rule 4:02 concerns periodic registration of attorneys.
- Rule 4:03 concerns periodic assessment of attorney registration fees.
- Rule 4:04 concerns the Clients' Security Board and Fund.
- Rule 4:05 concerns claims by clients to the Clients' Security Board for reimbursement of losses.
- Rule 4:06 concerns the miscellaneous powers and duties of the Clients' Security Board.
- Rule 4:07 concerns the Lawyers Concerned for Lawyers Fund and Oversight Committee.
- Rule 4:08 concerns the allowance of the Board of Bar Overseers and the Clients' Security Board to request interpretation, advice, and instruction from the Supreme Judicial Court—as well as to make suggestions or proposals to the court—concerning the rules included in Chapter 4.

- Rule 4:09 concerns the court's ability to amend, modify, or repeal Chapter 4 and provide for the dissolution and winding up of the Clients' Security Fund.

The primary focus of this chapter of *Ethical Lawyering in Massachusetts* is Rule 3:07 of the Supreme Judicial Court Rules—the Massachusetts Rules of Professional Conduct and comments ("Rules of Professional Conduct"). The Rules of Professional Conduct were adopted by the Supreme Judicial Court in June 1997, became effective January 1, 1998, and have been amended in part thereafter. They set forth the standards of professional conduct for members of the Massachusetts bar and serve as the basis for professional discipline. In order for readers to more effectively understand the Massachusetts Rules of Professional Conduct, the organizational framework and scope of the rules—as well as a brief history of the predecessor rules that were operative in the Commonwealth for many years and the reasons for the change from them—are discussed below.

§ 1.2 THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT—ORGANIZATION AND SCOPE

The Massachusetts Rules of Professional Conduct finally came into operation in the Commonwealth on January 1, 1998, replacing the Massachusetts Canons of Ethics and Disciplinary Rules, which had been in effect for a quarter of a century. The term "finally" is used because Massachusetts, the forty-fourth state to adopt the Rules of Professional Conduct, did so some fifteen years after the rules' promulgation by the American Bar Association. See § 1.3, below, for a discussion of the history of the Supreme Judicial Court's adoption of the rules.

Recently, the Supreme Judicial Court amended the Rules of Professional Conduct, effective July 1, 2015. As amended, the rules begin with a preamble and scope section designed to provide general orientation to the rules. The preamble outlines the various responsibilities that a lawyer may take on and the functions that a lawyer may perform. Such responsibilities include being a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. A lawyer's functions may include that of advisor, advocate, negotiator, and evaluator. The preamble articulates the lawyer's role in upholding the legal process and conforming the lawyer's behavior to the requirements of the law. The lawyer's duties as a public citizen to seek improvement of the law, the administration of justice, and the quality of legal services are also set forth. The preamble further attempts to acknowledge lawyers' conflicting responsibilities and the prescription by the Rules of Professional Conduct of terms for resolving such conflicts. The preamble also notes the

Exhibit I

Attorney fee rules undergo revisions in Massachusetts

Massachusetts Lawyers Weekly

January 12, 2011 Wednesday

Section: NEWS

Length: 1856 words

Byline: Christina Pazzanese

Body

The Supreme Judicial Court has approved sweeping and expansive changes to the way attorneys disclose and collect client fees and expenses, a move that has garnered strong support from bar leaders.

Under the revisions to Rule 1.5 of the Rules of Professional Conduct, which take effect March 15, lawyers will need to be far more specific than before about the fees and expenses they charge clients and how those charges are calculated.

The amended rule requires lawyers to get a client's consent about all fee-related issues before or at the very outset of the attorney-client relationship, not as a case unfolds or after a client terminates the engagement.

Lawyers in contingent-fee cases, whom many of the changes will most directly affect, must also now secure their clients' written consent about who will pay for accrued legal fees and expenses in the event they are discharged and succeeding counsel is hired before a case concludes.

Additionally, the SJC has established two new model fee-agreement forms for lawyers to use with clients, though the court will still allow attorneys to draft their own agreements provided they adhere to the rule and explain any material differences to clients.

Bar leaders say the new amendments represent a reasonable compromise in several areas that had sparked heated debate in the five years since the SJC called for a formal revision.

Ellen J. Messing, a Boston employment attorney who served on the Boston Bar Association subcommittee that reviewed previous draft changes to the rule, said she is pleased the court took many of the BBA's concerns into account.

"They were going to do a bunch of changes that would have been a disaster for solo practitioners and small firms," Messing said of a draft issued last spring, which included only one model form agreement that did not permit lawyers to require that clients pay the fees and expenses of prior counsel involved in a case.

"It does not make a lawyer unethical for making a reasonable choice that arises every day. That is really exciting," she said.

Jeffrey N. Catalano, vice president of the Massachusetts Bar Association, worked on the MBA subcommittee that evaluated the draft changes. He said the revisions are fair for both clients and lawyers and represent "a big step in the right direction. "

Catalano, a personal injury attorney at Todd & Weld in Boston, said the SJC's decision to give lawyers two model agreement options, as well as the freedom to use their own form provided it complies with the rule, makes for better transparency, helps reduce potential friction should things sour, and goes a long way to ensure the attorney-client relationship "begins on fair footing. "

"We don't want attorneys to have an unfair advantage, nor do we want the client to have an unfair advantage," he said.

Requiring clients and lawyers to sit down at the outset of a case and clarify how fees and costs will be paid during and after the relationship ends does put new burdens on lawyers, Catalano said, but it is "nothing insurmountable or unachievable. "

Boston trial attorney Elizabeth N. Mulvey, a member of the SJC's Standing Advisory Committee on Rules for Professional Conduct who pushed for greater clarity for clients on the model agreement, said though the panel "struggled" to find common ground on the issue, she is satisfied with the final result.

"It protects clients and lawyers," she said. "Lawyers are still free to propose fees, and clients are still entitled to know what they're agreeing to. "

Catching up to caselaw

Bar Counsel Constance V. Vecchione said the standing advisory committee initiated the rule changes in 2005 at the court's request following its ruling in Malonis v. Harrington in 2004. That case was followed by three others: Saggese v. Kelley in 2005, and Liss v. Studeny and In the Matter of the Discipline of an Attorney in 2008.

The amendments, which are now consistent with the American Bar Association rules, are simply "catching up" Rule 1.5 to the existing caselaw, said Vecchione, who serves on the committee.

In Malonis, the SJC had ruled that a contingency-fee attorney who had been discharged was entitled to be paid under a quantum meruit theory and that his fee ought to come from the successor counsel's contingent fee, not the plaintiff's recovery.

Recognizing the importance to lawyers of the broader question about who should be held responsible for legal fees under similar circumstances, the court asked the committee to study the matter and recommend whether rule changes ought to be instituted.

John L. Whitlock, the committee's chairman, said key issues surrounding fees and fee disclosures that were raised and decided in the four cases were not, until now, reflected in Massachusetts' professional conduct rules.

"Before these rules were adopted, there were not such clear guidelines as to what had to be done," said Whitlock, a lawyer at Edwards, Angell, Palmer & Dodge in Boston.

Messing said the rule changes will require the bar to do some broad educational outreach, particularly to ensure lawyers are not using improperly worded fee agreements.

'Very major undertaking'

The five-year effort to produce the rule changes was the committee's longest-running project and reflected a "very major undertaking that was complex and took much discussion," Whitlock said. "And as with many compromises, no one was entirely happy. "

At times during the drafting process, he said, various bar association members as well as the committee itself were sharply divided over the language to include in the model form fee agreement. Some, like Mulvey, argued that the agreement did not do enough to protect clients, while others railed that it went too far in restricting how lawyers conduct business, Whitlock said.

The bar associations voiced opposition to earlier proposed changes

to Rule 1.5 (c) concerning the payment of fees to prior counsel, calling them draconian and arbitrarily unfair to successor counsel.

In formal comments made by the BBA to the advisory committee in January 2009, then-President Kathy B. Weinman expressed concern over a default provision that, in the absence of an allocation clause in fee agreements, successor counsel's entire fee and costs could be at risk in the event of a fee dispute with predecessor counsel.

Weinman called the rule "far too harsh and arbitrarily unfair," especially given that no similar penalty for nondisclosure is imposed on predecessor counsel. The BBA recommended making nondisclosure a "significant factor" rather than a default measure in determining how such fees get paid.

Even the mere possibility that successor counsel could be responsible for predecessor counsel's fees, Weinman wrote, would unfairly require the second lawyer to "bear the entire burden of ensuring that a client is fully informed" and would "inevitably hinder" the ability of the client to engage successor counsel.

Writing on behalf of the MBA, general counsel Martin W. Healy commented in January 2009 that there are many legitimate reasons why successor counsel might omit informing a client of his obligation to pay predecessor counsel. Those reasons include being unaware of prior counsel, being told that there would be no claim by prior counsel, or simply leaving it out of the written document because the client and attorney had reached a verbal agreement.

Both the BBA and MBA had criticized the draft model fee agreement as insufficient to address the rich variety and complexity of today's contingency-fee work.

New changes to fee disclosure and collection rule

Under new revisions to Rule 1.5 of the Rules of Professional Conduct, which go into effect March 15, lawyers must now delineate at the onset of the attorney-client relationship how fees and expenses will be charged, how such fees and expenses will be calculated, and whether the client or successor counsel must pay should the lawyer be terminated before a case ends.

While the rule applies to all attorneys in every engagement, it is likely to affect lawyers in contingency-fee cases most acutely. Among the key changes:

* Rule 1.5(a), which prohibits all lawyers from charging an "illegal or clearly excessive fee," has now been expanded to prohibit "collecting an unreasonable amount for expenses. "

* Rule 1.5(b) now provides that in addition to the rate or basis of fees, a lawyer must communicate the scope of representation and the basis or rate of expenses to the client before or within a reasonable time after engagement. For a lawyer who has "regularly represented" a client, the lawyer must now disclose to the client any change in the basis or rate of fee or expenses.

* Rule 1.5(c) requires that at any time prior to the occurrence of contingency, if a lawyer is terminated or if the client requests, a lawyer must provide a written itemization of services and expenses within 20 days unless the lawyer informs the client in writing that he does not intend to make a claim for fees or expenses if terminated.

* Rule 1.5(c)(4) requires that a contingent-fee agreement contain language informing a client at the onset of representation if there is a possibility that a legal fee may be owed under other circumstances or on another basis.

* Rule 1.5(c)(6) requires such agreements to inform a client of the method by which expenses will be calculated and paid or reimbursed.

Section (c) includes the following two new subparagraphs:

* In Rule 1.5(c)(7), the contingent-fee agreement must state the basis on which fees and expenses will be claimed and the method by which they will be calculated if the lawyer intends to pursue a claim against the client for expenses or fees if the relationship is terminated before the conclusion of a contingent-fee case.

* In Rule 1.5(c)(8), if a lawyer is successor to counsel whose representation was terminated before the case concludes, the fee agreement must state whether the client or successor counsel is liable for any fees or expenses owed to predecessor counsel.

* Rule 1.5(e), regarding the division of fees between lawyers in different firms, now explicitly includes referral fees and requires the client to be notified and to consent in writing to the fee division at or before the client enters into a fee agreement.

* Rule 1.5(f) now contains two form fee agreements. Form A may be used without any special instructions or explanation to the client. Form B contains various options regarding out-of-pocket costs and expenses and former counsel's fees and expenses that require a lawyer to show and explain alternatives to the client and to get consent in writing as to the option selected. Both forms demand that a lawyer who intends to seek fees and expenses if the relationship is terminated before the case concludes to include a provision noting that possibility and to explain how that amount depends on the services performed, along with the timing and circumstances of the termination.

* Rule 1.5(f)(3) allows a lawyer to use an alternative form agreement provided it is consistent with Rule 1.5. Forms that differ dramatically from the approved Forms A and B must be explained to the client, and a lawyer must obtain the client's consent in writing.

Load-Date: January 19, 2011

End of Document

Exhibit J

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the twenty-second day of December, in the year two thousand and ten:

present,

HON. RODERICK L. IRELAND	)	
	)	
HON. FRANCIS X. SPINA	)	Justices
	)	
HON. JUDITH A. COWIN	)	
	)	
HON. ROBERT J. CORDY	)	
	)	
HON. MARGOT BOTSFORD	)	
	)	
HON. RALPH D. GANTS	)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby amended as follows:

Rule 3:07:	By striking out Mass. R. Prof. C. 1.5 and inserting in lieu thereof the new Rule 1.5 attached hereto.

The amendment accomplished by this order shall take effect on March 15 , 2011.

RODERICK L. IRELAND) Chief Justice
)
)
FRANCIS X. SPINA)
). Justices
)
JUDITH A. COWIN)
)
)
ROBERT J. CORDY)
)
)
MARGOT BOTSFORD)
)
)
RALPH D. GANTS)

MASS.R. PROF. C. 1.5

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;

(2) the name and address of the lawyer or lawyers to be retained;

(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;

(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;

(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;

(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;

(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) (1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(1) – (3) shall not apply when the client is an organization, including a non-profit or governmental entity.

CONTINGENT FEE AGREEMENT, FORM A

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)
retains the Lawyer_____
(Name) (Street & Number) (City or Town)
to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures	Signatures of client and lawyer
(To client) _____	_____ (Signature of client)
(To lawyer) _____	_____ (Signature of lawyer)

CONTINGENT FEE AGREEMENT, FORM B

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)
retains the Lawyer_____
(Name) (Street & Number) (City or Town)
to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

(i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

(ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a

descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures	Signatures of client and lawyer
(To client) _____	_____ (Signature of client)
(To lawyer) _____	_____ (Signature of lawyer)

Comment

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of the rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] Rule 1.5(b) states, as the ABA Model Rule does, that the basis or rate of a fee shall be communicated "preferably in writing." Appropriate caution and ease of proof of compliance with Rule 1.5(b) indicate that the presentation of a fee agreement to the client in writing is desirable.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] A lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B] The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client. Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C] When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D] A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model forms of contingent fee agreement specified in Rule 1.5(f)(1) and (2). However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[7A] Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. The Massachusetts rule does not require disclosure of the fee

division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f)(3), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the forms of contingent fee agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent, confirmed in writing.

Form of Fee Agreement

[10] Paragraph (f) provides model forms of contingent fee agreements and identifies explanations that a lawyer must provide to a client, except where the client is an organization, including a non-profit or governmental entity.

[11] Paragraphs (f)(1) and (f)(2) provide two forms of contingent fee agreement that may be used. Because paragraphs (3) and (7) of Form A do not contain alternative provisions, a lawyer who uses Form A does not need to provide any special explanation to the client. Paragraphs (2), (3), and (7) of Form B differ from Form A. While in most contingency cases, the contingency upon which compensation will be paid is recovery of damages, paragraph (2) of Form B permits lawyers and clients to agree to other lawful contingencies. A lawyer is not required to provide any special explanation when using paragraph (2). Paragraphs (3) and (7) of Form B allow options for the payment of costs and expenses and the payment of reasonable attorney's fees and expenses to former counsel. To ensure that a client gives informed consent to the agreed-upon option, a lawyer who uses Form B must retain in the form both options contained in paragraphs (3) and, where applicable, paragraph (7); show and explain these options to the client; and obtain the client's informed consent confirmed in writing to the selected option.

[12] Paragraph (f)(3) permits the lawyer and client to agree to modifications to Forms A and B, including modifications which are more favorable to the lawyer, to the extent permitted by this rule. However, a lawyer using a modified form of

fee agreement must explain to the client any provisions that materially differ from or add to those contained in Forms A and B, and obtain the client's informed written consent. For purposes of this rule, an agreement that does not contain option (i) in paragraph (3) and, where applicable, option (i) in paragraph (7) of Form B is materially different, and a lawyer must explain those different or added provisions to the client, and obtain the client's informed written consent.

[13] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreements contained in Rule 1.5(f) state the default rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

Exhibit K

Volume: 2

Pages: 374-456

Exhibits: None

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 PROFESSOR STEPHEN GILLERS

March 21, 2018, 1:52-3:32 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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applies to referral fees as well as other fees; is that right?
A. Applies to fee -- in my opinion, 1.5(a) applies to fees earned as a result of a referral.
Q. Okay. Now we have discussed at some length that 1.5(e), the rule governing the division of fees, in Massachusetts permits a referral fee where the attorney does not work and assumes no liability. Correct?
A. Correct.
Q. The factors under 1.5(a) are inconsistent with that provision in 1.5(e), aren't they?
In other words, in 1.5(a) factor number 1 is the time and labor required whereas under 1.5(e) the time and labor required is irrelevant, right?
A. Yes, but it doesn't mean a judge can't consider the absence of time and labor, even if allowed under 1.5(e) in evaluating 1.5(a).
Q. Sir, can you point us to -- well, first let me ask you this: Why isn't that opinion included in your report?
A. Because I wrote that the judge has the authority to reject any private fee agreement

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without any finding of clearly excessiveness.
So I thought that power, which the judge has, superseded or was greater than the power of a judge in reviewing the fee under 1.5(a). So I thought it would be redundant given that the judge has the power anyway without going through the laundry list of considerations in 1.5(a).
Q. Am I correct that in saying that your report did not include reference to the judge doing an analysis under 1.5(a) to determine whether a referral fee is clearly excessive?
A. You are correct.
Q. So that is a new element of your opinion which you happen to think was subsumed within the broader issue of the judge's powers?
A. I didn't happen to think anything -- well, what is the antecedent of that?
Q. Let me ask it to you this way: You understand that each of the parties has now retained an academic expert to rebut your opinions?
A. Yes.
Q. If you did not state in the report that one of your opinions is that a referral fee can be assessed under 1.5(a) including the time and labor

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standard of 1.5(a) for purposes of determining if it's clearly excessive --
PHONE LINE CONFERENCE: The following participant has entered the conference.
A. I did not.
Q. -- how would we then -- how would our rebuttal experts be able to address an issue that you didn't put in your report?
A. You must remember that I was asked this by Judge Rosen. I didn't put it in my report. I didn't think it was important to the judge's ultimate authority under federal common law and equity jurisprudence.
Judge Rosen thought it was important to elaborate this issue. So if the suggestion is I'm hiding it from your ethics experts, I -- I did not know he was going to ask me those questions yesterday.
Q. Actually, the suggestion was that it didn't occur to you until the judge asked you that 1.5(a) was another basis under which a referral fee might be rejected; is that incorrect?
A. I stand on my answer that I didn't think it was that important given the greater power under

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federal common law.
Q. Is there any authority in Massachusetts for the proposition that a referral fee can be deemed excessive if it is disproportionate to the time and labor expended?
A. I don't know. I haven't researched this question. The issue came up yesterday in questioning.
Q. Let me phrase it this way: Are you aware of any authority in Massachusetts, be it a case or an opinion of the Board of Bar Overseers or an advisory opinion of one of the two bar association ethics committees, that says that a referral fee can be deemed clearly excessive under 1.5(a) on the basis of the time and labor expended?
A. I am not.
Q. Okay. Do you believe that it is a relevant consideration as to whether a referral fee is clearly excessive if the percentage -- if the referral fee is stated as a percentage and the percentage is in line with standard practices in the venue?
A. I think it's a relevant consideration, yes.
Q. You think it is a relevant consideration?

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A. There is a constitutional notice requirement for discipline of course. And so a lawyer can't be disciplined under a rule that didn't exist at the time the lawyer's conduct was committed.
Q. Okay. Now let me address the same question in the context of judicial sanctions, sir.
Is it the case that in Massachusetts state and federal courts as a matter of practice sanctions will not be imposed under a rule of professional responsibility until such time as the rule has been amended to reflect that the conduct is not proper?
A. If the basis for the sanction is the rule, and the rule is in existence at the time of the conduct, then sanctions should not be imposed.
Q. Now let us turn very briefly to Saggese, sir.
A. Yes.
Q. In Saggese when the Court spoke of future conduct and future agreements, that language was actually in dictum, wasn't it?
A. Oh, no, I don't think so. This is -- I'm not sure that this is for me to address.
But when the Court says from here on in

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this is the way the rule is going to be read, a lawyer would be very foolish to say that's great, that's what you think, but it's not -- it's not a decision that's binding on me.
Q. But again, sir, if -- there's a difference between enforceability on the one hand and discipline or sanctions on the other, is there not?
A. There's a difference between enforceability and?
Q. Of an agreement to fee divide.
A. There's two different concepts.
Q. So are you saying the supreme judicial court which in that case held that the fee division would be enforced in referencing future agreements was overriding the normal rule that you cannot discipline a counsel under a rule until the text has been changed?
A. That's not a correct summation of my testimony. It was not overriding any normal rule. It was editing, if you will, or altering in modest ways the language of its own rule. May I finish?
Q. I'm sorry, I thought you had. Please go ahead.
A. And -- well, I will stop there.

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Q. If the decision alone constituted merely an explanation of an existing rule, it would not have been necessary to amend Rule 1.5(e) later in 2011, would it?
A. Um, I have to preface this by saying I wonder if this is an area in which I'm presented as an expert. I mean this is the administration of justice through the Massachusetts Supreme Judicial Court and its rule-making decisions. So I'm not sure that I'm the one to answer that question.
I understand what you're getting at, and it's an interesting point. But whether or not it's dicta or whether or not Saggese effectively changed the obligations of lawyers going forward from the date of Saggese or did not or did but didn't for purposes of discipline because the Saggese gloss could not be the basis for discipline which is what I think you may be suggesting --
Q. Yes, sir.
A. -- until March 15 when that gloss was incorporated into the language of Rule 1.5 six years after the Saggese decision.
So in the interim you're suggesting -- and it's an interesting question -- whether the

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original Rule 1.5 that was adjudicated in Saggese before the gloss continued to be the rule governing Massachusetts lawyers notwithstanding Saggese until March 15, 2011.
That's an interesting question. I'm not sure I'm the one to be asked that question.
Q. Do you feel that's beyond your expertise; that is, whether sanctions can be -- excuse me -- whether discipline can be imposed on the basis of Saggese before the rule was amended?
A. I think that's a very -- yes, I think that's a question about the intentionality of the Massachusetts Supreme Judicial Court. If I were advising a lawyer in 2006 who came to me with the original text of the rule -- this is within my expertise I think -- and the decision in Saggese and said do I have to follow what Saggese said the rule will from here on in be, or can I safely stay with the language of the pre-Saggese rule, my advice would be, to the extent it's useful to your question, you'd be foolish not to live by the Saggese gloss notwithstanding that it has taken some and may take a lot more time to amend the language of the rule.

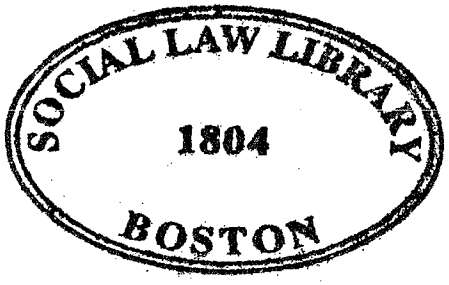
Exhibit L

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 5
Chapters 15 to 17

William B. Rubenstein
Sidley Austin Professor of Law
Harvard Law School



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damages."[3]

The normal practice is that class counsel files a motion for the award of attorney's fees in conjunction with moving for final approval of a proposed class action settlement.[4] That motion will often also encompass requests for costs and for incentive awards for the class representatives. If multiple counsel expect to file fee motions in the same case, they are encouraged to resolve disputes and coordinate the contents of their filings before submission.[5]

The succeeding sections discuss the required contents of a fee motion,[6] as well as the disclosure of fee-related agreements in the fee filings,[7] the timing of the filing,[8] and the notice that must accompany it.[9]

§ 15:11 Fee procedures at a class action's conclusion—Content requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule 54(d)(2), as applicable.[1] Both Rule 23[2] and Rule 54[3] require a fee claim to be made by motion.[4]

Rule 54(d)(2)(B) sets forth the required content of a fee

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[3]Fed. R. Civ. P. 54(d)(2)(A).

[4]On the settlement approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:10 to 13:61 (5th ed.).

[5]Manual for Complex Litigation, Fourth, § 14.221 ("Where multiple counsel in the case expect to submit separate fee motions, consider requiring them to coordinate their submissions, avoid duplication, and perhaps attempt to resolve disputes among themselves before submission.").

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:11 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:12 (5th ed.).

[8]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:13 (5th ed.).

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:14 (5th ed.).

[Section 15:11]

[1]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets.").

[2]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2) . . .").

[3]Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.").

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:10 (5th ed.).

motion, stating that it must:

- specify the judgment and the statute, rule, or other grounds entitling the movant to the award;[5]
- state the amount sought or provide a fair estimate of it;[6] and
- disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.[7]

The Rule's requirements are already fairly limited[8] and courts have used their discretion to excuse failures to meet even those limited requirements in certain circumstances.[9]

The first requirement—that the motion identify the legal basis for a fee[10]—is straightforward and non-controversial.

The second requirement—that the motion identify the amount sought[11]—raises a question of what level of detail is required in the fee motion. The best practice is for counsel to submit their time records and hourly rates—that is, their lodestar information[12]—via an affidavit accompanying the fee motion. Such documentation is required to be submitted at some point for any lodestar-based fee award and is generally helpful to a court in assessing a percentage-based fee award as it enables the court to undertake a lodestar cross-

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[5]Fed. R. Civ. P. 54(d)(2)(B)(ii).

[6]Fed. R. Civ. P. 54(d)(2)(B)(iii).

[7]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[8]Wright and Miller's Federal Practice and Procedure, Civil § 2680 ("Because of the early filing deadline for fees, the rule does not require that the motion be fully supported at the time of filing by all of the evidentiary material bearing on fees.").

[9]Morris v. Arizona Beverage Co., L.L.C., 2005 WL 5544961, *9 (S.D. Fla. 2005) (excusing noncompliance with a local rule analogous to Rule 54 because, *inter alia*, the plaintiff did not allege that the defendant's noncompliance prejudiced him in any way).

DeShiro v. Branch, 183 F.R.D. 281, 285, 76 Empl. Prac. Dec. (CCH) P 46028 (M.D. Fla. 1998) (excusing failure to state or estimate the amount of fee being sought in the motion because the moving party alerted its opponents to a rough estimate in another piece of correspondence).

[10]Fed. R. Civ. P. 54(d)(2)(B)(ii).

[11]Fed. R. Civ. P. 54(d)(2)(B)(iii).

[12]For a discussion of the lodestar concept, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:38 (5th ed.).

check.[13] The *Manual for Complex Litigation* states that if counsel's time and expense records are not submitted with the motion, they should be submitted "[i]n advance of any fee-award hearing"[14] and "in manageable and comprehensible form."[15] As class members have a right to review and object to a fee petition, this information is critical in that analysis and ought therefore to be disclosed in conjunction with the filing of the motion and dissemination of fee notice to the class.

The third prong of Rule 54(d)(2)'s motion requirement—concerning disclosure of fee agreements[16]—is discretionary with the court. It raises a host of particular issues in the class action context, which are the subject of the succeeding section.[17]

§ 15:12 Fee procedures at a class action's conclusion—Disclosure of fee-related agreements requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule 54(d)(2), as applicable.[1] Both Rule 23[2] and Rule 54[3] require a fee claim to be made by motion. Rule 54(d)(2)(B) sets forth the required content of a fee motion,[4] including the requirement that the motion must "disclose, if the court so orders, the terms of any agreement about fees for the services for

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[13]For a discussion of the lodestar cross-check concept, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:84 (5th ed.).

[14]Manual for Complex Litigation, Fourth, § 14.223.

[15]Manual for Complex Litigation, Fourth, § 14.223.

[16]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[17]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:12 (5th ed.).

[Section 15:12]

[1]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets.").

[2]Fed. R. Civ. P. 23(h)(1) ("[A] claim for an award must be made by motion under Rule 54(d)(2) . . .").

[3]Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.").

[4]For an overview of the Rule's requirements, *see* Rubenstein 5 **Newberg on Class Actions** § 15:11 (5th ed.).

which the claim is made."[5] Relatedly, Rule 23(e), governing class action settlement approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."[6]

The parties to the suit and their counsel may have a range of private agreements concerning fees. Such agreements might include:

- a retainer agreement between the class representatives and class counsel;
- a retainer agreement between individual class members and their counsel, including objectors and objectors' counsel;
- an agreement between class counsel and the defendant—often embedded in the settlement agreement—whereby the defendant agrees to pay, or not to contest, a certain fee request by class counsel;[7]
- agreements among class counsel about the allocation of fees; and
- agreements between class counsel and non-class counsel about the allocation of fees, such as payment to counsel who helped fund the case but may not have played a material role in litigating it.

While Rule 54(d)(2)(B)(iv) makes disclosure of such agreements dependent on a judicial order, there are at least two reasons that courts should regularly order disclosure. *First*, given that the court is acting as a fiduciary for absent class members in overseeing the settlement approval and fee process,[8] there is a strong argument that requiring transparency as to the fees is in the class's interest and hence a court

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[5]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[6]Fed. R. Civ. P. 23(e)(3).

[7]This is referred to as a "clear sailing agreement." For a discussion, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:9 (5th ed.).

[8]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 228, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008) ("The district court's close scrutiny of fee awards serves to 'protect the nonparty members of the class from unjust or unfair settlements affecting their rights as well as to minimize conflicts that may arise between the attorney and the class, between the named plaintiffs and the absentees, and between various subclasses.' The court's review also 'guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class.' " (quoting Strong v. BellSouth

should so order their disclosure.[9] The Fifth Circuit has put the argument in these terms, writing in a case concerning the allocation of fees among counsel:

> On a broad public level, fee disputes, like other litigation with millions at stake, ought to be litigated openly. Attorneys' fees, after all, are not state secrets that will jeopardize national security if they are released to the public . . . From the perspective of class welfare, publicizing the process leading to attorneys' fee allocation may discourage favoritism and unsavory dealings among attorneys even as it enables the court better to conduct oversight of the fees. If the attorneys are inclined to squabble over the generous fee award, they are well positioned to comment—publicly—on each other's relative contribution to the litigation.[10]

Some courts may require disclosure of fee agreements by an initial case management order; others may do so at the conclusion of the case.

Second, in evaluating the merits of the fee petition, courts have "given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion."[11] As the Advisory Committee that adopted Rule 23's fee provision states, "[t]he agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. 'Side agreements' regarding fees provide at least perspective pertinent to an appropriate fee award."[12] Moreover, the Committee noted that "[i]n some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with

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Telecommunications, Inc., 137 F.3d 844, 849, 1998-1 Trade Cas. (CCH) ¶ 72098, 40 Fed. R. Serv. 3d 462 (5th Cir. 1998))).

For a discussion of this fiduciary duty, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:40 (5th ed.).

[9]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 229, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008) (concluding that a "lack of transparency [in fee allocation process] supports a perception that many of these attorneys were more interested in accommodating themselves than the people they represent").

[10]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 230, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008).

[11]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

[12]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

th[e] goals [of ensuring an overall fee that is fair for counsel and equitable within the class], and the court might determine that adjustments in the class fee award were necessary as a result."[13] These passages suggest the relevance of fee agreements, another factor suggesting that courts should routinely order their disclosure.

Finally, as noted above, in addition to Rule 54's disclosure requirements, Rule 23(e), governing class action *settlement*—not *fee*—approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."[14] This generally references the settlement agreement itself, but, given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself—such as any agreements about fees—may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests.[15] There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. For example, if one set of counsel's fee allocation was capped at a certain amount, that counsel would have less interest in pushing further on behalf of the class once her cap was met. Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.

§ 15:13 Fee procedures at a class action's conclusion—Timing requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule

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[13]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

[14]Fed. R. Civ. P. 23(e)(3).

[15]Hartless v. Clorox Co., 273 F.R.D. 630, 646 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) ("The allocation of . . . fees amongst class counsel does not affect the monetary benefit to class members.").

Exhibit M

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TITLE VII. JUDGMENT

CHAPTER 54. JUDGMENT; COSTS

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Historical Appendix

The district court may suspend the finality of the merits judgment only prior to the filing of an effective notice of appeal.[10] If the fee opponent files an effective notice of appeal before the filing of the fee motion, the court is no longer in a position to suspend the finality of the merits judgment (*see generally* Ch. 58, *Entering Judgment*).

§ 54.154 Fee Motion Must State Basis for Fee Award and Estimate Amount Sought

As to the content of a motion for fees, Rule 54(d)(2)(B) is not demanding. The motion must:

- Specify the judgment entitling the movant to fees;[1]
- Specify the grounds for the fee award, i.e., identify the statutory,[2] equitable, or other basis for the award; and
- State or estimate the amount of the fee sought.[3]

The statute authorizing fees may impose additional requirements for the motion. For example, an applicant for a fee award against the federal government under the Equal Access to Justice Act (EAJA) must submit an application that (1) shows the applicant was the prevailing party, (2) shows the applicant is eligible to receive an award of fees, (3) shows the amount sought, and (4) alleges that the position of government in the case was not substantially justified (*see* § 54.172[1][b]).[4]

A fee movant need not, and indeed should not, submit copious evidentiary materials designed to prove the right to a fee or the amount of the fee. Those evidentiary materials should be submitted only as directed by the court (*see* § 54.155).

If the court so directs, the fee motion must also disclose the terms of any fee agreement with respect to the services implicated by the motion.[5] This authorization is broad enough to include not only the fee agreement between the fee movant and counsel, but also agreements between counsel splitting a fee to be awarded, or between adversaries settling a dispute when the dispute requires court approval, such as a class action suit or shareholder derivative action.[6] The compelled disclosure of such fee

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plaintiff's requests for prejudgment interest and for refund of payments made to defendant extends time to appeal).

[10] Fed. R. Civ. P. 58.

[1] Fed. R. Civ. P. 54(d)(2)(B)(ii).

[2] Fed. R. Civ. P. 54(d)(2)(B)(ii).

[3] Fed. R. Civ. P. 54(d)(2)(B)(iii).

[4] **Requirements for fee application under EAJA.** 28 U.S.C. § 2412(d)(1)(B); *see* Scarborough v. Principi, 319 F.3d 1346, 1348–1355 (Fed. Cir. 2003) (if fee applicant does not supply all required elements prior to expiration of EAJA's 30-day application deadline, trial court will lack jurisdiction to award fees under EAJA).

[5] Fed. R. Civ. P. 54(d)(2)(B)(iv). Pierce v. Barnhart, 440 F.3d 657, 664–665 (5th Cir. 2006) (motion for attorney's fees need not include terms of applicable fee agreement unless directed by court or required by local court rules).

[6] *See* Committee Note of 1993 to Amendment to Rule 54 (reproduced verbatim at § 54App.06[2]).

Exhibit N

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

In Re: Heartland Payment Systems, Inc. Customer Data Security Breach Litigation	§	Civil Action No. 4:09-MD-2046
This filing relates to:	§	
CONSUMER TRACK ACTIONS	§	

SETTLEMENT AGREEMENT

This Settlement Agreement, dated as of December 18, 2009, is made and entered into by and among the following Settling Parties (as defined below) to the above-captioned consolidated action: (i) Julie Barrett, Mark Hilliard, Derek Hoven, Talal Kaissi, Loretta A. Sansom, Scott Swenka, and Phillip Brown ("Representative Consumer Plaintiffs"), individually and on behalf of the Settlement Class (as defined below), by and through Ben Barnow, Barnow and Associates, P.C.; Lance A. Harke, Harke & Clasby LLP; and Burton H. Finkelstein, Finkelstein Thompson LLP (together, "Co-Lead Settlement Class Counsel"); and (ii) Heartland Payment Systems, Inc. ("Heartland"), by and through its counsel of record, Harvey J. Wolkoff and Mark P. Szpak, Ropes & Gray LLP. The Settlement Agreement is intended by the Settling Parties fully, finally, and forever to resolve, discharge, and settle the Released Claims (as defined below), upon and subject to the terms and conditions hereof.

I. THE LITIGATION

On January 20, 2009, Heartland issued a press release, stating that its processing system had incurred an unauthorized intrusion sometime in 2008 (the "Heartland Intrusion"), and that names, credit/debit card numbers, expiration dates, and other information on certain payment cards processed through Heartland ("Personal Financial Information") appeared to have been accessed as a result of the unauthorized intrusion. According to Heartland, its internal investigation revealed that

the hacker(s) had hidden malicious software in its payment processing system that allowed access to this sensitive consumer data.

The first consumer class action complaint in the nation related to the Heartland Intrusion was filed on January 23, 2009, on behalf of a putative nationwide class of consumers whose Personal Financial Information was alleged to have been negligently, willfully, and/or recklessly allowed to be stolen from Heartland.[1] A number of other consumer class action lawsuits were filed shortly thereafter.[2] The lawsuits collectively alleged, *inter alia*, that Heartland's failure to adequately protect consumers' Personal Financial Information violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.* ("FCRA"), was negligent, constituted a breach of express and implied contract, and violated various states' data breach notification statutes and consumer fraud and deceptive and unfair trade practices acts. The lawsuits sought statutory damages, compensatory damages, and injunctive relief stemming from the Heartland Intrusion.

On August 17, 2009, several individuals (the "Hackers") were indicted for hacking into the computer systems of various corporations, including Heartland. According to the Indictment, beginning on or about December 26, 2007, Heartland was the victim of an attack by the Hackers on its corporate computer network that resulted in malware being hidden in its payment processing

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[1] *Sansom, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv335 (D.N.J.).

[2] *Brown, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv86 (M.D. Ala.); *Swenka v. Heartland Payment Systems, Inc.*, No. 2:09cv179 (D. Ariz.); *Brown, et al. v. Heartland Payment Systems, Inc.* No. 4:09cv384 (E.D. Ark.); *Hilliard v. Heartland Payment Systems, Inc.*, No. 1:09cv219 (E.D. Cal.); *Mata v. Heartland Payment Systems, Inc.*, No. 3:09cv376 (S.D. Cal.); *Read v. Heartland Payment Systems, Inc.*, No. 3:09cv35 (N.D. Fla.); *Balloveras v. Heartland Payment Systems, Inc.*, No. 1:09cv2032 (S.D. Fla.); *Leavell v. Heartland Payment Systems, Inc.*, No. 3:09cv270 (S.D. Ill.); *Barrett, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv2053 (D. Kan.); *McLaughlin v. Heartland Payment Systems, Inc.*, No. 6:09cv3069 (W.D. Mo.); *Merino v. Heartland Payment Systems, Inc.*, No. 3:09cv439 (D.N.J.); *Kaissi v. Heartland Payment Systems, Inc.*, No. 3:09cv540 (D.N.J.); *Rose v. Heartland Payment Systems, Inc.*, No. 3:09cv917 (D.N.J.); *McGinty, et al. v. Heartland Payment Systems, Inc.*, No. 1:09cv244 (N.D. Ohio); *Watson v. Heartland Payment Systems, Inc.*, No. 4:09cv325 (S.D. Tex.); *Anderson, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv113 (E.D. Wis.).

system, allegedly resulting in the theft of approximately 130 million credit and debit card numbers and corresponding personal information.

Pursuant to the order of the Judicial Panel on Multidistrict Litigation ("JPML") dated June 23, 2009, the JPML transferred all related actions to the United States District Court for the Southern District of Texas ("the Court"). The actions were divided into a "consumer track," consisting of the actions asserting putative class claims on behalf of consumers, and a "financial institution track," consisting of the actions asserting putative class claims on behalf of financial institutions.[3]

Pursuant to the terms set out below, this Settlement Agreement resolves all actions and proceedings asserted or that could have been asserted against Heartland in relation to the Heartland Intrusion by and on behalf of Representative Consumer Plaintiffs and Settlement Class Members (as defined below) in the United States (including the District of Columbia), and any other such actions by and on behalf of putative classes of consumers originating or that may originate in jurisdictions in the United States (including the District of Columbia) against Heartland related to the Heartland Intrusion (collectively, "the Litigation").

II. CLAIMS OF THE REPRESENTATIVE CONSUMER PLAINTIFFS AND BENEFITS OF SETTLEMENT

Representative Consumer Plaintiffs believe that the claims asserted in the Litigation, as set forth in the various complaints, have merit. Representative Consumer Plaintiffs and Co-Lead

[3] The actions asserting putative class claims on behalf of financial institutions are as follows: *PBC Credit Union, et al. v. Heartland Payment Systems, Inc.*, No. 9:09cv80481 (S.D. Fla.); *Lone Summit Bank v. Heartland Payment Systems, Inc.*, No. 3:09cv581 (D.N.J.); *Tricentury Bank, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv697 (D.N.J.); *Amalgamated Bank, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv776 (D.N.J.); *Lone Star National Bank NA v. Heartland Payment Systems, Inc.*, No. 7:09cv64 (S.D. Tex.); *First Bankers Trust Company, National Bank Association v. Heartland Payment Systems, Inc.*, No. H-09-925 (S.D. Tex.); *Community West Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1201(S.D. Tex.); *The Eden State Bank v. Heartland Payment Systems, Inc.*, No. H-09-1203 (S.D. Tex.); *Heritage Trust Federal Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1284 (S.D. Tex.); *Pennsylvania State Employees Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1330 (S.D. Tex.).

Settlement Class Counsel, however, recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Litigation against Heartland through motion practice, trial, and potential appeals. Co-Lead Settlement Class Counsel also have taken into account the uncertain outcome and the risk of further litigation, as well as the difficulties and delays inherent in such litigation. Co-Lead Settlement Class Counsel are also mindful of the inherent problems of proof and possible defenses to the claims asserted in the Litigation. Co-Lead Settlement Class Counsel believe that the settlement set forth in this Settlement Agreement confers substantial benefits upon the Settlement Class (as defined below). Co-Lead Settlement Class Counsel have determined that the settlement set forth in this Settlement Agreement is fair, reasonable, and adequate, and in the best interests of the Settlement Class.

III. DENIAL OF WRONGDOING AND LIABILITY

Heartland denies each and all of the claims and contentions alleged against it in the Litigation, and believes that these claims and contentions are totally without merit. Specifically, Heartland denies all charges of wrongdoing or liability as alleged against it in the Litigation. Nonetheless, Heartland has concluded that further conduct of the Litigation as it relates to the consumer track would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Settlement Agreement. Heartland also has taken into account the uncertainty and risks inherent in any litigation. Heartland has, therefore, determined that it is desirable and beneficial that the Litigation as it relates to the consumer track be settled in the manner and upon the terms and conditions set forth in this Settlement Agreement.

IV. TERMS OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among Representative Consumer Plaintiffs, individually and on behalf of the Settlement Class, by and

through Co-Lead Settlement Class Counsel, and Heartland that, subject to the approval of the Court, the Litigation and the Released Claims shall be finally and fully compromised, settled, and released, and the Litigation shall be dismissed with prejudice as to all Settling Parties, upon and subject to the terms and conditions of this Settlement Agreement, as follows.

1. Definitions

As used in the Settlement Agreement, the following terms have the meanings specified below:

1.1 "Claims" means known claims and Unknown Claims (as defined in ¶ 1.23), actions, allegations, demands, rights, liabilities, and causes of action of every nature and description whatsoever, whether contingent or non-contingent, and whether at law or equity.

1.2 "Claims Administration" means the processing of claims received from Settlement Class Members by the Claims Administrator.

1.3 "Claims Administrator" means such claims administrator as may be selected by Heartland and agreed to by Co-Lead Settlement Class Counsel.

1.4 "Co-Lead Settlement Class Counsel" means Ben Barnow, Barnow and Associates, P.C.; Lance A. Harke, Harke & Clasby LLP; and Burton H. Finkelstein, Finkelstein Thompson, LLP.

1.5 "Costs of Claims Administration" means all actual costs associated with or arising from Claims Administration.

1.6 "Effective Date" means the first date by which all of the events and conditions specified in ¶ 9.1 hereof have occurred and have been met.

1.7 "Eligible Payment Card Account" means an account used to make a transaction that was processed by Heartland between and including December 26, 2007 and December 31, 2008 (the "Settlement Class Period").

1.8 "Final" means the occurrence of all of the following events: (i) the settlement pursuant to this Settlement Agreement is approved by the Court; (ii) the Court has entered a Judgment (as that term is defined herein); (iii) the time to appeal or seek permission to appeal from the Judgment has expired or, if appealed, the appeal has been dismissed in its entirety, or the Judgment has been affirmed in its entirety by the court of last resort to which such appeal may be taken, and such dismissal or affirmance has become no longer subject to further appeal or review. Notwithstanding the above, any order modifying or reversing any attorneys' fee award made in this case shall not affect whether the Judgment is "Final" as defined in the preceding sentence, or any other aspect of the Judgment.

1.9 "Judgment" means a judgment rendered by the Court, in the form attached hereto as Exhibit E, or a judgment substantially similar to such form in both terms and cost.

1.10 "Named Plaintiff" means each Person (as defined in ¶ 1.13 herein) who is named as a plaintiff in any pending case in the Litigation and who, prior to the execution of the Settlement Agreement by Co-Lead Settlement Class Counsel, joins in this settlement by affirming in a writing (which will be filed with the Court by the Settling Parties) that he or she, or his or her counsel, approve and join in this settlement.

1.11 "Notice Specialist" means Hilsoft Notifications, Souderton, Pennsylvania, or such other notice specialist as may be jointly agreed upon by the Settling Parties and approved by the Court.

1.12 "Opt-Out Date" means the date by which members of the Settlement Class must mail their requests to be excluded from the Settlement Class in order for that request to be effective. The postmark date shall constitute the date of mailing for these purposes.

1.13 "Person" means an individual, corporation, partnership, limited partnership, limited liability company or partnership, association, joint stock company, estate, legal

representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity, and their respective spouses, heirs, predecessors, successors, representatives, or assignees.

1.14 "Plaintiffs' Counsel" means Co-Lead Settlement Class Counsel and all other attorneys who represent Named Plaintiffs who have joined in this settlement.

1.15 "Related Parties" means an entity's past or present directors, officers, employees, principals, agents, attorneys, predecessors, successors, parents, subsidiaries, divisions and related or affiliated entities, and includes, without limitation, any Person related to such entity who is, was or could have been named as a defendant in any of the actions in the Litigation.

1.16 "Released Sponsoring Banks" means KeyBank National Association and Heartland Bank.

1.17 "Released Claims" shall collectively mean any and all Claims for Losses (as defined herein), including without limitation those arising under state or federal law of the United States (including, without limitation, any causes of action under the California Business & Professional Code § 17200 et seq., California Civil Code § 1798.80 – 84 et seq., California Civil Code § 1798.53, Tex. Bus. & Com. § 48.001 et seq., Georgia Code § 10-1-910 et seq., and any similar statutes in effect in any states in the United States; the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.*; the various states' data breach notification statutes; negligence; negligence *per se*; breach of contract; breach of fiduciary duty; breach of confidence; misrepresentation (whether fraudulent, negligent or innocent); unjust enrichment; and bailment), and also including, but not limited to, any and all claims in any state or federal court of the United States for damages, injunctive relief, disgorgement, declaratory relief, equitable relief, attorneys' fees and expenses, pre-judgment interest, credit monitoring services, the creation of a fund for future damages, statutory penalties, restitution, the appointment of a receiver, and any

other form of relief, that either have been asserted or could have been asserted by any Settlement Class Member against any of the Released Persons or any of the Indemnified Persons (as defined below) based on, relating to, concerning or arising out of the allegations, facts, or circumstances alleged in the Litigation or any other allegations, facts or circumstances with respect to the Heartland Intrusion. Without limitation of the foregoing, Released Claims specifically include Claims for Losses (as defined herein) stemming from the Heartland Intrusion that may have been or could have been asserted by any Settlement Class Member against any person or entity (such as, for example and without limitation, any entity that issued credit or debit cards to Settlement Class Members) (collectively, the "Indemnified Persons") that could seek indemnification or contribution from any of the Released Persons in respect of such Claim, except that Released Claims shall not include Claims by any individual Settlement Class Member against any card-issuing financial institution brought on an individual, case-by-case basis for reimbursement or waiver of purportedly fraudulent card charges (or other charges by the card-issuing financial institution in connection with purportedly fraudulent card charges) that such card-issuing financial institution assertedly should have reimbursed or waived but has refused to reimburse or waive. Released Claims shall not include the right of any Settlement Class Member or any Released Person or any Indemnified Person to enforce the terms of the settlement contained in the Settlement Agreement.

1.18 "Released Persons" means Heartland and its Related Parties and the Released Sponsoring Banks and their respective Related Parties.

1.19 "Representative Consumer Plaintiffs" means Julie Barrett, Mark Hilliard, Derek Hoven, Talal Kaissi, Loretta A. Sansom, Scott Swenka, and Phillip Brown.

1.20 "Settlement Class" means all Persons in the United States who had or have a payment card that was used in the United States between and including December 26, 2007 and

December 31, 2008 (the "Settlement Class Period"), and who allege or may allege that they have suffered any of the Losses defined herein. Excluded from the definition of Settlement Class are Heartland and its officers and directors, and those Persons who timely and validly request exclusion from the Settlement Class.

1.21 "Settlement Class Member(s)" means a Person(s) who falls within the definition of the Settlement Class.

1.22 "Settling Parties" means, collectively, Heartland and Representative Consumer Plaintiffs, individually and on behalf of the Settlement Class.

1.23 "Unknown Claims" means any of the Released Claims that any Settlement Class Member, including any Representative Consumer Plaintiff, does not know or suspect to exist in his favor at the time of the release of the Released Persons that, if known by him or her, might have affected his or her settlement with and release of the Released Persons, or might have affected his or her decision not to object to and/or to participate in this settlement. With respect to any and all Released Claims, the Settling Parties stipulate and agree that, upon the Effective Date, Representative Consumer Plaintiffs expressly shall have, and each of the other Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, waived the provisions, rights, and benefits conferred by California Civil Code § 1542, and also any and all provisions, rights, and benefits conferred by any law of any state, province or territory of the United States (including, without limitation, Montana Code Ann. § 28-1-1602; North Dakota Cent. Code § 9-13-02; and South Dakota Codified Laws § 20-7-11), which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Settlement Class Members, including Representative Consumer Plaintiffs, and any of them, may hereafter discover facts in addition to or different from those that they, and any of them, now know or believe to be true with respect to the subject matter of the Released Claims, but Representative Consumer Plaintiffs expressly shall have, and each other Settlement Class Member shall be deemed to have, and by operation of the Judgment shall have, upon the Effective Date, fully, finally, and forever settled and released any and all Released Claims. The Settling Parties acknowledge, and Settlement Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver is a material element of the settlement of which this release is a part.

1.24 "United States" as used in this Settlement Agreement includes the District of Columbia.

2. The Settlement

2.1 Actual Damages Fund: Within ten (10) days following preliminary approval of the settlement, Heartland will place the principal amount of $1,000,000 (the "Initial Funding") into an interest-bearing, escrow account (the "Actual Damages Fund"). The Initial Funding will be used to reimburse Settlement Class Members who are determined to have submitted Valid Claims (as defined and described pursuant to ¶ 2.2). Interest on the Initial Funding will inure to the benefit of Settlement Class Members as and to the extent provided below.

(a) In the event the Initial Funding and any interest accrued thereon is exceeded by the aggregate amount to be paid on approved Valid Claims pursuant to ¶ 2.2, Heartland will promptly replenish the Actual Damages Fund initially in the amount of $500,000, and in the event that the Actual Damages Fund is again so exceeded, Heartland will replenish it with an additional $500,000; and in the event that the Actual Damages Fund is again so exceeded, Heartland will replenish it with an additional $400,000, as advances for amounts needed to pay any additional Valid

Claims (the "Replenishment Fundings" and, jointly with the Initial Funding, the "Fundings"). In no event shall the Replenishment Fundings exceed a total of $1,400,000 in the aggregate, i.e., up to but not more than a total of $2,400,000 shall be placed cumulatively in the Actual Damages Fund by means of the Fundings.

(b) In the event the Initial Funding and any interest accrued thereon is not entirely depleted by the payment of Valid Claims pursuant to ¶ 2.2, the unpaid balance of the Initial Funding and any interest accrued thereon will be transferred to a non-profit organization(s) dedicated to the protection of consumers' privacy rights, with emphasis on advancing the implementation of end-to-end encryption of payment card authorization transactions or similar security enhancements. This *cy pres* provision shall not apply, however, to the Replenishment Fundings, and any unused balance of the Replenishment Fundings shall be returned promptly to Heartland, with the interest accrued thereon. The organization(s) referred to herein will be designated by Heartland and shall be subject to approval by Co-Lead Settlement Class Counsel, which approval shall not be unreasonably withheld.

2.2 Reimbursement of Valid Claims: Reimbursements to Settlement Class Members from the Actual Damages Fund will be made only for "Valid Claims." A Valid Claim shall consist of only those "Losses" (as defined in ¶ 2.2 (b)) that a Settlement Class Member claims in accordance with Paragraph 2.2(a) below, and proves by a preponderance of the evidence (i.e., more likely than not to be true), to have directly and proximately resulted from information relative to an Eligible Payment Card Account of such Settlement Class Member having been stolen or placed at risk of being stolen as a result of the Heartland Intrusion, as determined either by the Claims Administrator or, in the event the Claims Administrator's determination is reviewed pursuant to ¶ 2.2(d) below, by the dispute resolution firm appointed pursuant thereto.

(a) To be eligible for determination as a Valid Claim, a Settlement Class Member's claim for reimbursement of a Loss or Losses (a "Reimbursement Claim") must be submitted by mail on a written form agreed to by the parties and must be supported by documentation showing by a preponderance of the evidence, and a sworn certification attesting, that the claimant is a Settlement Class Member and that his or her or its claim is a Valid Claim. On the claim form, the Settlement Class Member must provide the number and expiration date of the payment card account that is the basis for such claim, for verification by Heartland and/or the Claims Administrator and/or the dispute resolution firm that such account is an Eligible Payment Card Account and evaluation of the claim, and such information shall be deemed confidential and protected as such by Heartland and/or the Claims Administrator and/or the dispute resolution firm, as appropriate.

(b) A "Loss" or "Losses" shall consist only of: (i) reasonable, unreimbursed, out-of-pocket expenses (specifically, telephone or postage costs, other third-party charges resulting from card cancellations or replacements, unauthorized and unreimbursed account charges, or Identity-Theft-Related Charges (as defined below)) actually incurred by the Settlement Class Member; and, (ii) whether or not the Settlement Class Member has incurred any out-of-pocket expenses as referenced in 2.2(b)(i) above, a reasonable amount for time (calculated at $10 per hour up to five (5) hours) actually expended by the Settlement Class Member to address such a card cancellation, card replacement, unauthorized account charge, or Identity-Theft-Related Charge. Losses shall in no event include credit monitoring or insurance costs incurred by Settlement Class Members, attorneys' fees, attorneys' costs or attorneys' expenses incurred by Settlement Class Members, or losses resulting from any information having been stolen or placed at risk of being stolen from an entity other than from Heartland. For purposes of the definition of Losses, an "Identity-Theft-Related Charge" shall mean a charge, other than a charge to the Eligible Payment Card Account of

the Settlement Class Member, incurred as a result of someone's assuming the Settlement Class Member's identity and taking out and using credit or otherwise obtaining monies and other things of value fraudulently in the name of the Settlement Class Member. Valid Claims shall be limited to $175 per Settlement Class Member, with no more than two Valid Claims allowed per household. However, in the event that the Losses in a Settlement Class Member's Valid Claim include Identity-Theft-Related Charges, up to $10,000 in such Identity-Theft Related-Charges may be included in such Settlement Class Member's Valid Claim, but in no event shall the Settlement Class Member's reimbursement for a Valid Claim exceed $10,000. All allowable amounts of Valid Claims are subject to the limit on the Actual Damages Fund as set forth in ¶ 2.1. Losses shall be net of and not include any other recovery by or reimbursement of the Settlement Class Member of the expense in question and shall not include any other type of alleged damage or expense, including, without limitation, exemplary or punitive damages or any alleged losses by reason of alleged mental anguish, emotional distress, or any claimed physical injury.

(c) In order to be eligible to have a Valid Claim, any Reimbursement Claim must be submitted to the Claims Administrator during the period beginning upon publication of the notice of settlement following preliminary approval and ending August 1, 2011 (the "Final Claim Date"), which is two and a half years from the date of the announcement of the Heartland Intrusion. Losses must have been incurred prior to the Final Claim Date. The Claims Administrator's review of Reimbursement Claims, including all requests for review of the denial of Reimbursement Claims, shall commence within sixty (60) days of the Effective Date, and proceed in order of the Claims Administration's receipt of completed claims, as determined by the Claims Administrator. Payment of Valid Claims shall commence no later than 120 days after all Reimbursement Claims have been finally decided, including any review of Reimbursement Claims and any reimbursement determinations pursuant to pursuant to ¶ 2.2(d), and shall be subject

to pro-rata reduction in the event such amounts together would otherwise exceed the Actual Damages Fund. However, in the event that the total Reimbursement Claims received and any amounts payable under § 2.2(d) can be calculated and would not exceed $2,400,000, then payment of Valid Claims may commence without awaiting all Reimbursed Claims to have been finally decided, if so requested in writing by Co-Lead Settlement Counsel and approved by Heartland, which approval shall not be unreasonably withheld.

(d) Any Settlement Class Member whose Reimbursement Claim is denied by the Claims Administrator may request review of the denial and resolution of the Reimbursement Claim through a dispute resolution firm to be agreed upon by the parties, such as JAMS. Similarly, Heartland shall have the right to request review of the allowance of a Reimbursement Claim through the same dispute resolution process. Heartland shall bear the costs of the dispute resolution firm, separate and apart from the Fundings, up to a total of $200,000, and Heartland shall contract to do so, so as to provide for dispute resolution for all such requests for review hereunder. Resolution of any Reimbursement Claim by the dispute resolution firm will commence only after the Final Claim Date and shall be based on the dispute resolution firm's review of the Reimbursement Claim file and any response by Heartland or the Settlement Class Member (as the case may be), and, in those cases in which the dispute resolution firm deems it necessary and appropriate, an oral hearing on the Reimbursement Claim (which shall be by telephone or in person, at the Settlement Class Member's election). There will be no recovery by any Settlement Class Member for exemplary or punitive damages, or for (except as may be provided for below in this paragraph) attorneys' fees, costs or expenses, or for any other amount that does not constitute a Valid Claim as defined above, provided, however, that in the event the Losses included in a Valid Claim as sustained by the dispute resolution firm include Identity-Theft-Related Charges, Heartland shall reimburse the Settlement Class Member for the reasonable attorneys' fees and costs (not including expert fees) incurred

by the Settlement Class Member in connection with such dispute resolution, not to exceed an amount equal to 25 percent of the amount of the Identity-Theft-Related Charges included in such Valid Claim, all subject to the limit on the Actual Damages Fund as set forth in ¶ 2.1 above. Reimbursement Claim determinations by the dispute resolution firm shall be final and not subject to further review.

(e) Reimbursement Claims shall be submitted to, and reimbursements shall be paid by, the Claims Administrator from the Actual Damages Fund, subject to the terms and conditions set forth herein.

2.3 Within thirty (30) days of the execution of the Settlement Agreement (or such later time as may be agreed to between Heartland and Co-Lead Settlement Class Counsel), an independent expert retained by Heartland will generate a written report setting forth any actions taken or planned to be taken by Heartland since January 20, 2009 to enhance the security of Heartland's computer system ("the Enhancement Actions"). Heartland will permit Representative Consumer Plaintiffs' designated independent expert to review the report. In the alternative, Heartland may, in its discretion, permit Representative Consumer Plaintiffs' designated independent expert to review a copy of Heartland's most recent Payment Card Industry Report on Compliance ("ROC"). Representative Consumer Plaintiffs' designated independent expert shall promptly provide a responsive letter to Co-Lead Settlement Class Counsel stating whether the Enhancement Actions (or the information reflected in ROC, as the case may be) are, in the judgment of Representative Consumer Plaintiffs' designated independent expert, a prudent and good faith attempt by Heartland to minimize the likelihood of intrusion in the future. Within fifteen (15) days thereafter, Co-Lead Settlement Class Counsel shall provide Heartland with a letter indicating whether they accept the report, or do not accept it; failure to provide such a letter to Heartland shall be deemed acceptance. The settlement is contingent upon Co-Lead Settlement Class Counsel's

acceptance of the report, which acceptance shall not be unreasonably withheld. The foregoing terms of this Paragraph shall be completed prior to any hearing on final approval of the settlement, and subject to such confidentiality restrictions as Heartland may reasonably require to protect the security of its computer system, the confidentiality of the ROC or other written report referenced above, or other proprietary information.

2.4 All costs associated with notice to the Settlement Class as required herein and Costs of Claims Administration shall be paid by Heartland. To the extent that such notice costs exceed $1,500,000.00, however, Heartland shall have the option, in its sole discretion, of rescinding the Settlement Agreement.

2.5 The Settling Parties agree, for purposes of this settlement only, to the certification of the Settlement Class. If the settlement set forth in this Settlement Agreement is not approved by the Court, or if the settlement is terminated or cancelled pursuant to the terms of this Settlement Agreement, then this Settlement Agreement, and the certification of the Settlement Class provided for herein, will be vacated and the Litigation shall proceed as though the Settlement Class had never been certified, without prejudice to any party's position on the issue of class certification or any other issue. The Settling Parties' agreement to the certification of the Settlement Class is also without prejudice to any position asserted by the Settling Parties in any other proceeding, case or action including, without limitation, the "financial institutions track" proceedings otherwise consolidated with the Litigation in the above-captioned civil action, as to which all of their rights are specifically preserved.

2.6 Heartland agrees that the time for Co-Lead Settlement Class Counsel to file a Master Amended Complaint related to the consumer track plaintiffs shall be treated by them as extended without date.

3. Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing

3.1 As soon as practicable after the execution of the Settlement Agreement, Co-Lead Settlement Class Counsel and counsel for Heartland shall jointly submit this Settlement Agreement to the Court, and, within 7 calendar days after the period for any termination of the Settlement Agreement pursuant to ¶¶ 2.3 [has expired without Co-Lead Settlement Class Counsel having taken such action, Co-Lead Settlement Class Counsel shall file a motion for preliminary approval of the settlement with the Court and apply for entry of an order (the "Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing"), in the form attached hereto as Exhibit A, or an order substantially similar to such form in both terms and cost, requesting, *inter alia*,

(a) certification of the Settlement Class for settlement purposes only pursuant to ¶ 2.5;

(b) preliminary approval of the settlement as set forth herein;

(c) approval of the publication of a customary form of summary notice (the "Summary Notice") in a form substantially similar to the one attached hereto as Exhibit B (in a manner certified by the Notice Specialist to have a reach of not less than approximately 80% of the putative class, targeted to adults with credit or debit cards over 18 years of age, in the United States), and a customary long form of notice ("Notice") in a form substantially similar to the one attached hereto as Exhibit C, which together shall include a fair summary of the parties' respective litigation positions, the general terms of the settlement set forth in the Settlement Agreement, instructions for how to object to or opt-out of the settlement, the process and instructions for making

claims to the extent contemplated herein, and the date, time, and place of the Final Fairness Hearing;

(d) appointment of Hilsoft Notifications as Notice Specialist (or such other provider of class action notification service, as may be jointly agreed to);

(e) appointment of Epiq Systems, Inc. as Claims Administrator; (or such other provider of claims administrative service, as may be jointly agreed to); and

(f) approval of a Claim Form in a form substantially similar to the one attached hereto as Exhibit D.

The forms of Summary Notice, Notice and Claim Form attached hereto as Exhibits B, C, and D shall be reviewed by the proposed Notice Specialist and Claims Administrator and may be revised as agreed upon by the Settling Parties prior to such submission to the Court for approval.

3.2 Heartland shall pay for and shall assume the administrative responsibility of providing notice to the Settlement Class in accordance with the Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing, and the costs of such notice, together with the Costs of Claims Administration, shall be paid by Heartland, subject to the terms set forth herein. Notice shall be provided to Settlement Class Members by publication in print and shall be designed to have a reach of not less than approximately 80% of the putative class, targeted to adults with credit or debit cards over 18 years of age, in the United States through publication of the Summary Notice, and which publication shall run, if approved by the Court, in a range of consumer magazines, newspapers, and/or newspaper supplements to be designated by the Notice Specialist and approved by the Court. The Claims Administrator shall establish a dedicated settlement website, and shall maintain and update the website throughout the Claim Period, with the forms of Summary Notice, Notice, and Claim Forms approved by the Court, as well as this Settlement Agreement. The Claims Administrator also will provide copies of the forms of Summary Notice, Notice, and Claim Forms

approved by the Court, as well as this Settlement Agreement, upon request. Prior to the Final Fairness Hearing, Co-Lead Settlement Class Counsel and Heartland shall cause to be filed with the Court an appropriate affidavit or declaration with respect to complying with this provision of notice. Notice shall be provided in English and/or Spanish, as appropriate. The forms of Summary Notice, Notice and Claim Form approved by the Court may be adjusted by the Notice Specialist and/or Claims Administrator, respectively, in consultation and agreement with the Settling Parties, as may be reasonable and not inconsistent with such approval.

3.3 Co-Lead Settlement Class Counsel and Heartland shall request that after notice is given, the Court hold a hearing (the "Final Fairness Hearing") and grant final approval of the settlement set forth herein.

3.4 Co-Lead Settlement Class Counsel and Heartland further agree that the proposed Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing shall provide, subject to Court approval, that, pending the final determination of the fairness, reasonableness, and adequacy of the settlement set forth in the Settlement Agreement, no Settlement Class Member, either directly, representatively, or in any other capacity, shall institute, commence, or prosecute against Heartland any of the Released Claims in any action or proceeding in any court or tribunal.

4. Opt-Out Procedures

4.1 Each Person wishing to opt out of the Settlement Class shall individually sign and timely submit written notice of such intent to the designated Post Office box established by the Claims Administrator. The written notice must clearly manifest an intent to be excluded from the Settlement Class. To be effective, written notice must be postmarked at least twenty-one (21) days prior to the date set in the Notice for the Final Fairness Hearing.

4.2 All Persons who submit valid and timely notices of their intent to be excluded from the Settlement Class, as set forth in ¶ 4.1 above, referred to herein as "Opt-Outs," shall neither

receive any benefits of nor be bound by the terms of this Settlement Agreement. All Persons falling within the definition of the Settlement Class who do not request to be excluded from the Settlement Class in the manner set forth in ¶ 4.1 above shall be bound by the terms of this Settlement Agreement and Judgment entered thereon.

5. Objection Procedures

5.1 Each Settlement Class Member desiring to object to the settlement shall submit a timely written notice of his or her objection. Such notice shall state: (i) the objector's full name, address, telephone number, and e-mail address; (ii) information identifying the objector as a Settlement Class Member, including (a) proof that they are a member of the Settlement Class (e.g., a letter from their financial institution indicating that their Personal Financial Information had been compromised in the Heartland Intrusion), including documentation of any Losses they claim to have suffered as a result of the alleged theft of their Personal Financial Information, if any, if they are objecting to any portion of the settlement dealing with reimbursement of Losses and for which they believe they would have an existing claim, or (b) an affidavit setting forth, in as much detail as the objector can reasonably provide, that they received a letter from their financial institution indicating that their Personal Financial Information had been compromised in the Heartland Intrusion, including the approximate date of said receipt; (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection; (iv) the identity of all counsel representing the objector; (v) the identity of all counsel representing the objector who will appear at the Final Fairness Hearing; (vi) a list of all persons who will be called to testify at the Final Fairness Hearing in support of the objection; (vii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (viii) the objector's signature or the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation). In order to be an effective objection, such

notice shall also identify, by case name, court, and docket number, all other cases in which the objector (directly or through counsel) or the objector's counsel (on behalf of any person or entity) has filed an objection to any proposed class action settlement, or has been a named plaintiff in any class action or served as lead plaintiff class counsel. To be timely, written notice of an objection in appropriate form must be filed with the Clerk of the United States District Court for the Southern District of Texas, P.O. Box 61010, Houston, TX 77208, twenty-one (21) days prior to the date set in the Notice for the Final Fairness Hearing, and served concurrently therewith upon one of Co-Lead Settlement Class Counsel (Ben Barnow, Barnow and Associates, P.C., One North LaSalle Street, Suite 4600, Chicago, IL 60602), and counsel for Heartland (Harvey J. Wolkoff, Ropes & Gray LLP, One International Place, Boston, MA, 02110). Counsel for Heartland may request that the objector's payment card number and expiration date be provided to the Claims Administrator, for the purposes described in Paragraph 2.2(a) above, with notice to Co-Lead Settlement Class Counsel of such request.

6. Releases

6.1 Upon the Effective Date, each Settlement Class Member, including Representative Consumer Plaintiffs, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims. Further, upon the Effective Date, and to the fullest extent permitted by law, each Settlement Class Member, including Representative Consumer Plaintiffs, shall, either directly, indirectly, representatively, as a member of or on behalf of the general public, or in any capacity, be permanently barred and enjoined from commencing, prosecuting, or participating in any recovery in, any action in this or any other forum (other than participation in the settlement as provided herein) in which any of the Released Claims is asserted.

6.2 Upon the Effective Date, Heartland shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged, Representative Consumer Plaintiffs, each and all of the Settlement Class Members, Co-Lead Settlement Class Counsel, and all other Plaintiffs' Counsel who have consented to and joined in the settlement, from all claims, including Unknown Claims, based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims, except for enforcement of the Settlement Agreement. Any other Claims or defenses Heartland may have against such Persons, including without limitation any Claims based upon or arising out of any retail, banking, debtor-creditor, contractual or other business relationship with such Persons, that are not based upon or do not arise out of the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims, are specifically preserved and shall not be affected by the preceding sentence.

6.3 Notwithstanding any term herein, Heartland does not, by operation of this settlement, release any Claims it or its Related Parties may have based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Claims asserted against it in the "financial institution track" of the consolidated proceedings in the United States District Court for the Southern District of Texas, Claims based on its rights and duties under existing contracts with respect to fees, charges, penalties, assessments, fines, and allocations of loss by and all other obligations to payment card associations, and Claims based upon or arising out of any precompliance or compliance or noncompliance proceedings or any other proceedings under payment card association rules.

6.4 Notwithstanding any term herein, Heartland shall not have, or been deemed to have, released, relinquished, or discharged any Representative Consumer Plaintiff, Settlement Class Member, or Plaintiffs' Counsel who has consented to and joined in the settlement, from any claim

based on or arising out of any act of fraud, misrepresentation, or other misconduct in connection with the submission of any claim pursuant to the settlement set forth in this Settlement Agreement, or any claim against any of them based on or arising out of any failure to abide by the terms of the Settlement Agreement.

6.5 Notwithstanding any term herein, neither Heartland nor its Related Parties shall have or shall be deemed to have released, relinquished or discharged any Claim or defense against any Person other than Representative Consumer Plaintiffs, each and all of the Settlement Class Members, Co-Lead Settlement Class Counsel, and all other Plaintiffs' Counsel who have consented to and joined in the settlement. Persons not released by Heartland or its subsidiaries, divisions or affiliates of any Claim or defense include, without limitation, the Released Sponsoring Banks and their respective Related Parties.

7. Plaintiffs' Counsel's Attorneys' Fees, Costs, and Expenses, and Incentive Awards to Representative Consumer Plaintiffs and Named Plaintiffs

7.1 The Settling Parties did not discuss attorneys' fees, costs, and expenses, or incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, as provided for in ¶¶ 7.2 and 7.3, until after the substantive terms of the settlement had been agreed upon, other than that Heartland would pay reasonable attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs as may be agreed to by Heartland and Co-Lead Settlement Class Counsel, and/or as ordered by the Court, or in the event of no agreement, then as ordered by the Court. Heartland and Co-Lead Settlement Class Counsel then negotiated and agreed as follows:

7.2 Heartland has agreed to pay, subject to Court approval, up to the amount of $725,000.00 to Co-Lead Settlement Class Counsel for attorneys' fees, and up to $35,000.00 to Co-Lead Settlement Class Counsel for reasonable costs and expenses, subject to reasonable

documentation. Co-Lead Settlement Class Counsel, in their sole discretion, to be exercised reasonably, shall allocate and distribute the amount of attorneys' fees, costs, and expenses awarded by the Court among Plaintiffs' Counsel. If any Plaintiff's Counsel disagrees with the allocation of fees and/or costs he or she has been awarded, they may, after fourteen (14) days of the receipt of said award, file a motion with the Court seeking an adjustment in said award. Co-Lead Settlement Class Counsel shall have fourteen (14) days to file a response to any such motion.

7.3 Heartland has agreed to pay incentive awards, subject to Court approval, up to the amount of $200.00 for each Representative Consumer Plaintiff, and $100.00 for each of the other Named Plaintiffs.

7.4 Within twenty (20) days of the Effective Date, Heartland shall pay the attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, as set forth above in ¶¶ 7.2 and 7.3, to an account established by Co-Lead Settlement Class Counsel. Co-Lead Settlement Class Counsel shall thereafter distribute the award of attorneys' fees, costs, and expenses to Representative Consumer Plaintiffs and Named Plaintiffs consistent with ¶ ¶ 7.2 and 7.3.

7.5 The amount(s) of any award of attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, is intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement. No order of the Court or modification or reversal or appeal of any order of the Court concerning the amount(s) of any attorneys' fees, costs, or expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs awarded by the Court to Co-Lead Settlement Class Counsel shall affect whether the Judgment is Final or constitute grounds for cancellation or termination of this Settlement Agreement.

8. Administration of Claims

8.1 The Claims Administrator shall administer and calculate the claims submitted by Settlement Class Members under ¶ 2.2. Co-Lead Settlement Class Counsel and Heartland shall be given reports as to both claims and distribution, and have the right to review and obtain supporting documentation and challenge such reports if they believe them to be inaccurate or inadequate. The Claims Administrator's determination of the validity or invalidity of any such claims shall be binding, subject to the dispute resolution process set forth in ¶ 2.2(d).

8.2 Except as otherwise ordered by the Court, all Settlement Class Members who fail to timely submit a claim for any benefits hereunder within the time frames set forth herein, or such other period as may be ordered by the Court, or otherwise allowed, shall be forever barred from receiving any payments or benefits pursuant to the settlement set forth herein, but will in all other respects be subject to and bound by the provisions of the Settlement Agreement, the releases contained herein, and the Judgment.

8.3 No Person shall have any claim against the Claims Administrator, Heartland, or Co-Lead Settlement Class Counsel based on distributions of benefits made substantially in accordance with the Settlement Agreement and the settlement contained herein, or further order(s) of the Court.

9. Conditions of Settlement, Effect of Disapproval, Cancellation or Termination

9.1 The Effective Date of the settlement shall be conditioned on the occurrence of all of the following events:

(a) the Court has entered the Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing, as required by ¶ 3.1, hereof;

(b) Heartland has not exercised its option to terminate the Settlement Agreement pursuant to ¶ 9.3 hereof;

(c) the Court has entered the Judgment granting final approval to the settlement as set forth herein; and

(d) the Judgment has become Final, as defined in ¶ 1.8, hereof.

9.2 If all of the conditions specified in ¶ 9.1 hereof are not satisfied, then the Settlement Agreement shall be canceled and terminated subject to ¶ 9.4 hereof, unless Co-Lead Settlement Class Counsel and counsel for Heartland mutually agree in writing to proceed with the Settlement Agreement.

9.3 Within seven (7) days after the deadline established by the Court for Persons to request exclusion from the Settlement Class, Co-Lead Settlement Class Counsel shall furnish to counsel for Heartland a complete list of all timely and valid requests for exclusion (the "Opt-Out List"). Heartland, in its sole discretion, shall have the option to terminate this Settlement Agreement if the aggregate number of Persons who submit valid and timely requests for exclusion from the Settlement Class exceeds 2,500 Persons eligible to be Settlement Class Members.

9.4 In the event that the Settlement Agreement is not approved by the Court or the settlement set forth in the Settlement Agreement is terminated in accordance with its terms, (a) the Settling Parties shall be restored to their respective positions in the Litigation, and shall jointly request that all scheduled litigation deadlines shall be reasonably extended by the Court so as to avoid prejudice to any Settling Party or litigant, which extension shall be subject to the decision of the Court, and (b) the terms and provisions of the Settlement Agreement shall have no further force and effect with respect to the Settling Parties and shall not be used in the Litigation or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of the Settlement Agreement shall be treated as vacated, *nunc pro tunc*. Notwithstanding any

statement in this Settlement Agreement to the contrary, no order of the Court or modification or reversal on appeal of any order reducing the amount of attorneys' fees, costs, and expenses awarded to Co-Lead Settlement Class Counsel shall constitute grounds for cancellation or termination of the Settlement Agreement.

10. Miscellaneous Provisions

10.1 The Settling Parties: (a) acknowledge that it is their intent to consummate this agreement; and (b) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement, and any applicable requirements under the Class Action Fairness Act of 2005, and to exercise their best efforts to accomplish the terms and conditions of this Settlement Agreement.

10.2 The parties intend this settlement to be a final and complete resolution of all disputes between them with respect to the Litigation. The settlement compromises claims which are contested and shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties each agree that the settlement was negotiated in good faith by the Settling Parties, and reflects a settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their right to rebut, in a manner that such party determines to be appropriate, any contention made in any public forum that the Litigation was brought or defended in bad faith or without a reasonable basis.

10.3 Neither the Settlement Agreement nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity or lack thereof of any Released Claim, or of any wrongdoing or liability of any of the Released Persons; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Persons, in any civil, criminal, or administrative

proceeding in any court, administrative agency, or other tribunal. Any of the Released Persons may file the Settlement Agreement and/or the Judgment in any action that may be brought against them or any of them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10.4 Representative Consumer Plaintiffs shall be entitled to reasonable confirmatory discovery from Heartland to be conducted by Co-Lead Settlement Class Counsel. The period for confirmatory discovery shall begin no sooner than, and completed within ninety (90) days after, the date of preliminary approval of the settlement. Heartland shall cooperate in good faith to make such confirmatory discovery possible. At the conclusion of confirmatory discovery, Co-Lead Settlement Class Counsel shall, based upon all facts known to them, determine in good faith whether in their opinion the settlement is fair, reasonable and adequate. If Co-Lead Settlement Class Counsel determine that the settlement is not in their opinion fair, reasonable and adequate, Co-Lead Settlement Class Counsel shall terminate the Settlement and give notice to Heartland of such termination within ten (10) days after confirmatory discovery concludes. In such case, the settlement shall be null and void, and the parties shall return to their original positions. Heartland may defer incurring costs for notice under ¶ 3.2, and/or providing such notice under ¶ 3.2, until the period for Co-Lead Settlement Class Counsel to terminate the settlement pursuant to this paragraph has expired without Co-Lead Settlement Class Counsel taking such action.

10.5 All documents and materials provided by Heartland in confirmatory discovery shall be treated as confidential and returned to Heartland within sixty (60) days of the Effective Date.

10.6 The Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

10.7 This Settlement Agreement, together with the Exhibits attached hereto, constitutes the entire agreement among the parties hereto, and no representations, warranties, or inducements have been made to any party concerning the Settlement Agreement other than the representations, warranties, and covenants contained and memorialized in such document. Except as otherwise provided herein, each party shall bear its own costs.

10.8 Co-Lead Settlement Class Counsel, on behalf of the Settlement Class, are expressly authorized by the Representative Consumer Plaintiffs to take all appropriate actions required or permitted to be taken by the Settlement Class pursuant to the Settlement Agreement to effectuate its terms and also are expressly authorized to enter into any modifications or amendments to the Settlement Agreement on behalf of the Settlement Class which they deem appropriate.

10.9 Each counsel or other Person executing the Settlement Agreement on behalf of any party hereto hereby warrants that such Person has the full authority to do so.

10.10 The Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court.

10.11 The Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

10.12 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Settlement Agreement.

10.13 This Settlement Agreement shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Texas, and the rights and obligations of the parties to the Settlement Agreement shall be construed and enforced in accordance with, and

governed by, the internal, substantive laws of the State of Texas without giving effect to that State's choice of law principles.

10.14 As used herein, "he" means "he, she, or it;" "his" means "his, hers, or its," and "him" means "him, her, or it."

10.15 All dollar amounts are in United States dollars.

10.16 All agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed, by their duly authorized attorneys.

Counsel for Heartland Payment Systems, Inc.

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IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed, by their duly authorized attorneys.

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Exhibit O

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHAWNDEE HARTLESS, on Behalf of Herself and All Others Similarly Situated and the General Public, Plaintiff, vs. CLOROX COMPANY, Defendant.	No. 06-CV-02705-CAB CLASS ACTION STIPULATION OF SETTLEMENT

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This Stipulation of Settlement is made and entered into by plaintiff Shawndee Hartless, on behalf of herself, the general public, and all others similarly situated and defendant The Clorox Company.

I. DEFINITIONS

A. As used in this Stipulation the following capitalized terms have the meanings specified below:

1. "Action" means the case entitled *Hartless v. Clorox Company*, filed on December 13, 2006, in the U.S. District Court for the Southern District of California and assigned Case No. 06-CV-2705-CAB.

2. "Approved Claim(s)" means the claims approved by the Claim Administrator according to the claims criteria in Exhibit A.

3. "Claim Administrator" means the independent company agreed upon by the Parties to provide the Class and Publication Notice and administer the claims process. The Parties agree that The Garden City Group, Inc. will be retained as the Claim Administrator.

4. "Claims Cost Estimate" is the Claim Administrator's good faith best estimate of all the expenses to be incurred in the claims process.

5. "Claim Forms" mean the forms that are substantially in the form of Exhibit F hereto. The "Claim Form 1" is Exhibit F(1) hereto; the "Claim Form 2" is Exhibit F(2) hereto.

6. "Claim Fund" means the fund for payment of Class Members' claims, certain notice and administration costs, and expenses related to maintaining the fund (including taxes that may be owed by the Claim Fund), if any.

7. "Claim Fund Balance" means the balance at the end of the Claim Review Period, consisting of: (a) the first $7 million paid into the Claim Fund; and (b) additional amounts, if any, up to $1 million, paid into the Claim Fund as necessary to pay Class Members' claims, minus (i) the total amount paid to Class Members who submit Approved Claims; (ii) $750,000 paid to the Claim Administrator toward notice and claim administration costs; and (iii) expenses associated with maintaining the Claim Fund (including taxes that may be owed by the Claim Fund), if any.

8. "Claim Review Period" means the three month period beginning no later than 10 days after the Effective Date.

9. "Claim Submission Period" means the period beginning on the date notice to the Class is first published, and continuing until 30 days after the date of the Final Approval Hearing.

10. "Class" and/or "Class Members" means all persons or entities in the United States who purchased, used, or suffered any property damage from the use of Clorox Automatic Toilet Bowl Cleaner with Bleach ("CATBC") during the Class Period. Specifically excluded from the Class are: (a) all federal court judges who have presided over this Action and their immediate family; (b) all persons who have submitted a valid request for exclusion from the Class; (c) Defendant's employees, officers, directors, agents, and representatives and their family members; and (d) those who purchased CATBC for the purpose of re-sale.

11. "Class Counsel" means the attorneys of record for plaintiffs in the Clorox Lawsuits.

12. "Co-Lead Counsel" means the law firm of Blood Hurst & O'Reardon LLP and the law firm of Bonnett, Fairbourn, Friedman & Balint, P.C.

13. "Class Notice" means the "Notice of Class Action Settlement" substantially in the same form as Exhibit E attached hereto.

14. "Class Notice Package" means the information as approved in form and content by Class Counsel and Defendant's Counsel and to be approved by the Court. Class Notice Packages will include: (a) the Class Notice; and (b) the Claim Forms. The Class Notice Package will also be available in Spanish.

15. "Class Period" is from December 13, 2002 to the date notice to the Class is first published.

16. "Clorox Lawsuits" means the following cases:

(a) *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL (San Diego Superior Court);

(b) *Hartless v. Clorox Company*, Case No. 06-CV-2705-CAB (Southern District of California); and

(c) *Wachowski v. Clorox Company*, Case No. CV-09-138-CAB (Southern District of California).

17. "Court" means the U.S. District Court for the Southern District of California.

18. "Defendant" means The Clorox Company, also referred to herein as "Clorox."

19. "Defendant's Counsel" means the law firm of O'Melveny & Myers LLP.

20. "Distribution Plan" means a written final accounting and plan of distribution prepared by the Claim Administrator, identifying: (a) each claimant whose claim was approved, including the dollar amount of the payment awarded to each such claimant, and the dollar amount of any pro rata reduction required by ¶III.B.2(e); (b) each claimant whose claim was rejected; (c) the dollar amount of the Claim Fund Balance to be disbursed to the recipient(s) selected by the Court as provided in ¶III.B.2(d); and (d) a final accounting of all administration fees and expenses incurred by the Claim Administrator.

21. "Effective Date" means the date described in ¶VII.A.

22. "Final Approval Hearing" means the hearing to be held by the Court to consider and determine whether the proposed settlement of the Action as contained in this Stipulation should be approved as fair, reasonable, and adequate, and whether the Final Settlement Order and Judgment approving the settlement contained in this Stipulation should be entered.

23. "Final Settlement Order and Judgment" means an order and judgment entered by the Court:

(a) Giving final approval to the terms of this Stipulation as fair, adequate, and reasonable;

(b) Providing for the orderly performance and enforcement of the terms and conditions of the Stipulation;

(c) Dismissing the Action with prejudice;

(d) Discharging the Released Parties of and from all further liability for the Released Claims to the Releasing Parties; and

(e) Permanently barring and enjoining the Releasing Parties from instituting, filing, commencing, prosecuting, maintaining, continuing to prosecute, directly or indirectly, as an

individual or collectively, representatively, derivatively, or on behalf of them, or in any other capacity of any kind whatsoever, any action in the California Superior Courts, any other state court, any federal court, before any regulatory authority, or in any other tribunal, forum, or proceeding of any kind, against the Released Parties that asserts any Released Claims that would be released and discharged upon final approval of the Settlement as provided in ¶¶IV.A and B of this Stipulation.

(f) The actual form of the Final Settlement Order and Judgment entered by the Court may include additional provisions as the Court may direct that are not inconsistent with this Stipulation, and will be substantially in the form attached hereto as Exhibit G.

24. "Notice Plan" or "Notice Program" means the plan for dissemination of the Publication Notice and Class Notice Package as described in ¶VI.

25. "Fund Institution" means a third party institution which the Parties will approve and to which Clorox shall pay $7 million in trust to a fund, and shall pay up to an additional $1 million if needed to pay class member claims as described in ¶III.B.1.

26. "Parties" means the Plaintiff and the Defendant.

27. "Plaintiff" means Shawndee Hartless.

28. "Preliminary Approval Order" means the "Order re: Preliminary Approval of Class Action Settlement," substantially in the form of Exhibit B.

29. "Publication Notice" means information as approved in form and content by Co-Lead Counsel and Defendant's Counsel and to be approved by the Court, substantially in the same form as Exhibit C attached hereto. The Publication Notice will be translated into Spanish for dissemination in Spanish publications pursuant to the Notice Plan.

30. "Rejected Claims" means all claims rejected according to the claims criteria in Exhibit A.

31. "Released Claims" means those claims released pursuant to ¶¶IV.A and B of this Stipulation.

32. "Released Parties" means Defendant and each of its parent, affiliated and subsidiary corporations and all of their agents, employees, partners, predecessors, successors, assigns, insurers, attorneys, officers and directors.

33. "Releasing Parties" means the named plaintiffs in the Clorox Lawsuits, individually and as representatives of the general public, and the Class Members.

34. "Settlement Website" means the website established by the Claim Administrator that will contain documents relevant to the settlement including the Class Notice Package in English and Spanish. Claim Forms may be submitted by Class Members via the Settlement Website.

35. "Stipulation of Settlement" and/or "Stipulation" means this Stipulation of Settlement, including its attached exhibits (which are incorporated herein by reference), duly executed by plaintiffs of record in the Clorox Lawsuits, Class Counsel, Defendant and Defendant's Counsel.

B. Capitalized terms used in this Stipulation, but not defined above, shall have the meaning ascribed to them in this Stipulation and the exhibits attached hereto.

II. RECITALS

A. On December 13, 2006, plaintiff Hartless filed a complaint against Defendant in the U.S. District Court for the Southern District of California. The complaint alleged: (1) violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code ("Civil Code") §1750 *et seq.*; (2) breach of the Implied Warranty of Merchantability; and (3) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code ("Bus. & Prof. Code") §17200 *et seq.*

B. On March 19, 2007, Clorox's motion to dismiss was granted in part and denied in part and plaintiff Hartless was given leave to file an amended complaint.

C. On November 28, 2007, plaintiff Hartless filed her First Amended Complaint alleging causes of action for: (1) violation of the CLRA; and (2) violation of the UCL.

D. The *Hartless* complaint alleges that on each package of its Automatic Toilet Bowl Cleaner with Bleach ("CATBC" or "Drop-In Tablets"), Clorox falsely and deceptively states that the CATBC "Does not harm plumbing." Plaintiff alleges that the chemicals in the Drop-In Tablets are highly corrosive and attack the toilet tank components, in particular causing the rubber and plastic parts to deteriorate until the components fail or no longer seal properly, and that Plaintiff suffered such property damage. Plaintiff also claims that Clorox – based on its own tests as well as independent testing – knew or should have known that the Drop-In Tablets would deteriorate the

toilet tank parts, and yet sold the product by telling its customers that the CATBC would not harm plumbing. The complaint seeks monetary damages and restitutionary relief. The allegations of the complaint are incorporated herein for reference.

E. Clorox denies Plaintiff's allegations, and on December 17, 2007 Clorox filed its answer to the *Hartless* complaint.

F. On November 20, 2008, Peter Wachowski independently filed a complaint against Clorox in the U.S. District Court for the Northern District of California, asserting substantially similar allegations. On January 22, 2009, the *Wachowski* action was transferred to the U.S. District Court for the Southern District of California and deemed a related action to the *Hartless* case.

G. On July 10, 2009, Shawndee Hartless filed a claim in Superior Court of the State of California, County of San Diego ("*Hartless II*"). The state court complaint seeks injunctive and declatory relief.

H. Before commencing the respective actions, counsel for plaintiff Hartless and counsel for plaintiff Wachowski affirm that each conducted separate examinations and evaluations of the relevant law and facts to assess the merits of their respective plaintiff's claims and to determine how to best serve the interests of the members of the proposed classes. After instituting her action, plaintiff Hartless served formal written discovery requests on Clorox in the form of: Requests for Production of Documents; First and Second Sets of Interrogatories; and First and Second sets of Requests for Admissions. Clorox provided written responses to each set of requests and, in some cases, supplemental responses after the parties met and conferred. Plaintiff Hartless also served document subpoenas on five of the companies involved in marketing and advertising for Clorox and received responsive documents from some of them.

I. In response to the document requests, Clorox produced approximately 42,400 pages of documents. By the fall of 2009, Hartless' Counsel completed their review of the Clorox documents. In further preparation for class certification and trial, Hartless served a Fed. R. Civ. P. 30(b)(6) notice of deposition on Clorox and an individual deposition notice of a Clorox employee. In addition, Hartless served a deposition subpoena on a former employee of Clorox who was responsible for some testing of Clorox's CATBC. The depositions were scheduled for November

2009. In addition, Hartless' Counsel conducted an informal interview of a former Clorox employee and worked with consultants to review and analyze the CATBC testing documents produced by Clorox. Plaintiffs' motions for class certification were due to be filed in the federal actions on December 7, 2009.

J. On October 27, 2009, Class Counsel and Clorox and its counsel participated in a settlement mediation with the Honorable Gary Taylor (Retired). Based upon Plaintiff's investigation and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiff and Class Counsel agreed to settle the Action pursuant to the provisions of this Stipulation after considering, among other things: (1) the substantial benefits available to the Class under the terms of this Stipulation; (2) the attendant risks and uncertainty of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating this Stipulation promptly to provide effective relief to plaintiffs and the Class.

K. Clorox has denied and continues to deny each and all of the claims and contentions alleged by plaintiffs. Clorox has expressly denied and continues to deny all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Action and states that its CATBC is a safe product when used as directed. Clorox also has denied and continues to deny that its CATBC label was false or misleading.

L. Nonetheless, Clorox has concluded that further defense of the Action would be protracted and expensive, and that it is desirable that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in the Stipulation. Defendant also has taken into account the uncertainty and risks inherent in any litigation. Clorox, therefore, has determined that it is desirable and beneficial to it that the Action be settled in the manner and upon the terms and conditions set forth in the Stipulation.

III. SETTLEMENT RELIEF

In consideration of the covenants set forth herein, the Parties agree as follows:

A. Prospective Relief

Clorox will do the following:

1. Clorox will cease using the language "Does not harm plumbing" or substantially similar language that reasonably conveys the same meaning on future CATBC labels and packages, promotional materials, and/or advertisements.

B. Retrospective Relief

Clorox does not sell the CATBC directly to consumers and thus has no way to identify individual Class Members. Additionally, an individual Class Member's recovery may be too small to make traditional methods of proof economically feasible. Further, Class Members are not likely to retain records of small purchases or repairs for long periods of time. In order to assure that Class Members have access to the proceeds of this settlement, a Claim Fund will be established and administered as follows:

1. Clorox shall pay up to $8 million to the Fund Institution to establish the Claim Fund for payment of Class Member claims for alleged property damage (which damages may be measured by the purchase price) resulting from the purchase and/or use of CATBC, and for the payment of certain notice and administration costs and expenses, as follows:

(a) Not more than 30 days after the Court's order granting Preliminary Approval, Clorox shall pay $760,000 to the Fund Institution.

(b) Within 30 days after the Effective Date, Clorox shall pay $6,240,000 in trust to the Fund Institution.

(c) If, and only if, amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) exceed $7 million, Clorox shall pay up to an additional $1 million into the Claim Fund as needed to pay Class Members' Approved Claims.

2. The Claim Fund shall be applied as follows:

(a) To reimburse or pay $750,000 of the total costs reasonably and actually incurred by the Claim Administrator in connection with providing notice to and administering claims submitted by the Class. All costs incurred by the Claim Administrator and/or Clorox in

connection with providing notice to and administering claims for the Class in excess of $750,000, shall be paid separately by Clorox and shall not be paid out of the Claim Fund;

(b) To distribute to Class Members who submit Approved Claims to the Claim Administrator and to pay class representative service awards;

(c) To pay for expenses associated with maintaining the Claim Fund (including taxes that may be owed by the Claim Fund), if any;

(d) If the amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) do not exceed $7 million, the remainder of the Claim Fund (the "Claim Fund Balance") shall be distributed to an appropriate non-profit or civic entity(ies) agreed to by the Parties and approved by the Court for use in a manner that the Court shall determine will be an appropriate vehicle to provide the next best use of compensation to Class Members arising out of claims that have been made by Plaintiff in this Action and as consideration for the extinguishment of those claims;

(e) If the amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) above exceed $8 million, all Approved Claims will be reduced pro rata, based on the respective dollar amounts of the Approved Claims, until the total aggregate of Approved Claims, $750,000 paid in notice and/or claim administration costs, and expenses associated with maintaining the Claim Fund, if any, equals $8 million.

3. Class Members shall have the opportunity to submit a claim to the Claim Administrator during the Claim Submission Period.

4. The claim process will be administered by a Claim Administrator, according to the criteria set forth in Exhibit A, and neither Class Counsel nor Clorox shall participate in resolution of such claims.

5. The decision of the Claim Administrator shall be final and binding on Clorox and all Class Members submitting Claims, and neither Clorox nor such Class Members shall have the right to challenge or appeal the Claim Administrator's decision.

6. All expenses of the Claim Administrator shall be paid as provided in ¶III.B.2(a).

7. The Claim Administrator shall approve or reject all claims according to the claims criteria in Exhibit A. The determination of claims shall occur during the Claim Review Period.

8. Within 15 days after conclusion of the Claim Review Period, the Claim Administrator shall provide to Clorox and Co-Lead Counsel a written final accounting and Distribution Plan identifying: (a) each claimant whose claim was approved, including the dollar amount of the payment awarded to each such claimant, and the dollar amount of any pro rata reduction required by ¶III.B.2(e); (b) each claimant whose claim was rejected; (c) the dollar amount of the Claim Fund Balance to be disbursed to the recipient(s) ordered by the Court as provided in ¶III.B.2(d); and (d) a final accounting of all administration fees and expenses incurred by the Claim Administrator. No sooner than 20 days, but not later than 45 days after delivering the Distribution Plan, the Claim Administrator shall disburse the remaining amounts in the Claim Fund according to the Distribution Plan and mail letters to all claimants with Rejected Claims explaining the rejection. In no event shall a Class Member's claim be paid until the conclusion of the Claim Review Period.

9. If any distribution checks mailed to Class Members are returned as non-deliverable, or are not cashed within 180 days, or are otherwise not payable, any such funds shall be disbursed to the recipients ordered by the Court as provided in ¶III.B.2(d).

IV. RELEASES

A. As of the Effective Date, in consideration of the settlement obligations set forth herein, any and all claims, demands, rights, causes of action, suits, petitions, complaints, damages of any kind, liabilities, debts, punitive or statutory damages, penalties, losses and issues of any kind or nature whatsoever, asserted or unasserted, known or unknown (including, but not limited to, any and all claims relating to or alleging deceptive or unfair business practices, false or misleading advertising, intentional or negligent misrepresentation, negligence, concealment, omission, unfair competition, promise without intent to perform, unsuitability, unjust enrichment, and any and all claims or causes of action arising under or based upon any statute, act, ordinance, or regulation governing or applying to business practices generally, including, but not limited to, any and all claims relating to or alleging violation of Bus. & Prof. Code §§17200-17209 and §17500, the CLRA (Civil Code §§1750-1784), or any and all other federal, state, and /or local statutes analogous or similar to the California statutes cited herein), arising out of or related to the Clorox Lawsuits, that were asserted or reasonably could have been asserted in the Clorox Lawsuits by or on behalf of all

Releasing Parties, whether individual, class, representative, legal, equitable, administrative, direct or indirect, or any other type or in any other capacity, against any Released Party ("Released Claims") shall be finally and irrevocably compromised, settled, released, and discharged with prejudice.

B. Each of the Releasing Parties hereby waives any and all rights and benefits arising out of the facts alleged in the Clorox Lawsuits by virtue of the provisions of Civil Code §1542, or any other provision in the law of the United States, or any state or territory of the United States, or principle of common law or equity that is similar, comparable or equivalent to Civil Code §1542, with respect to this release. The Releasing Parties are aware that Civil Code §1542 provides as follows:

> ***A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.***

The Releasing Parties expressly acknowledge that they may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but the Releasing Parties, upon the Effective Date, shall be deemed to have, and by operation of law shall have, fully, finally and forever settled, released, and discharged any and all Released Claims, known or unknown, suspected or unsuspected, whether or not concealed or hidden, that now exist or heretofore have existed upon any theory of law or equity, including but not limited to, Released Claims based on conduct that is negligent, reckless, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Parties agree that the Released Claims constitute a specific and not a general release.

C. The Releasing Parties shall be deemed to have agreed that the release set forth in ¶¶IV.A and B (the "Release") will be and may be raised as a complete defense to and will preclude any action or proceeding based on the Released Claims.

D. As of the Effective Date, by operation of entry of judgment, the Released Parties shall be deemed to have fully released and forever discharged Plaintiff, all other Class Members and Class Counsel from any and all claims of abuse of process, malicious prosecution, or any other claims arising out of the initiation, prosecution or resolution of the Clorox Lawsuits including, but not

limited to, claims for attorneys' fees, costs of suit or sanctions of any kind, or any claims arising out of the allocation or distribution of any of the consideration distributed pursuant to this Stipulation of Settlement.

V. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY

Solely for the purposes of the settlement of this Action, the Parties agree to the certification of a Class of all persons or entities in the United States who purchased, used, or suffered any property damage from the use of Clorox Automatic Toilet Bowl Cleaner from December 13, 2002, to the date notice to the Class is to be published. Plaintiff Shawndee Hartless shall make this request for certification to the U.S. District Court for the Southern District of California, currently assigned to the Honorable Cathy Ann Bencivengo; and Co-Lead Counsel shall request the Court to enter an order, which, among other things, certifies the Class for settlement purposes, as set forth in this paragraph. Defendant contends that certification of the alleged class (other than on a settlement basis) would not be possible absent this settlement because individual issues would predominate.

In the event this Stipulation of Settlement and the settlement proposed herein is not finally approved, or is terminated, cancelled, or fails to become effective for any reason whatsoever, this class certification, to which the parties have stipulated solely for the purpose of the settlement of the Action, shall be null and void and the Parties will revert to their respective positions immediately prior to the execution of this Stipulation of Settlement. Under no circumstances may this Stipulation of Settlement be used as an admission or as evidence concerning the appropriateness of class certification in these or any other actions against Clorox.

VI. CLASS NOTICE AND COURT APPROVAL

A. Notice Order; Preliminary Approval

Within 30 days after the execution of the Stipulation of Settlement, the Parties shall apply to the Court for a Preliminary Approval Order substantially in the form and content of Exhibit B, conditionally certifying the Class for settlement purposes as defined in ¶V, for preliminary approval of the settlement, for scheduling a final approval hearing, and for approving the contents and method of dissemination of the proposed Publication Notice and Class Notice Package.

B. The Notice Program

The notice program shall consist of notice by publication (the Publication Notice, attached hereto as Exhibit C) which generally describes the settlement and directs all interested parties to a detailed Class Notice available on the Settlement Website and, at the request of interested parties, by U.S. Mail. Co-Lead Counsel shall also place a link to the Settlement Website on the websites of Blood Hurst & O'Reardon, LLP and Bonnett, Fairbourn, Friedman & Balint, P.C. for a period starting from the date the Publication Notice is published, and continuing no longer than the end of the Claim Submission Period. Clorox shall pay the cost associated with the Publication Notice and Class Notice Package, except those costs associated with posting and maintaining notice on Plaintiffs' Counsel's Internet websites.

1. Publication Notice

Commencing at least 105 days before the Final Approval Hearing or some other date as set by the Court, Clorox shall cause to be published the Publication Notice substantially in the form and content of Exhibit C pursuant to the Notice Plan described in Exhibit D. The Publication Notice as shown in Exhibit C shall incorporate Claim Form 1. The Notice Plan shall include dissemination of the Publication Notice translated into Spanish and published in Spanish.

2. Class Notice Package

The Class Notice Package shall be available in electronic format on the Settlement Website and mailed as a hard copy by the Claim Administrator upon request. In addition, Clorox shall direct the Claim Administrator to mail the Class Notice Package to counsel for the plaintiff(s) in any pending litigation that concerns property damage or false advertising related to CATBC against Defendant. To the extent that Clorox has an address for any persons who complained to or inquired of Clorox concerning CATBC during the Class Period, Clorox shall also direct the Claim Administrator to mail the Class Notice Package to the last known address of each such person.

Each Class Notice Package shall contain a Class Notice substantially in the form of Exhibit E and the Claim Forms substantially in the forms of Exhibits F(1) and F(2).

3. Notice of Deadlines

Both the Publication Notice and the Class Notice shall inform Class Members of the dates by which they must file any objections, requests for exclusions, and submit a Claim Form. Class Members shall have 45 days from the date notice to the Class is to be last published to file objections, to file notices of intent to appear at the Final Approval Hearing, or to submit exclusion requests. Class Members will have the opportunity to submit a Claim Form during the period beginning on the date notice to the Class is first published, and continuing until 30 days after the date of the Final Approval Hearing.

C. Final Approval Hearing

The Parties shall request that after notice is given, the Court hold a Final Approval Hearing for the purpose of determining whether final approval of the settlement of the Action as set forth herein is fair, adequate, and reasonable to the Class Members, and enter a Final Settlement Order and Judgment dismissing the Action with prejudice substantially in the form and content of Exhibit G.

D. Requests for Exclusion

If prior to the Final Approval Hearing, the number of putative Class Members who timely request exclusion from the class in accordance with the provisions of the Preliminary Approval Order exceeds 2,000, Clorox shall have the right, but not the obligation, to terminate this Stipulation of Settlement or to seek appropriate modifications to this Stipulation of Settlement that adequately protect the Parties. Copies of all Requests for Exclusion received by the Claim Administrator, together with copies of all written revocations of Requests for Exclusion received, shall be delivered to the Parties' counsel no later than 8 days after the Class Members' deadline to submit such exclusion requests, or at such other time as the Parties may mutually agree in writing.

E. The *Hartless* State Court Action and the *Wachowski* Action

1. Upon execution of the Stipulation of Settlement by all signatories, Co-Lead Counsel shall notify the San Diego Superior Court in which the injunctive relief action captioned *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL ("*Hartless II*"), is pending of the intent to settle that action through this Stipulation of Settlement and request a stay of the state court action during the settlement process. Once the events and conditions set forth in ¶¶VII.A 1, 2, and 5 have been

met or have occurred, Co-Lead Counsel shall request that the *Hartless II* state court action be dismissed with prejudice.

2. Upon execution of the Stipulation of Settlement by all signatories, counsel for plaintiff Peter Wachowski shall notify the Court of the intent to settle the *Wachowski* action through this Stipulation of Settlement and request a stay of his action during the settlement process. Once the events and conditions set forth in ¶¶VII.A 1, 2, and 5 have been met or have occurred, counsel for Wachowski shall request that his action be dismissed with prejudice.

VII. CONDITIONS; TERMINATION

A. This Settlement shall become final on the first date after which all of the following events and conditions have been met or have occurred (the "Effective Date"):

1. The Court has preliminarily approved this Stipulation (including all attachments), the settlement set forth herein and the method for providing notice to the Class;

2. The Court has entered a Final Settlement Order and Judgment in the Action;

3. The San Diego Superior Court has entered an order dismissing *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL, with prejudice;

4. The U.S. District Court for the Southern District of California has entered an order dismissing *Wachowski v. Clorox Co.*, No. CV-09-138-CAB, with prejudice; and

5. One of the following has occurred:

(a) The time to appeal from such orders has expired and no appeals have been timely filed;

(b) If any such appeal has been filed, it has finally been resolved and the appeal has resulted in an affirmation of the Final Settlement Order and Judgment; or

(c) The Court, following the resolution of any such appeals, has entered a further order or orders approving the Settlement of the Action on the terms set forth in this Stipulation of Settlement, and either no further appeal has been taken from such order(s) or any such appeal has resulted in affirmation of the settlement order.

B. If the Settlement is not made final (per the provisions of ¶VII.A.), this entire Stipulation shall become null and void as set forth in ¶V of this Stipulation, except that the Parties

shall have the option to agree in writing to waive the event or condition and proceed with this settlement, in which event the Stipulation of Settlement shall be deemed to have become final on the date of such written agreement. In the event the Stipulation becomes null and void, Clorox shall be responsible for all administrative and notice costs incurred as of the date the Stipulation becomes null and void, including the costs of notifying the Class and any claim administration costs.

VIII. COSTS, FEES AND EXPENSES

A. Attorneys' Fees and Expenses

1. The Parties agree that an award of attorneys' fees and expenses to Class Counsel will be in addition to the consideration to Plaintiff, the Class Members and the general public, and shall in no way reduce the settlement consideration.

2. Co-Lead Counsel shall make, and Clorox agrees not to oppose, an application for an award of attorneys' fees and expenses not to exceed a total of $2,250,000. Defendant shall make all reasonable efforts to pay the award of Class Counsels' fees and expenses within 15 days and in no event later than 30 days after the Effective Date or after the issuance of an order awarding such amount, whichever is later.

3. Class Counsel, in their sole discretion, shall allocate and distribute the award of attorneys' fees and expenses among Class Counsel.

B. Class Representative Award

Defendant agrees not to oppose an application for class representative service awards to be paid out of the Claim Fund to the named plaintiffs in the Clorox Lawsuits in an amount not to exceed $4,000 for Hartless and $2,000 for Wachowski. Such awards shall be paid within 30 days after the Effective Date or within 30 days after the issuance of an order awarding such amount, whichever is later. In the event that a Class Member appeals the award of attorneys' fees and costs, or the class representative service awards, Defendant shall not take a position contrary to this Stipulation.

C. Claim Administration Costs

Clorox shall bear the costs associated with administering the claim process, and implementing the prospective relief, as provided in ¶III.

D. Costs of Class Notice

Clorox shall bear the costs of notifying the Class of this proposed settlement, as provided in ¶III.B.2(a).

IX. COVENANTS AND WARRANTIES

A. Authority to Enter Agreement

Plaintiff and Defendant each covenants and warrants that she/it has the full power and authority to enter into this Stipulation of Settlement and to carry out its terms, and that they have not previously assigned, sold, or otherwise pledged or encumbered any right, title or interest in the claims released herein or their right, power and authority to enter into this Stipulation of Settlement. Any person signing this Stipulation of Settlement on behalf of any other person or entity represents and warrants that he or she has full power and authority to do so and that said other person or entity is bound hereby.

B. Represented by Counsel

In entering into this Stipulation of Settlement, the Parties represent they have relied upon the advice of attorneys, who are the attorneys of their own choice, concerning the legal consequences of this Stipulation of Settlement; that the terms of this Stipulation of Settlement have been explained to them by their attorneys; and that the terms of this Stipulation of Settlement are fully understood and voluntarily accepted by the Parties.

C. No Other Actions

As of the date of executing this Stipulation, aside from lawsuits identified in documents produced in this Action, Plaintiff and Co-Lead Counsel represent and warrant that they are not aware of any action or potential action other than the Clorox Lawsuits that: (1) raises allegations similar to those asserted in the Clorox Lawsuits; and (2) is pending or is expected to be filed in any forum by any person or entity against Clorox. Until the Effective Date, Plaintiff and her Counsel shall have a continuing duty to notify Clorox if Plaintiffs or Plaintiffs' Counsel become aware of any such action.

X. MISCELLANEOUS

A. Governing Law. The interpretation and construction of this Stipulation of Settlement shall be governed by the laws of the State of California.

B. Counterparts. This Stipulation of Settlement may be executed in counterparts. All counterparts so executed shall constitute one agreement binding on all of the Parties hereto, notwithstanding that all Parties are not signatories to the original or the same counterpart.

C. No Drafting Party. Any statute or rule of construction that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Stipulation of Settlement and the Parties agree that the drafting of this Stipulation has been a mutual undertaking.

D. Entire Agreement. All agreements, covenants, representations and warranties, express or implied, written or oral, of the Parties hereto concerning the subject matter hereof are contained in this Stipulation of Settlement and the exhibits hereto. Any and all prior or contemporaneous conversations, negotiations, drafts, terms sheets, possible or alleged agreements, covenants, representations and warranties concerning the subject matter of this Stipulation of Settlement are waived, merged herein and superseded hereby.

E. Retained Jurisdiction. The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Stipulation, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Stipulation.

F. Cooperation. Each of the Parties hereto shall execute such additional pleadings and other documents and take such additional actions as are reasonably necessary to effectuate the purposes of this Stipulation of Settlement.

G. Amendments in Writing. This Stipulation of Settlement may only be amended in writing signed by Co-Lead Counsel and Defendant's Counsel.

H. Binding Effect; Successors and Assigns. This Stipulation of Settlement shall inure to the benefit of, and shall be binding upon, the Parties hereto as well as the legal successors and assigns of the Parties hereto and each of them.

I. Construction. As used in this Stipulation of Settlement, the terms "herein" and "hereof" shall render to this Stipulation in its entirety, including all exhibits and attachments, and not limited to any specific sections. Whenever appropriate in this Stipulation of Settlement, the singular

shall be deemed to refer to the plural, and the plural to the singular, and pronouns of any gender shall be deemed to include both genders.

J. Waiver in Writing. No waiver of any right under this Stipulation of Settlement shall be valid unless in writing.

K. Computation of Time. All time periods set forth herein shall be computed in business days if seven days or less and calendar days if eight days or more unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Stipulation or by order of the Court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal or court holiday, or, when the act to be done is the filing of a paper in Court, a day in which weather or other conditions have made the office of the clerk of the Court inaccessible, in which event the period shall run until the end of the next day as not one of the aforementioned days. As used in this subsection, "legal or court holiday" includes New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Memorial Day, Independent Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States or by the State of California.

L. No Admission of Liability. Each of the Parties understands and agrees that he, she or it has entered into this Stipulation of Settlement for purpose of purchasing peace and preventing the risks and costs of any further litigation or dispute. This settlement involves disputed claims; specifically, Clorox denies any wrongdoing, and the Parties understand and agree that neither this Stipulation of Settlement, nor the fact of this settlement, may be used as evidence or admission of any wrongdoing by Clorox.

M. Notice. Any notice to the Parties required by this Stipulation of Settlement shall be given in writing by first class US Mail and e-mail to:

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
lhurst@bholaw.com

For Defendant:

Sabrina H. Strong
Adam G. Levine
O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May , 2010

SHAWNDEE HARTLESS

DATED: May , 2010

PETER WACHOWSKI

DATED: May ____, 2010

THE CLOROX COMPANY

BY: _____

TITLE: _____

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
lhurst@bholaw.com

For Defendant:

Sabrina H. Strong
Adam G. Levine
O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May ____, 2010 ______________________________
SHAWNDEE HARTLESS

DATED: May 17, 2010 Peter C. Wachowski
____
PETER WACHOWSKI

DATED: May ____, 2010 THE CLOROX COMPANY

____
BY: ______________________________
TITLE: ______________________________

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
lhurst@bholaw.com

For Defendant:

Sabrina H. Strong
Adam G. Levine
O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May , 2010

SHAWNDEE HARTLESS

DATED: May , 2010

PETER WACHOWSKI

DATED: May 21, 2010

THE CLOROX COMPANY

BY: LAURA STEIN

TITLE: SENIOR VICE PRESIDENT— GENERAL COUNSEL

DATED: May 19, 2010

BLOOD HURST & O'REARDON, LLP
TIMOTHY G. BLOOD
LESLIE E. HURST

LESLIE E. HURST

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Telephone: 619/338-1100
619/338-1101 (fax)

BONNETT, FAIRBOURN, FRIEDMAN
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ANDREW S. FRIEDMAN
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Attorneys for Plaintiff

DATED: May 19, 2010

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RICHARD J. DOHERTY

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Attorneys for Peter Wachowski

DATED: May 21, 2010

O'MELVENY & MYERS LLP
SABRINA H. STRONG
ADAM LEVINE

Sabrina H. Strong by ECME
SABRINA H. STRONG

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Telephone: 213/430-6000
213/430-6407 (fax)

Attorneys for Defendant

LIST OF EXHIBITS

A. Claims Administration Protocols

B. Order re: Preliminary Approval of Class Action Settlement

C. Publication Notice

D. Notice Plan

E. Notice of Class Action Settlement

F(1). Claim Form 1

F(2). Claim Form 2

G. Final Settlement Order and Judgment

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CF/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 21, 2010.

s/Leslie E. Hurst
LESLIE E. HURST

BLOOD HURST & O'REARDON, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
toreardon@bholaw.com

Exhibit P

USCS Fed Rules Civ Proc R 23, Part 1 of 9

Current through changes received May 14, 2018.

USCS Court Rules > Federal Rules of Civil Procedure > Title IV. Parties

Rule 23. Class Actions [Effective until December 1, 2018]

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1)the class is so numerous that joinder of all members is impracticable;

(2)there are questions of law or fact common to the class;

(3)the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4)the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.A class action may be maintained if Rule 23(a) is satisfied and if:

(1)prosecuting separate actions by or against individual class members would create a risk of:

(A)inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B)adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2)the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3)the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A)the class members' interests in individually controlling the prosecution or defense of separate actions;

(B)the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C)the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D)the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1)*Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2)*Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i)the nature of the action;

(ii)the definition of the class certified;

(iii)the class claims, issues, or defenses;

(iv)that a class member may enter an appearance through an attorney if the member so desires;

(v)that the court will exclude from the class any member who requests exclusion;

(vi)the time and manner for requesting exclusion; and

(vii)the binding effect of a class judgment on members under Rule 23(c)(3).

(3)*Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A)for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B)for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4)*Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5)*Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1)*In General.* In conducting an action under this rule, the court may issue orders that:

(A)determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B)require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i)any step in the action;

(ii)the proposed extent of the judgment; or

(iii)the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C)impose conditions on the representative parties or on intervenors;

(D)require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E)deal with similar procedural matters.

(2)*Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1)*Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A)must consider:

(i)the work counsel has done in identifying or investigating potential claims in the action;

(ii)counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii)counsel's knowledge of the applicable law; and

(iv)the resources that counsel will commit to representing the class;

(B)may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C)may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D)may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E)may make further orders in connection with the appointment.

(2)*Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3)*Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4)*Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1)A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2)A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

History

Amended Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; March 27, 2003, eff. Dec. 1, 2003; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2018, eff. Dec. 1, 2018.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Prospective amendments:

Other provisions:

Notes of Advisory Committee on Rules. *Note to Subdivision (a).* This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L J 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill L Rev 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill L Rev 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn L Rev 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn L Rev 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del Ch Rule 113; Fla Comp Gen Laws Ann (Supp, 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual

Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala Code Ann (Michie, 1928) § 5701; 2 Ind Stat Ann (Burns, 1933) § 2-220; NYCPA (1937) § 195; Wis Stat (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v Stiglitz*, 260 Ky 430, 86 SW2d 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn L Q 399 (1934); Note, 36 Harv L Rev 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa 419, 114 A 377 (1921); *Pickett v Walsh*, 192 Mass 572, 78 NE 753, 6 LRA NS 1067 (1906); *Colt v Hicks*, 97 Ind App 177, 179 NE 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v Coronado Coal Co.*, 259 US 344, 66 L Ed 975, 42 S Ct 570, 27 ALR 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v Swormstedt*, 16 How 288, 14 L Ed 942 (US 1853). Compare *Christopher et al. v Brusselback*, 302 US 500, 82 L Ed 388, 58 S Ct 350 (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v Cauble*, 255 US 356, 41 S Ct 338, 65 L Ed 673 (1921). See also *Terry v Little*, 101 US 216, 25 L Ed 864 (1880); *John A. Roebling's Sons Co. v Kinnicutt*, 248 F 596 (DC NY, 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v Tennessee Valley Authority*, 297 US 288, 80 L Ed 688, 56 S Ct 466 (1936); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L J 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937). See also *Subdivision (b)* of this rule which deals with Shareholder's Action; Note, 15 Minn L Rev 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League v Napoleon Broward Drainage Dist.*, 253 F 246 (DC Fla, 1918); *Gramling v Maxwell*, 52 F2d 256 (DC NC, 1931), approved in 30 Mich L Rev 624 (1932); *Skinner v Mitchell*, 108 Kan 861, 197 P 569 (1921); *Duke of Bedford v Ellis* (1901) AC 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932).

Note to Subdivision (b). This is former Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v Oakland*, 104 US 450, 26 L Ed 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 US IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937).

Notes of Advisory Committee on 1966 Amendment. *Note to Subdivision (b).* Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co. v Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v Tompkins*, clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the Courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes v Oakland*, 1882, 104 US 450, 26 L Ed 827, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v Tyson*, 1842, 16 Peters 1, 10 L Ed 865, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v Tompkins* in 1938, concerned with the question whether *Hawes v Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v Oakland*, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from Rule 23 FRCP. The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy v Steel*, 1887, 120 US 241, 245, 30 L Ed 624, 7 S Ct 520, the Court referring to *Hawes v Oakland* said: “In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States.”

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v Tompkins* are *Dimpfel v Ohio & Miss. R.R.* (1884), 110 US 209, 28 L Ed 121, 3 S Ct 573; *Illinois Central R. Co. v Adams*, 1901, 180 US 28, 34, 45 L Ed 410, 21 S Ct 251; *Venner v Great Northern Ry.* (1908), 209 US 24, 30, 52 L Ed 666, 28 S Ct 328; *Jacobson v General Motors Corp.*, SD NY 1938, 22 F Supp 255, 257. These cases generally treat *Hawes v Oakland* as establishing a “principle” of equity, or as dealing not with jurisdiction but with the “right” to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no “title” and results in a dismissal “for want of equity.”

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v Gould*, 1911, 202 NY 11, 94 NE 1088.

The first case arising after the decision in *Erie R. Co. v Tompkins*, in which this problem was involved, was *Summers v Hearst*, SD NY 1938, 23 F Supp 986. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: “The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law.” He quoted *Pollitz v Gould* (1911), 202 NY 11, 94 NE 1088, as saying that the United States Supreme Court “seems to have been more concerned with establishing this rule as one of practice than of substantive law” but that “whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.”

He then concluded that, although the federal decisions treat the equity rule as “stating a principle of substantive law”, if former “Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.”

Some other federal decisions since 1938 touch the question.

In *Picard v Sperry Corporation*, SD NY 1941, 36 F Supp 1006, 1009–10, affirmed without opinion, CCA 2d, 1941, 120 F2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court

held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v Tompkins.* In *York v Guaranty Trust Co. of New York*, CCA 2d, 1944, 143 F2d 503, rev'd on other grounds, 1945, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by FRCP 23(b) or other state statutes are procedural," citing the Picard and other cases.

In *Gallup v Caldwell*, CCA 3d, 1941, 120 F2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins v DeSoto Securities Co.*, WD La 1942, 45 F Supp 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman v Missouri-Kansas Pipe Line Co.*, D Del 1941, 41 F Supp 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v Tompkins*, or its effect on the rule.

In *Perrott v United States Banking Corp.*, D Del 1944, 53 F Supp 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. . . . Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp. v Barr*, SD NY 1945, 9 Fed Rules Serv 23b 11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b). These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt v Moffett*, Ct App 1945, 294 NY 180, 61 NE 2d 435, revg 51 NYS 2d 188, affg 49 NYS 2d 64; *Noel Associates, Inc. v Merrill*, Sup Ct 1944, 184 Misc 646, 63 NYS 2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v Clinton Trust Co.*, Sup Ct 1944, 183 Misc 340, 48 NYS 2d 267; *Noel Associates, Inc. v Merrill*, supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v Merrill*, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt v Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v Atkinson*, Sup Ct 1944, 182 Misc 675, 49 NYS 2d 703 (constitutional); *Citron v Mangel Stores Corp.*, Sup Ct 1944, 50 NYS 2d 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 1945, 54 Yale LJ 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch 131, R S Cum Supp 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v Moffett*, Sup Ct NY 1945, 184 Misc 1074, 56 NYS 2d 134.

See also generally, 2 *Moore's Federal Practice*, 1938, 2250–2253, and Cum. Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

Notes of Advisory Committee on 1966 amendments. Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo LJ 551, 570–76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity*, 245–46, 256–57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn LQ 327, 329–36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv L Rev 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v Veterans' Coop. H. Assn.*, 13 FRD 11 (DDC 1952); *Shipley v Pittsburgh & L.E.R. Co.*, 70 F Supp 870 (WD Pa 1947); *Deckert v Independence Shares Corp.*, 27 F Supp 763 (ED Pa 1939), revd, 108 F2d 51 (3d Cir 1939), revd 311 US 282, 85 L Ed 189, 61 S Ct 229 (1940), on remand, 39 F Supp 592 (ED Pa 1941), revd sub nom *Pennsylvania Co. for Ins. on Lives v Deckert*, 123 F2d 979 (3d Cir 1941) (see Chafee, supra, at 264–65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v Reed*, 180 F2d 991 (6th Cir 1950); *Wilson v City of Paducah*, 100 F Supp 116 (WD Ky 1951); *Citizens Banking Co. v Monticello State Bank*, 143 F2d 261 (8th Cir 1944); *Redmond v Commerce Trust Co.*, 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 188 (1944); *United States v American Optical Co.*, 97 F Supp 66 (ND Ill 1951); *National Hairdressers' & C. Assn. v Philad Co.*, 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940), affd mem, 129 F2d 1020 (3d Cir 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v Bankers Sec. Corp.*, 17 FRD 245 (ED Pa 1954), affd 230 F2d 717 (3d Cir 1956); *Giesecke v Denver Tramway Corp.*, 81 F Supp 957 (D Del 1949); *York v Guaranty Trust*

Co., 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, reh den 326 US 806, 90 L Ed 491, 66 S Ct 7 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v Kalodner*, 145 F2d 316, 320 (3d Cir 1944), cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945). But cf. the early decisions, *Duke of Bedford v Ellis*, [1901] AC 1; *Sheffield Waterworks v Yeomans*, LR 2 Ch App 8 (1866); *Brown v Vermuden*, 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice*, pars 23.10 [1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); but cf. *P. W. Husserl, Inc. v Newman*, 25 FRD 264 (SD NY 1960); *Athas v Day*, 161 F Supp 916 (D Colo 1958). On ancillary intervention, see *Amen v Black*, 234 F2d 12 (10th Cir 1956), cert granted 352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956), dism on stip 355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958); but cf. *Wagner v Kemper*, 13 FRD 128 (WD Mo 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230–31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv L Rev at 937–38; Note, Binding Effect of Class Actions, 67 Harv L Rev 1059, 1062–65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum L Rev 818, 833–36 (1946); Mich Gen Court R 208.4 (effective Jan. 1, 1963); Idaho R Civ P 23 (d); Minn R Civ P 23.04; N Dak R Civ P 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L Rev 433, 458–59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351–52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v Radio Corp. of Am.*, 183 F2d 558, 560 (3d Cir 1950); *Zachman v Erwin*, 186 F Supp 681 (SD Tex 1959); *Baim & Blank, Inc. v Warren-Connelly Co., Inc.*, 19 FRD 108 (SD NY 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Note to Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum L Rev 1254, 1259–60 (1961); cf. 3 *Moore*, supra, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to

obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v Cauble*, 255 US 356, 366–67, 65 L Ed 673, 41 S Ct 338 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v Looney*, 219 F2d 529 (9th Cir 1955); *Rank v Krug*, 142 F Supp 1, 154–59 (SD Calif 1956), on app, *State of California v Rank*, 293 F2d 340, 348 (9th Cir 1961); *Gart v Cole*, 263 F2d 244 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959); cf. *Martinez v Maverick Cty. Water Con. & Imp. Dist.*, 219 F2d 666 (5th Cir 1955); 3 Moore, supra, par 23.11 [2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v Cauble*, 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); *Waybright v Columbian Mut. Life Ins. Co.*, 30 F Supp 885 (WD Tenn 1939); cf. *Smith v Swormstedt*, 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v Bankers Securities Corp.*, 17 FRD 245 (ED Pa 1954), affd, 230 F2d 717 (3d Cir 1956); *Giesecke v Denver Tramway Corp.*, 81 F Supp 957 (D Del 1949); *Zahn v Transamerica Corp.*, 162 F2d 36 (3d Cir 1947); *Speed v Transamerica Corp.*, 100 F Supp 461 (D Del 1951); *Sobel v Whittier Corp.*, 95 F Supp 643 (ED Mich 1951), app dism, 195 F2d 361 (6th Cir 1952); *Goldberg v Whittier Corp.*, 111 F Supp 382 (ED Mich 1953); *Dann v Studebaker-Packard Corp.*, 288 F2d 201 (6th Cir 1961); *Edgerton v Armour & Co.*, 94 F Supp 549 (SD Calif 1950); *Ames v Mengel Co.*, 190 F2d 344 (2d Cir 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v Chicago T. & T. Co.*, 128 F2d 245 (7th Cir 1942); *Citizens Banking Co. v Monticello State Bank*, 143 F2d 261 (8th Cir 1944); *Redmond v Commerce Trust Co.*, 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 187 (1944); cf. *York v Guaranty Trust Co.*, 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v Burnham*, 197 F2d 973 (2d Cir 1952), cert den 344 US 875, 97 L Ed 678, 73 S Ct 169 (1952); 3 Moore, supra, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v Bennett & Armour*, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. *City & County of San Francisco v Market Street Ry.*, 95 Cal App 2d 648, 213 P2d 780 (1950). Similar

problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v Paramount Pictures, Inc.*, 66 F Supp 323, 341–46 (SD NY 1946); 334 US 131, 144–48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).).

Note to Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v Flax*, 313 F2d 284 (5th Cir 1963); *Bailey v Patterson*, 323 F2d 201 (5th Cir 1963), cert den 376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964); *Brunson v Board of Trustees of School District No. 1, Clarendon Cty.*, S.C., 311 F2d 107 (4th Cir 1962), cert den 373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963); *Green v School Bd. of Roanoke, Va.*, 304 F2d 118 (4th Cir 1962); *Orleans Parish School Bd. v Bush*, 242 F2d 156 (5th Cir 1957), cert den 354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957); *Mannings v Board of Public Inst. of Hillsborough County, Fla.*, 277 F2d 370 (5th Cir 1960); *Northcross v Board of Ed. of City of Memphis*, 302 F2d 818 (6th Cir 1962), cert den 370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962); *Frasier v Board of Trustees of Univ. of N.C.*, 134 F Supp 589 (MD NC 1955, 3-judge court), affd, 350 US 979, 100 L Ed 848, 76 S Ct 467 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Note to Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v F. J. Young & Co., Inc.*, 144 F2d 387 (2d Cir 1944); *Miller v National City Bank of N. Y.*, 166 F2d 723 (2d Cir 1948); and for like problems in other contexts, see *Hughes v Encyclopaedia Britannica*, 199 F2d 295 (7th Cir 1952); *Sturgeon v Great Lakes Steel Corp.*, 143 F2d 819 (6th Cir 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages

but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v United States*, 111 F Supp 80 (DNJ 1953); cf. Weinstein, supra, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); cf. *Weeks v Bareco Oil Co.*, 125 F2d 84 (7th Cir 1941); *Kainz v Anheuser-Busch, Inc.*, 194 F2d 737 (7th Cir 1952); *Hess v Anderson, Clayton & Co.*, 20 FRD 466 (SD Calif 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L Rev at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is “superior” to the others in the particular circumstances.

Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v Bareco Oil Co.*, 125 F2d 84, 88–90, 93–94 (7th Cir 1941) (anti-trust action); see also *Pentland v Dravo Corp.*, 152 F2d 851 (3d Cir 1945), and Chafee, supra, at 273–75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 USC § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 USC § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.).

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Note to Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may

cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.).

Note to Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par 23.11 [4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); *York v Guaranty Trust Co.*, 143 F2d 503, 529 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945); *Pentland v Dravo Corp.*, 152 F2d 851, 856 (3d Cir 1945); *Speed v Transamerica Corp.*, 100 F Supp 461, 463 (D Del 1951); *State Wholesale Grocers v Great Atl. & Pac. Tea Co.*, 24 FRD 510 (ND Ill 1959); *Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp.*, 28 F Supp 386, 390 (ND Ala 1939); *Tolliver v Cudahy Packing Co.*, 39 F Supp 337, 339 (ED Tenn 1941); *Kalven & Rosenfield*, supra, 8 U of Chi L Rev 684 (1941); Comment, 53 Nw UL Rev 627, 632–33 (1958); *Developments in the Law*, supra, 71 Harv L Rev at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v Hercules Powder Co.*, 7 FRD 24, 28–29 (WD Mo 1947); *Abram v Sam Joaquin Cotton Oil Co.*, 46 F Supp 969, 976–77 (SD Calif 1942); Chafee, supra, at 280, 285; 3 Moore, supra, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* § 86, comment (h), §

116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L Rev at 460.

Note to Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v American Optical Co.*, 97 F Supp 66 (ND Ill 1951), and 1950–51 CCH Trade Cases 64573–74 (par 62869); cf. *Weeks v Bareco Oil Co.*, 125 F2d 84, 94 (7th Cir 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v F. J. Young & Co.*, 144 F2d 387 (2d Cir 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v United States*, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v Lee*, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940); *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950); cf. *Dickinson v Burnham*, 197 F2d 973, 979 (2d Cir 1952), and studies cited at 979 n 4; see also *All American Airways, Inc. v Elderd*, 209 F2d 247, 249 (2d Cir 1954); *Gart v Cole*, 263 F2d 244, 248–49 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230–31; *Brendle v Smith*, 7 FRD 119 (SD NY 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v Transitron Electronic Corp.*, 201 F Supp 934 (D Mass 1962); *Hormel v United States*, 17 FRD 303 (SD NY 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Notes of Advisory Committee on 1998 amendments. *Note to Subdivision (f).* This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1292(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Changes Made after Publication (GAP Report). No changes were made in the text of Rule 23(f) as published.

Several changes were made in the published Committee Note. (1) References to 28 U.S.C. § 1292(b) interlocutory appeals were revised to dispel any implication that the restrictive elements of § 1292(b) should be read in to Rule

23(f). New emphasis was placed on court of appeals discretion by making explicit the analogy to certiorari discretion. (2) Suggestions that the new procedure is a "modest" expansion of appeal opportunities, to be applied with "restraint," and that permission "almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion," were deleted. It was thought better simply to observe that courts of appeals will develop standards "that reflect the changing areas of uncertainty in class litigation."

Notes of Advisory Committee on 2003 amendments. *Note to Subdivision (c).* Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26–36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim class counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Note to Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23 (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court’s discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court’s decision. Among these are changes in

the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Note to Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to “fire” class counsel.In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court’s duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint “class counsel.” In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps of numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class “at an early practicable time,” and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant’s existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court’s later determination of a reasonable attorney fee.

Note to Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to “an action certified as a class action.” This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for

Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 [103 L. Ed. 2d 67, 76] (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount,

for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. “Side agreements” regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court’s objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel’s motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel’s motion for attorney fees must be “directed to the class in a reasonable manner.” Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel’s fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

Changes Made After Publication and Comment. Rule 23(c)(1)(B) is changed to incorporate the counsel-appointment provisions of Rule 23(g). The statement of the method and time for requesting exclusion from a (b)(3) class has been moved to the notice of certification provision in Rule 23(c)(2)(B).

Rule 23(c)(1)(C) is changed by deleting all references to "conditional" certification.

Rule 23(c)(2)(A) is changed by deleting the requirement that class members be notified of certification of a (b)(1) or (b)(2) class. The new version provides only that the court may direct appropriate notice to the class.

Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B), and to incorporate the statement transferred from (c)(1)(B) on "when and how members may elect to be excluded."

Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement.

Rule 23(e)(2) is revised to change the provision that the court may direct the parties to file a copy or summary of any agreement or understanding made in connection with a proposed settlement. The new provision directs the parties to a proposed settlement to identify any agreement made in connection with the settlement.

Rule 23(e)(3) is proposed in a restyled form of the second version proposed for publication.

Rule 23(e)(4)(B) is restyled.

Rule 23(g)(1)(C) is a transposition of criteria for appointing class counsel that was published as Rule 23(g)(2)(B). The criteria are rearranged, and expanded to include consideration of experience in handling claims of the type asserted in the action and of counsel's knowledge of the applicable law.

Rule 23(g)(2)(A) is a new provision for designation of interim counsel to act on behalf of a putative class before a certification determination is made.

Rule 23(g)(2)(B) is revised to point up the differences between appointment of class counsel when there is only one applicant and when there are competing applicants. When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests.

Rule 23(h) is changed to require that notice of an attorney-fee motion by class counsel be "directed to class members," rather than "given to all class members."

Notes of Advisory Committee on 2007 amendments. The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Notes of Advisory Committee on 1966 amendments. A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise

when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par 23.08 (2d ed 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

Notes of Advisory Committee on 2007 amendments. The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Advisory Committee on 2009 amendments. The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Advisory Committee on 2018 Amendments. Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain,

easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such

results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or

withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Prospective amendments:

By order dated April 26, 2018, the Supreme Court of the United States approved the following amendments to Rule 23, effective Dec. 1, 2018, and authorized their transmission to Congress in accordance with 28 USCS § 2074:

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

INTERPRETIVE NOTES AND DECISIONS

I.IN GENERAL

1.Generally

2.Liberal construction

3.—Discretion of court

4.—Particular cases

5.Validity of Rule

6.Procedural characterization of Rule

7.Amendments of 1966

8.—Retroactivity

9.— —Discretion of court

10.—Binding effect of judgment

11.—Intervention

12.—Res judicata

13.Nature of class action

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15.Substantive rights and effect thereon

16.Relationship to other federal rules

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19.—FRCP 12

Exhibit Q

ADVISORY COMMITTEE
ON
CIVIL RULES

Philadelphia, PA
April 10, 2018

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AGENDA

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April 10, 2018

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2. **ACTION ITEM**: Approve Minutes of the November 2017 meeting of the Advisory Committee on Civil Rules

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4. **ACTION ITEM**: **Rule 30(b)(6)** Subcommittee Report

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6. **Information Item**: **Social Security Review** Subcommittee Report

7. **ACTION ITEM**: **Rule 71.1(d)(3)(B)(i)** Newspaper Publication

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Exhibit R

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, THE CITY OF BRISTOL PENSION FUND, and THE CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 15-12345-MLW
INSULET CORPORATION, DUANE DESISTO, ALLISON DORVAL, BRIAN ROBERTS, and CHARLES LIAMOS,	)	
Defendants.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

March 9, 2018
4:19 p.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

THE COURT: Good afternoon. Would counsel please identify themselves for the court and for the record.

MR. HARROD: Good afternoon, Your Honor. James Harrod, Bernstein, Litowitz, Berger & Grossman, for the plaintiffs.

MR. FREDERICKS: William Fredericks, Scott & Scott, Attorneys At Law, LLP, also for lead plaintiffs.

MS. BULLERJAHN: Good afternoon, Your Honor. Caroline Bullerjahn of Goodwin Procter on behalf of defendants.

MS. BIRNBACH: Deborah Birnbach from Goodwin for defendants.

THE COURT: Okay. We're here today in connection with the motion for preliminary approval of the class action settlement. I've read the memo and, with some distractions, examined the proposed order of notice. I'm interested in hearing you on the request for preliminary approval, and then if I allow or am inclined to allow it, we can focus on the documents.

MR. HARROD: Okay. Thank you, Your Honor.

I'd initially like to thank you. I had asked you to move this hearing from Monday, so I greatly appreciate you were able to do so.

THE COURT: It's turned out to be a busy day, as you saw, and I'm sorry you had to wait.

MR. HARROD: It's quite all right. It was actually quite interesting I think for us to see that.

THE COURT: Actually, as you say, good for you. I also think it's good for the administration of justice. We don't have a lot of time to philosophize. But the bar has become so specialized. If you wonder why it takes time to get into court on a class action matter, you know, if you see the end of a criminal case like that one, it gives you some idea of the range of things that are done in the court, and I think that's in the interests of the administration of justice. But go ahead.

MR. HARROD: So thank you. And so it's a $19.5 million settlement we're here to seek preliminary approval for. We view preliminary approval as does the law, which is I think stated fairly well in our memo, as this is a two-step process and this is the first step. The primary objective of obtaining preliminary approval is so that we can send out notice to the class and schedule a final approval hearing so that the class and the court will have the opportunity to sort of look at a more complete record in support of the various things that we're going to be requesting at that point.

I think readily this case meets the standard for preliminary approval, both from a procedural and substantive perspective. The recovery itself is excellent in --

THE COURT: Well -- I'm sorry. Go ahead. It's

excellent because of what?

MR. HARROD: Well, I think principally it's excellent because there were very significant risks in this case that I think always existed but became more acute and apparent to us as the discovery proceeded. The risks included principally proof on the allegation that the product problems that were the core allegation in the case were pervasive. Defendants were able to put forward evidence which we disputed but which provided a viewpoint that not only were the product problems cabined off, but they were within the company's internal tolerances, which, even if you disagree with, would have undermined potentially arguments about falsity but also arguments about scienter. There was evidence which contradicted that, but we felt that that was a significant risk that we would have to overcome to win at trial.

04:21

THE COURT: So the $19.5 million you estimated I think would be 47 percent per share recovery to the class?

MR. HARROD: So yeah. Well, so can I break that down a little bit for you, Your Honor?

04:22

THE COURT: Well, let me ask you a couple of questions to make sure you include this in your answers. One, is that before or after the award of attorney's fees, the 47 cents?

MR. HARROD: Right. So 47 cents is a number that's required for us to include in the notice. Under the Reform Act, one of the statutory items is the recovery on a per-share

basis. I don't -- I obviously don't know and I can give you some other information about that. 47 cents is the number before fees and expenses. There's a latter paragraph in the notice that says that the fees and expenses I think, if granted at the levels that are set forth in the notice now, would be 13 cents per share.

THE COURT: I may have missed that.

MR. HARROD: Okay.

THE COURT: And what I didn't see in your memo and I don't think it's in the notice but I'll give you a chance to correct any misunderstanding I may have about the notice, what do your damage experts say are the estimated losses?

MR. HARROD: So let me -- I want to answer that question, and I'm very prepared to do that, but I just wanted to give you one clarification on the 47 cents number.

THE COURT: Actually, I still don't know. Where did the 47 cents --

MR. HARROD: So the 47 cents, what it does is it assumes everyone in the class has the same amount of injury, and it assumes every single share that was in the class, which I think our expert said was 48 million shares, is injured in the exact same amount and that they all file claims. And in our experience, those numbers, while required under the statute, don't necessarily reflect the reality of either what the settlement achieved or what class members actually get.

But we have not discerned a better way of doing it, nor has congress allowed us to do it a different way. So the that's the answer to the 47 cents.

THE COURT: But basically, so it's, what, $19.5 million divided by the number of shares before attorney's fees expenses are taken out.

MR. HARROD: Correct, yes.

THE COURT: If somebody had 100 shares, $47?

MR. HARROD: Well, yeah. But that's not actually how -- that's not actually how the money gets distributed. That's the way the statute says we have to.

THE COURT: Well --

MR. HARROD: Right. I don't -- yeah. Let me answer your other question because I think that will provide better context for what I think you're really getting at is what is the quantum of what we got here.

So to preface that I would say the damage and loss causation issues were hugely disputed.

THE COURT: I know, I know. They can be discounted. And a settlement might be reasonable even if it provides a fraction, small fraction of alleged or actual losses. But I want to know. Because it was notably absent from your memorandum, and the case you saw me end started on Monday and we missed one day because of the snow.

MR. HARROD: Okay.

THE COURT: So I've been doing other things this week, but I did read your memorandum, and I thought I would see, and in fact I believe the PSLRA requires that it be in the notice. And I'm not -- I don't think it's in the notice. What does your expert say are the amount of damages that should be awarded if you prevail?

MR. HARROD: If we won on all of our claims and you attribute the entire amount of the loss to each of those disclosures, which I think would probably not be the case, but the best estimate I have for that is 151 million to 226 million.

THE COURT: 151 million to what?

MR. HARROD: 226 million.

THE COURT: So 19 million is what percentage of that?

MR. HARROD: At the top end of the damages, it's about nine percent.

THE COURT: Nine percent?

MR. HARROD: Yeah.

THE COURT: Nine percent of the 226?

MR. HARROD: Correct.

THE COURT: Okay.

MR. HARROD: Does that -- I can elaborate on that. I don't think I'm at liberty -- defendants obviously had a different number.

THE COURT: Well, I mean, that contributes to the

reasonableness. I should know that, too. And in fact, doesn't the PLSRA section 78u-4-7(B)(ii) require that the notice have a statement from each party concerning the issue or issues, if the parties do not agree on the average amount of damages -- in other words, I don't know why I can't be told, I think the notice is supposed to tell the class, you know, plaintiffs say the damages are up to 226 million. The defendants say it would be this.

MR. HARROD: I read that as saying that the notice has to disclose that there was a disagreement about damages but that it doesn't require you to disclose what the amounts of that are.

THE COURT: Well, look, the adversary system doesn't work here because now you both want me to approve the settlement, and the first named plaintiff here is Arkansas Teacher, right?

MR. HARROD: Mm-hmm.

THE COURT: And they've been supervising this litigation?

MR. HARROD: They and the other lead plaintiffs, yes.

THE COURT: And have you seen the documents I finally approved after requiring revisions of the Arkansas Teacher V. State Street Bank litigation?

MR. HARROD: I'm not -- I'm generally familiar with that. I'm not sure I'm specifically familiar with what you're

referring to.

THE COURT: Well, in several class actions in the last couple of years, while I've preliminarily approved them, I found the notices were inadequate, and I ordered that they be revised. And my present sense is that your notice substantively in what's covered is inadequate, so you're not going to go home with a signed order today at best. So you haven't looked at those?

MR. HARROD: No, I can't say that I have looked at those.

04:29

THE COURT: Who drafted the notice that I was given, you?

MR. HARROD: My firm, yes.

THE COURT: Was your firm in the Aegerion case?

MR. HARROD: No.

THE COURT: You haven't seen the notice in that case either.

MR. HARROD: I have not.

THE COURT: These are two cases in which I've ordered

04:29

counsel to re-write the notices after finding preliminary approval is appropriate. But anyway, keep going.

MR. HARROD: So --

THE COURT: Well, don't keep going. What's the defendant's estimate of damages?

MS. BULLERJAHN: Your Honor, our damages expert

determined that the greatest number of damages would be approximately 106 million. There were six alleged corrective disclosures in the case. And in our view, which is somewhat set forth in our class certification opposition, there were not statistically significant drops in stock prices for some of those, so damages should not be attributed to those. So 106 million was the maximum recoverable damages, and that's a plaintiff-style estimate.

THE COURT: All right. So that would be, 19.5 million would be maybe --

MS. BULLERJAHN: About 18.4 percent, to be precise, Your Honor.

THE COURT: About.

MS. BULLERJAHN: Just off the top of my head.

THE COURT: All right. That's not bad. Why don't you keep going.

MR. HARROD: All right. Thank you, Your Honor. So on the basis of the risks in the case and on the basis -- which I can talk more about. I'm not sure if Your Honor is interested in that or not.

THE COURT: No. I studied it. Look, you reached this proposed settlement after substantial discovery following my denial of the motion to dismiss. So my understanding is it's presumptively reasonable. We have arm's length bargaining between, as far as I know, experienced counsel. There was a

significant effort to mediate and then further efforts to settle. Did you discuss attorney's fees as part of agreeing on the amount of the settlement?

MR. HARROD: We -- that was not part of the negotiation with the defendant.

THE COURT: You know, these are indicia of reasonableness. With regard to the attorney's fees, the notice says now that you may ask for up to 25 percent; is that correct?

04:32 MR. HARROD: Yes.

THE COURT: Is it your intention to actually ask for 25 percent?

MR. HARROD: This is a completely honest answer. My expectation is that's what we will ask for.

THE COURT: I hope every answer you give is honest. Right. So the notice -- I mean, recently required that it say that. If it's your intention to ask for 25 percent, all you have to say is the lawyer is going to ask for 25 percent.

MR. HARROD: I'm sorry. The only caveat I would make

04:32 there is there's a process where our clients would have the opportunity to review, you know, a more complete record in support of final approval. And I have had a conversation with them about it, but they have not said yes, you can do that.

THE COURT: Well, it's your intention to seek it. I don't think anybody will complain if it's less.

MR. HARROD: Correct.
THE COURT: And your clients are supposed to scrutinize that.
MR. HARROD: Right.
THE COURT: So you'd get 25 percent of attorney's fees plus expenses?
MR. HARROD: Correct.
THE COURT: How much are the expenses?
MR. HARROD: The expenses that we've capped at
04:33 $600,000, I expect that it would be less than that. The expenses currently right now paid and incurred are about $350,000.
THE COURT: 25 percent of 19.5 million is how much, approximately?
MR. HARROD: I have it right here, but I can't find -- oh, 4.875 million.
THE COURT: And what do you say your lodestar is? Because that's a benchmark.
MR. HARROD: The lodestar is 4.3 -- about 4,350,000.
04:34 THE COURT: So there's virtually no multiplier.
MR. HARROD: The multiple on that would be 1.12, assuming a 25 percent fee is granted and requested.
THE COURT: Are you familiar with the issues that prompted me to appoint a special master to review the award of attorney's fees in the Arkansas Teacher v. State Street case?

MR. HARROD: Yes, Your Honor.
THE COURT: How many law firms are there who have appeared for lead counsel in this case, three?
MR. HARROD: There are two lead counsel firms. There are two other firms who have done work on the case who would be included in that, and there's some attorney's fees that will be treated as expenses.
THE COURT: Some attorney's fees that --
MR. HARROD: That are not part of --
04:35 THE COURT: Who are the four firms who have a appearances?
MR. HARROD: My firm, Bernstein, Litowitz, Berger & Grossman; Mr. Frederick's firm, Scott & Scott. We are the two co-lead counsel firms. The third firm is Berman Tabacco.
THE COURT: The Bernstein firm, what's the second firm?
MR. HARROD: Scott & Scott.
THE COURT: All right. The third firm?
MR. HARROD: The third firm is Berman Tabacco, which
04:35 is formerly Berman DeValerio.
THE COURT: That's Berman DeValerio?
MR. HARROD: Yeah, that's what they used to be called.
THE COURT: Are they --
MR. HARROD: They're the Boston liaison.
THE COURT: Local counsel?

MR. HARROD: Yes.

THE COURT: And what's the fourth?

MR. HARROD: The fourth firm is Glancy Promgay & Murray, who actually filed the first two complaints that were filed in this action.

THE COURT: Okay. And they've all worked on this case?

MR. HARROD: Yes.

THE COURT: And did you say there are other attorneys who haven't filed an appearance that would share in the settlement?

MR. HARROD: They have not appeared in this case or represented plaintiffs in the case, so they're not included in the application for plaintiff's fees.

THE COURT: But they would be in expenses? What are the names of those firms?

MR. HARROD: The names of those two firms, one is Shapiro Haber & Urmy, which is a firm based in Boston. They have a small bill.

THE COURT: What's the other firm?

MR. HARROD: The other firm is -- I'm not going to pronounce the names right -- Hach, H-a-c-h, Rose -- rose like the flower. They were -- my client, Arkansas Teacher, had an outside investment visitor that they were retained to represent as part of the discovery process. So ostensibly an expense

that the class bore to represent a third party.

THE COURT: What do you mean, your firm had an investment advisor?

MR. HARROD: Not my firm. My client. So my client, Arkansas Teacher, has investment advisors that make investment decisions for them, that monitor and make investments in the portfolio that they've, you know, maintained for the teachers retirement. And their outside investment advisor was subpoenaed by defendants in this case, and there was a
04:37 significant amount of discovery involving that firm. They did not have in-house counsel and did not have outside counsel.

THE COURT: Is there one or more other attorneys that would benefit, get money from the settlement of this case?

MR. HARROD: No.

THE COURT: Are you going to be seeking service awards for the named plaintiffs?

MR. HARROD: We will, Your Honor. I don't know the amounts of those.

THE COURT: Is that in the memo?

04:38 MR. HARROD: No. I mean, it's embodied in the $600,000, but it is not addressed specifically in the memo. It's something we would address at the final approval stage.

THE COURT: Is it in the notice?

MR. HARROD: Yes, it's referred to in the notice. The amounts are not specifically set forth. But the way that that

would work, ideally is that the notice would go out, it would direct the class to the settlement website where we will file our final approval papers, and those papers will set forth all the detail regarding these matters.

THE COURT: Why wouldn't you put the amount of the -- do you know how much you intend to seek in service awards for each of the named plaintiffs?

MR. HARROD: We do not. We know in a ballpark sense. I think we've decided for estimating the expenses that they would be no more than $30,000.

MR. FREDERICKS: In the aggregate.

MR. HARROD: Per, per, $90,000. I don't know that there will be that much, Your Honor.

THE COURT: Well, you're going to have to put that in the service award -- in the notice. Have you already received the $19.5 million?

MR. HARROD: We have not.

MR. FREDERICKS: Your Honor, I believe that the defendant's obligation to deposit the money runs from such date as the court may grant preliminary approval.

THE COURT: Okay. And where are you going to put the money?

MR. FREDERICKS: Your Honor, Huntington National Bank has been designated the escrow agent in the settlement papers. They have a long record of handling similar escrow accounts in

other matters, and they've waived all their fees in this case.

THE COURT: And there will be a separate account for this?

MR. FREDERICKS: There will be a separate escrow account. We've negotiated an arrangement whereby they are not charging us fees for their investment services.

THE COURT: How are they getting compensated?

MR. FREDERICKS: I believe it benefits the bank simply for their capital requirements to have deposits on account. So they're happy to have the money without charging a retail rate, shall we say.

THE COURT: All right. So what else should I know?

MR. HARROD: So the process would be, if Your Honor were to sign the preliminary approval order, if you find that that's appropriate, that the order would provide for the notice to be mailed to the class within 20 business days of that order. The defendants are required under the stipulation and under the preliminary approval order to provide us with a list of record holders of the Insulet company's shares.

The claims administrator also has a list it maintains of nominees, these are the banks who hold securities in what's called street name, meaning like most people and most investors have the shares held in a custodial bank or investment advisor, and so those people will receive the notice. They are required within seven days to either request notices so that they can

mail them to their clients or to send a file with the names and addresses of their clients to the claims administrator, who will then send them out.

THE COURT: They have to do it within seven days?

MR. HARROD: They have to -- they have to either request or send the file within seven days. If they request the notices themselves, they have seven days from the time that they receive the notices to mail them out to their customers. I don't know, standing here today, what the balance of that is. I think most nominees send labels or files to the claims administrator so they handle the mailing and it goes out promptly.

04:42

THE COURT: And then what happened next?

MR. HARROD: So the next thing that happens is that the one blank in the preliminary approval order, were you to sign it, would be to set a date for a final approval hearing. All the other events are keyed off of that date.

THE COURT: But assume I've set the final approval hearing -- roughly, what's the date if I sign the order today?

04:43

MR. HARROD: If you sign the order today, the earliest date that we could do it is Monday, June 18.

THE COURT: Okay. So that's June 18. And when would exclusions and opt-outs have to be filed?

MR. HARROD: They would be due, under that scenario, 21 days before, so I think that's May 29.

THE COURT: Right. And how much after your motion for final approval papers and requests for attorney's fees are filed?

MR. HARROD: So the final approval papers are to be filed 35 days, so there's 14 days between --

THE COURT: That's the way I read it. So people are supposed to get this and in two weeks decide, you know, maybe I want to consult a lawyer, figure out what's going on, collect all their papers to show they're members of the class? That's one of the things your proposed order requires, right?

MR. HARROD: Well, the notice starts going out, would need to be mailed by April 20. So they would have from April 20 until May 29 to make a decision about opt-out or objections.

THE COURT: Well, I think in the other Arkansas Teacher case I required that they have not two weeks but 30 days. I mean, it just struck me, looking at the notice and the terms, that everything is calculated to make it very difficult for somebody to object or opt out. I mean, they have to serve you, right?

MR. HARROD: They have to -- objections have to be served and filed. Opt-outs --

THE COURT: Right, but if the objections are filed, you would get notice of it through ECF?

MR. HARROD: Correct, yes.

THE COURT: And then you're going to send notice to

people that you and the claims administrator believe are members of the class, right?

MR. HARROD: I mean, I can't say 100 percent, but I think that the notice process that's being employed here, which is used in most securities cases, is pretty good in the sense that because the nominees have records of who traded the stock during the class period, I can't say it's 100 percent, but it's more effective than in most other class actions.

THE COURT: Right. Then why does somebody who wants
04:45 to object have to submit all of those documents that your proposal suggests they submit to show they're members of the class?

MR. HARROD: Well, those requirements apply to different things differently. I understand what you're saying. We want to be sure that -- anybody can get on a website and print off a copy of the notice. So we have to have some process for verifying that the people who purport to be in the class are in the class, given that there's money at stake and whatever money we distribute reduces whatever everyone else
04:46 gets. So those requirements exist for that purpose. And just because somebody held shares during the class period doesn't mean that they're a class member. They could have not have purchased any.

THE COURT: But isn't that equally true for anybody who doesn't opt out? They just file a claim?

MR. HARROD: No. They have to provide documentation to get paid. Your Honor, should I keep going? Are there things that you would like me to address or focus on?

THE COURT: You can keep going.

MR. HARROD: So 35 days under the plan that we proposed, the final approval papers would get filed. And Your Honor is correct that 14 days after that opt-outs and objections would be due. We would have seven days after the opt-outs and objections are due, which is seven days prior to the final approval hearing, to put in replies in response to any of that information.

The final approval hearing would happen, and with all hope there would be, you know, you would find that the settlement is approvable and approve it and enter a judgment. I think, you know, I've addressed and Your Honor has addressed and noted that the settlement based on the risks and the recovery is adequate and certainly more than acceptable for this stage of approval.

THE COURT: What does the defendant say about all of this?

MS. BULLERJAHN: Your Honor, defendants agree with plaintiffs that the settlement is adequate and preliminary approval is appropriate. I can personally attest that this was hotly litigated, as plaintiffs' counsel said in a memo, and certain the terms of the settlement were very carefully

negotiated at arm's length.

The only other thing I would like to add on behalf of defendants is that as set forth in the settlement stipulation, defendants are entering into this settlement, by doing so are not conceding any liability or the merits of the claims asserted by plaintiffs. Rather they are entering the settlement or have entered the settlement to avoid future costs, burden and uncertainty associated with litigating the case.

04:48 THE COURT: Okay.

MS. BULLERJAHN: Thank you.

THE COURT: And did you have any discussion about the plaintiffs' attorney's fees before you agreed on the settlement amount?

MS. BULLERJAHN: We did not, Your Honor. The settlement amount was agreed to first. We actually had no negotiations whatsoever about the plaintiff fees or about the 25 percent that was set forth.

THE COURT: You're indifferent to where the money

04:48 goes. You'll pay 19.5 million and don't have an interest in who gets it.

MS. BULLERJAHN: The only thing I will add to that, Your Honor, is that it's very clearly set forth in the stipulation that the determination with respect to attorney's fees is completely separate from the approval of the settlement

and should not hold up the approval of the settlement if the court deems the attorney's fees to not be reasonable.

THE COURT: And what else should I know to make an informed decision on the motion for preliminary approval?

MS. BULLERJAHN: From our perspective, Your Honor, I think Mr. Harrod covered it. I don't think there's anything else from defendants' perspective that we need to add.

THE COURT: All right. Well, I'll probably prove to be satisfied that the settlement -- you know, that I should
04:49 certify a class for settlement purposes and the settlement is within the range of being fair, reasonable and adequate, that it should be considered through a fair process by properly informed class members.

I do have some concerns about the schedule and the notice. I didn't have as much time to study this as I had intended. I'm looking at your proposed order and the settlement that's as part of -- I think Exhibit 1, right?

MR. HARROD: Your Honor, it's Exhibit 1 to the motion for preliminary approval. It's also an exhibit to the
04:50 stipulation settlement, but I think for ease, it's --

THE COURT: It's attached to the proposed order?

MR. HARROD: It's attached to the motion. It's docket entry 108-1.

THE COURT: Correct. Is there a cover page summarizing the information contained in the final settlement

agreement?

MR. HARROD: You're referring to the notice?

THE COURT: Yes.

MR. HARROD: Yes.

THE COURT: I don't think so.

MR. HARROD: Some of this may be a function of the way the document is typeset here, because when they typeset it for actual mailing, it does get condensed a little bit. So the summary is what we would typically refer to as paragraphs 1 through 7 of the notice, and there's a preamble to that that's even shorter, and it says basically who the parties are and that this is a notice of settlement issued by the court. If I can just direct you, it's at the top of the ECF stamp, it's page 18 of 55 is where that starts.

THE COURT: Hold on just one second. I'm sorry to jump around on you. Is there anything that expresses the authority that I have and always require be included that I can alter or excuse any deadline or requirement for good cause shown?

MR. HARROD: You mean deadlines under -- there's a specific provision in the preliminary approval order that says you can change the date of the final approval hearing.

THE COURT: I'm talking about anything. If somebody files an objection a day or two late, I have the authority to consider it if I think it's justified. I want --

MR. HARROD: Your Honor --

THE COURT: -- there to be notice of that.

MR. HARROD: Your Honor, I don't believe that there is any such provision on either the preliminary approval or to the notice, but I would just say to you I'm not sure that's required because I think it's inherently --

THE COURT: I think people should know it because they might look at it and say, "I missed the deadline and I'm out of luck."

04:54 So let's see. In Arkansas Teacher v. State Street and in the Aegerion case, I believe I required a different kind of summary, especially in Aegerion. Aegerion is 114-10105 and Arkansas Teacher is 11-10230. In Aegerion you would look at docket number 145.2. In State Street you would look at docket numbers 95.1, 3 and 5. Five is the summary notice.

MR. HARROD: Your Honor, those are the documents as revised per your instructions to counsel.

THE COURT: Right. I'm going to give you a chance to basically bring me something that looks like that and has the 04:55 same kind of timeframes. I went through this a couple of times to figure out what I believe was reasonable, and, you know, give meaningful opportunities to object and all that.

So let's see. One, you would look at the cover page summaries of those two cases. They're not the same format, but they have the information that I think should be there at the

outset. Here you have -- do you have the statement of potential outcome of the case?

MR. HARROD: I don't think we have something that's captioned that way. We have -- in the last paragraph of that section as 7 is Reasons For Settlement, which I think encompasses the same idea.

THE COURT: Okay.

MR. HARROD: And Your Honor, just trying to find the right page.

04:57 THE COURT: Page of?

MR. HARROD: The notice. Paragraph 30 of the notice is under the caption What Might Happen If There Were No Settlement.

THE COURT: This is the type of information that I think should be in the summary. It really summarizes the key things. These are our claims. They have defenses. We think we would win. But we might lose. We think if we win, we'd get $220 million. They think at most we would get 106 and argue that the damages would be much less. You'll see what I

04:58 approved in other instances, but I think that the summary requires that it really all be up front.

As I say, nobody will complain if you're going to ask for less, but I think you'll find in these that what I approved said, you know, the attorneys are going to see 25 percent, not up to 25 percent, which is what was originally proposed. If

your clients change their mind and tell you you can't seek 25 percent, that's okay.

MR. HARROD: Fair enough.

THE COURT: That's okay. If you're going to seek service awards, I think this is important to shareholders, or the lead plaintiffs representing us or somebody might think $30,000 is a lot of money, they're getting $30,000 we're not getting, and maybe I ought to scrutinize things more carefully because they're going to get another $30,000. Is that all the named plaintiffs get?

04:59

MR. HARROD: Well, they get whatever they're entitled to under the claims process.

THE COURT: Right, yes.

MR. HARROD: That would be the only two sources.

THE COURT: Except for that service award, they're treated the same as every other class member?

MR. HARROD: Yes. Let me just amend that to make one clarification which I'm not sure will happen in this case. If they had out-of-pocket expenses, it would be included in the award. So if they had, you know, travel costs or whatever, then that, but I'm not sure that's the case here.

04:59

THE COURT: And how do you propose to determine how much of a service award they should each get?

MR. HARROD: I will speak for my client because I have had the conversation with them about it and we've done it in

the past for them, and I think Your Honor might have approved one in State Street, subject to the review process that's going on there. But we do it as basically a lost wages sort of calculation, the hours that they expended on the litigation, times a reasonable hourly rate. And I think for Arkansas Teacher employees there's a statutory formula for that.

THE COURT: Okay. It's going to be tied to the effort invested in this case.

MR. HARROD: For ATRS I can explicitly say that's the case.

MR. FREDERICKS: That would be similar for City of Bristol and Omaha Police and Fire. And I think, as with ATRS, they're both in-house counsel as well as professionals who are involved in the litigation.

THE COURT: Well, it's 5:00. I wish I could be more precise for you, but I'm not going to decide this matter today, but I am inclined to preliminarily approve the settlement for distribution. I think the requirements of Rule 23 are met, and it seems to me that, given the risks of litigation as you described it and the procedural integrity of the process that led to the settlement, it seems within the range of reason.

I just want to make sure the notice complies with the PLSRA as I've been coming to understand and apply it and that it's fair to the class members if they want to take a different view, if they want to opt out, if they want to object. So if

you look at the -- and I haven't compared the time limits in Arkansas Teacher v. State Street and Aegerion, which are the two templates I'm using. But as I said, I think I've been giving people like 30 days to decide what they want to do, not 14 days. And, you know, if that means the approval has to go out another couple of weeks, I don't think that's nearly as important. And the order has to clearly say the court retains the discretion to --

MR. HARROD: Extend.

05:02 THE COURT: -- extend any deadlines for good cause shown.

MR. HARROD: Just so I'm clear, you want that in the notice that the class understands that as well?

THE COURT: Yes, exactly.

MR. HARROD: Correct. Okay. Your Honor, just to sort of logistically propose a way forward, what I think we should do is, we will certainly go back and look at those notices. There's one sort of point that I would make. My understanding is that State Street is not a PSLRA case because it was a

05:03 consumer and contract type claim.

THE COURT: Yes.

MR. HARROD: So I will --

THE COURT: That's a good point, but Aegerion is a PSLRA case.

MR. HARROD: Right. We will look at that, and we'll

make every effort to revise the notice. We'll of course need to show that to the defendants because it is an exhibit to the stipulation. I don't anticipate that they will have any significant issues with that.

THE COURT: Do the defendants anticipate any problem with issues that I've been raising?

MS. BULLERJAHN: No, Your Honor.

THE COURT: All right. What's the minimum reasonable time to give me, you know, a new proposed order, documents and
05:04 a memorandum describing what you've done?

MR. HARROD: Yeah. For those items, I think it's safe to say we could do it by next Friday. Is that acceptable to the court?

THE COURT: It's not too long. Let me see your book. Are you sure it's enough?

MR. HARROD: I'm trying to think --

THE COURT: You can do this, and I know I'm old, but it used to be we had to mail things to people. And then they could go home for a couple of days or do something else, but
05:04 now everything goes at such breakneck speed. I don't object to getting it next Friday, and I'd like to keep this moving along. But I don't see that this is -- but it really does need to match up, and you're going to have to explain to me, you know, what you've changed, and I expect it's going to look quite different. So I don't know that a redline version is going to

be quite right, but if you're just making edits, send me a redline version, but I'd rather give you a deadline that's reasonable and realistic.

MR. HARROD: Well, why don't you give us then 14 days from today, and we can, you know, unless there's something --

THE COURT: I think that's the way to do it, and then if you can get it done sooner --

MR. HARROD: Earlier.

THE COURT: -- fine. And I'll ask the deputy clerk, my law clerk, to let me know promptly when it comes in, because we do have a lot going on, so the easiest thing to do would be to approve what you gave me, but I'm not comfortable with it. All right?

MR. FREDERICKS: Logistically, would Your Honor like us to come back for a hearing?

THE COURT: I'll let you know if you need to come back. It may not be necessary, if you satisfy me. I would like you to give me a disk, though, with whatever you send.

MR. HARROD: We can -- we can email the files if that's easier.

THE COURT: Whatever it is.

MR. HARROD: You want electronic versions?

THE COURT: I don't understand the technology. I want to be able to edit it.

MR. HARROD: We can certainly make that available,

Your Honor.

MR. FREDERICKS: I think logistically, if we don't have a hearing, we may also suggest some dates for a final approval hearing.

THE COURT: Exactly, exactly. Suggest some dates, and say, you know, if I approve this one week after you submit it, these would be the dates. Don't schedule a hearing in July. I won't be here. And actually, I may have to move -- I'll deal with the hearing date, but I'm doing some international travel, law-related, so there's times that I'm not here. All right.

MR. HARROD: Before we submit that, would it be helpful if we confer with your deputy to talk about dates to make sure we're not shooting in the dark about possible dates?

THE COURT: Yeah, you can do that. With regard to August -- I'm going to be out almost all of July. I'll be out one week in August, which is --

COURTROOM CLERK: The week of the 13th.

(Discussion off the record.)

THE COURT: Don't schedule the week of the 13th, and then as of now, much of August I'm going to be here in a multibillion dollar patent case getting ready to try or trying it. But if you do this right, the final approval hearing shouldn't take long. All right?

MR. HARROD: That's our hope, Your Honor.

THE COURT: It's your hope. You're going to get

almost $5 million. That will be considerably more than I made in my 33-year career as a judge, so we've got to get it right. All right. Court is in recess.

(Adjourned, 5:08 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 18th day of March, 2018.

/s/ Kelly Mortellite

_____

Kelly Mortellite, RMR, CRR

Official Court Reporter

10:33

Exhibit S

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

DECLARATION OF PETER A. JOY IN SUPPORT OF LABATON SUCHAROW LLP'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

1. I am the Henry Hitchcock Professor of Law at Washington University in St. Louis

School of Law, where my primary area of research and teaching is legal ethics. I have been an attorney at law admitted to practice and on active status and in good standing for more than forty years, and I have had a Martindale-Hubbell AV rating since 1980. I am the co-author of a textbook on professional responsibility, and I have published extensively on legal ethics issues, including in peer-reviewed publications. I am a member of the American Bar Association (ABA) Center for Professional Responsibility, and I have been active in bar association activities including serving on local bar association ethics committees and serving as a Special Investigator for the Ohio Supreme Court Board of Commissioners on Character and Fitness. Several state and federal courts have admitted my expert testimony and reports on various issues of legal ethics.

2. In February 2018, the law firm of Labaton Sucharow LLP (Labaton) retained me to provide my independent expert opinion on several aspects of these proceedings involving its representation of Arkansas Teacher Retirement System (ATRS) and class members. Since that time:

a.) I submitted an expert report on March 26, 2018, and I reached the following conclusions to a reasonable degree of professional certainty:

i. the fee arrangement between Labaton and Arkansas Teacher Retirement System (ATRS) and the fee sharing arrangement between Labaton and the law firm of Chargois & Herron complied with Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) 1.5 and 7.2 in effect at the time Labaton entered into its agreement with ATRS;

ii. there was no ethical duty or legal requirement for Labaton to provide notice to the Court of its fee sharing agreement with Chargois & Herron absent a local court rule, a standing order, a case-specific order, or clear legal authority to do so;

iii. there was no ethical duty or legal requirement for Labaton to provide notice to class members of its fee sharing arrangement with Chargois & Herron absent a duty to disclose the fee sharing arrangement to the Court;

iv. courts and ethics authorities do not impose sanctions on or discipline a lawyer or law firm when a legal or ethical duty is unclear; and

v. Mass. R. Prof. C. 1.5(a) prohibition on a "clearly excessive fee" does not apply to the Mass. R. Prof. 1.5(e) "division of a fee (including a referral fee) between lawyers who are not in the same firm."

b.) The Special Master and his Counsel, consisting of two lawyers and partially attended by the Special Master's expert witness, deposed me for approximately four and one-half hours.

c.) I was present for a hearing before the Honorable Judge Mark Wolf on May 30, 2018.

d.) I reviewed the Special Master's Report and Recommendations (Special Master's Report), which included the Supplemental Ethical Report by Professor Stephen Gillers.

3. I submit this Declaration for the following purposes: (1) to respond to the mischaracterizations of my expert report and deposition testimony in the Special Master's Report, particularly as to Labaton's ethical obligations to the Court, the class, and ATRS; and (2) to address the lack of legal and ethics authority for some of the conclusions reached by the Special Master.

I. The Special Master's Report Mischaracterizes Some of My Expert Report and Deposition Testimony and Misapplies the Massachusetts Rules of Professional Conduct

4. The Special Master contends that in my Ethics Report I characterized the retention agreement between Labaton and ATRS as "imperfect." Special Master's Report, p. 250. In doing so, the Special Master takes statements in my Ethics Report out of context in a way that I believe is misleading. First, the Special Master's Report does not mention that in my Ethics Report I stated unequivocally: "Labaton's engagement letter with ARTRS for the State Street Litigation met the requirements of Mass. R. Prof. C. 1.5(e) as it existed at the time of the engagement letter." Joy Ethics Report, p. 27. In explaining my analysis and expert opinion, I referred to Mass. R. P. C. 1.5(e), in effect until March 2011, Joy Expert Report, p. 29, which stated, in pertinent part: "A division of a fee between lawyers who are not in the same firm may be made

only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable." Comment [4A] to Mass. R. P. C. 1.5 further explained:

> Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. . . . The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

After quoting from both Mass. R. Prof. C. 1.5 (e) and Comment [4], I explained:

> Mass. R. Prof. C. 1.5(e) in effect in February 2011,[1] when Labaton and ARTRS finalized their fee agreement, permitted Labaton to share fees with Chargois & Herron for its role in securing ARTRS as a client. Mass. R. Prof. C. 1.5(e) also did not require Labaton to disclose how it would divide its fees with Chargois & Herron, and did not expressly require that the division of fees be confirmed in writing. The fee agreement Labaton had with ARTRS permitted Labaton to allocate fees to other lawyers, including as referral fees. The fee agreement did not – and was not specifically required to – identify Chargois & Herron. The omission of Chargois & Herron's name was consistent with previous instructions from Hopkins. Further, in the context of the monitoring counsel role, former counsel Christa Clark, with whose knowledge ARTRS should be charged, was aware of Chargois & Herron, had given written permission for Labaton to affiliate with or use Chargois & Herron as Labaton deemed appropriate, LBS017456, and had been told by Belfi that Labaton would be affiliating with Chargois & Herron.

Joy Expert Report, p. 29.

The discussion of an "imperfect division of fee arrangement between law firms and a client" in my report, Joy Ethics Report, pp. 16-27, was to illustrate that even an imperfect division of fee

[1] In December 2010, Mass. R. P. C. 1.5(e) was amended, effective March 15, 2011, to state, in pertinent part: "A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into the fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable." The writing requirement was not in Rule 1.5(e) at the time that Labaton entered into its retention agreement with ATRS.

arrangement under Mass. R. Prof. C. 1.5(e) would not be considered a violation of Mass. R. Prof. C. 7.2(b),[2] which prohibits giving anything of value to a person recommending the lawyer's services. Additionally, my opinion states that "if the Special Master or the Court concludes that the written consent did not constitute perfect compliance with Mass. R. Prof. C. 1.5(e), there is precedent in the United States District Court, District of Massachusetts, considering an 'imperfect fee agreement' that does not comply fully with Mass. R. Prof. C. 1.5(e). In *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp.2d 115 (D. Mass 2002), an "oral fee-splitting agreement made in contravention of the rules of professional conduct," *id.* at 117, was nonetheless held enforceable. *Id.* at 132." Joy Expert Report, p. 31.

5. The Special Master contends that in my Deposition testimony I characterized the retention agreement between Labaton and ATRS as "imperfect." Special Master's Report, p. 250. In doing so, the Special Master takes statements in my deposition out of context in a way that I believe is misleading. First, it is the Special Master's Counsel questioning me that refers to "so-called imperfect fee divisions under Rule 1.5(e)," and he does so once. *See* Joy 4/3/18 Dep., p. 20:1. At no time in my deposition do I refer to the retention agreement between Labaton and ATRS as imperfect. To the contrary, in my deposition I make it clear that the retention agreement between Labaton and ATRS complied with Mass. R. Prof. C. 1.5(e) in effect at the time of the agreement. The following portions of my deposition demonstrate this:

> Q. So you believe that the retention letter satisfied the requirement that the client be informed that a division of fees will be made and the client consents to the joint participation?

[2] During the relevant time period, including when Labaton finalized its retention letter with ATRS on February 8, 2011, the provision stating that a lawyer not give anything of value to a person recommending the lawyer's services, with some exceptions, appeared in section (c) and not (b) of Mass. R. Prof. C. 7.2. Mass. R. Prof. C. 7.2 was amended on March 26, 2015, effective July 1, 2015, section (b) of the former version of 7.2 was deleted, and section (c) became section (b). The Special Master's Report refers to Mass. R. Prof. C. 7.2(b), so I do so for this Declaration.

A. That's right.

Joy 4/3/18 Dep., p. 73:5-10.

> **THE SPECIAL MASTER:** Standing on its own, the retention agreement standing on its own, there's no obligation - -
>
> **THE WITNESS:** The retention agreement, standing on its own, met 1.5(e) as it existed at the time.

Joy 4/3/18 Dep., p. 174:3-8.

6. The Special Master's Report states that, in concluding that Labaton breached its duty under Mass. R. Prof. C. 1.5(e), the Special Master was relying on how the Massachusetts Supreme Judicial Court interpreted Rule 1.5(e) in *Saggese v. Kelley*, 837 N.E.2d 699 (Mass. 2005). Special Master's Report, pp. 249-252. In doing so, the Special Master incorporates the *Saggese* requirements for written consent to fee sharing arrangements into the Special Master's analysis of the Labaton's retention agreement with ATRS. While the Special Master recommends against disciplinary sanctions because the *Saggese* requirements were not incorporated into the language of Rule 1.5(e) at the time of the retention agreement between Labaton and ATRS, nonetheless the Special Master states that Labaton violated Rule 1.5(e) and bases the proposed "remedies" in part on that purported violation. Special Master's Report, p. 253 n.201. The Special Master does not cite to any case or lawyer disciplinary authority for reading the *Saggese* requirements into Mass. Rule Prof. C. 1.5(e), because no such authority exists. The Special Master's reading and application of Mass. Rule Prof. C. 1.5(e) at the time of Labaton retention agreement with ATRS is contrary to all existing disciplinary matters, advisory ethics opinions, and case authority in Massachusetts. As I stated in my deposition, neither Massachusetts ethics authorities nor the Massachusetts courts incorporated and applied the *Saggese* requirement into Rule 1.5(e) from 2005, when *Saggese* was decided, until after the rule

was amended effective in March 2011, which was after the date of the Labaton and ATRS retention agreement. Joy 4/3/18 Dep., pp. 68:12 – 70:3. Even when Rule 1.5(e) was amended, the new Rule 1.5(e) did not incorporate all of the *Saggese* requirements, further indicating that the *Saggese* requirements were not controlling in Massachusetts. Joy 4/3/18 Dep., p. 68:18-22. I concluded that the requirements in *Saggese* are most likely dicta. Joy 4/3/18 Dep., p. 69:12-21. The Special Master refers to the issue of Labaton's compliance with Rule 1.5(e) as it existed at the time of Labaton's retention agreement with ATRS as "a close call." Special Master's Report, p. 250. It is not a close call, and the lack of any controlling authority supporting the Special Master's interpretation of Rule 1.5(e) demonstrates that the Special Master's interpretation and application of Rule 1.5(e) to Labaton is unprecedented and inconsistent with authority in Massachusetts.

7. The Special Master refers to a declaration filed by Hopkins on March 15, 2018, in which the Special Master claims that Hopkins "purports to 'ratify that [the Chargois agreement.'" Special Master's Report, p. 101 n.83. The Special Master does not acknowledge that the Massachusetts Supreme Judicial Court has held: "Ratification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate." *Saggesse v. Kelley*, 837 N.E.2d 699, 706 (Mass. 2005). The Special Master's report omits the fact that I discussed this aspect of the *Saggese* case, which demonstrates that when a court has found that Mass. R. Prof. C. 1.5(e) was not initially perfected, ratification is adequate. Joy Expert Report, p. 30. Even if the Court were to adopt the Special Master's unique interpretation of Mass. R. Prof. C. 1.5(e) as it existed at the time of the retention agreement between Labaton and ATRS, Hopkins' ratification would have been adequate consent to the fee sharing agreement between Labaton and Chargois & Herron.

8. Because the Special Master determined that Labaton's retention agreement with ATRS was not in compliance with Rule 1.5(e) as uniquely interpreted by the Special Master, the Special Master then contends that Labaton did not comply with Mass. R. Prof. C. 7.2(b), which prohibits giving anything of value to a person for recommending the lawyer's services. Special Master's Report, pp. 263-73. If the Special Master had found Labaton in compliance with Rule 1.5(e), or if the Court determines that Labaton complied with Rule 1.5(e) in effect at the time of Labaton' retention agreement with ATRS, then there would not be a need to consider Labaton's compliance with Mass. R. 7.2(b).

9. The Special Master's analysis of Mass. R. Prof. C. 7.2(b) does not substantively address my opinion and extensive research that "person" in Rule 7.2(b) does not refer to a lawyer in a fee sharing agreement. Special Master's Report, p. 266. The Special Master fails to address the points in my report that demonstrate the proper reading of Rule 7.2(b) is that "person" does not include a lawyer in a fee sharing agreement whether the fee sharing agreement was perfected or imperfect. Joy Expert Report, pp. 16-27. My Ethics Report states that I conducted exhaustive research that included:

> Massachusetts state court cases; advisory ethics opinions of the Committee on Professional Ethics for Massachusetts Bar Association; advisory ethics opinions of the Boston Bar Association Ethics Committee; articles and reports of the Massachusetts Board of Bar Overseers;[3] a selection of public Disciplinary
>
> Decisions of the Massachusetts Board of Bar Overseers;[4] all of the available non-public discipline matters called Admonitions by the Massachusetts Board of Bar

[3] I reviewed "The Year in Ethics and Bar Discipline" reports for all available years, 2007 to 2017, "That Was The Year That Was: Noteworthy Decisions On Ethics And Bar Discipline in 2003," and all reports that mentioned fees, advertising, or solicitation found on the Massachusetts Board of Bar Overseers website. *Articles*, MASSACHUSETTS BOARD OF BAR OVERSEERS, https://www.massbbo.org/Ethics.

[4] There appear to be hundreds of public disciplinary decisions on the Massachusetts Board of Bar Overseers. *See Disciplinary Decisions*, MASSACHUSETTS BOARD OF BAR OVERSEERS, https://www.massbbo.org/Decisions. There is no apparent way to search the decisions based on the alleged rule violation or subject matter, and I determined that there were too many decisions to review

> Overseers;[5] searched and reviewed United States District Court opinions in the First Circuit, and searched and reviewed First Circuit Court opinions. I could not find a single case that held, or any disciplinary decision, ethics opinion, or bar report that stated, that a division of attorney fees under a fee arrangement that does not fully comply with Mass. R. Prof. C. 1.5(e), or the equivalent ethics rule to Mass. R. Prof. C. 1.5(e), would violate Mass. R. Prof. C. 7.2(c), or the equivalent ethics rule to Mass. R. Prof. C. 7.2(c).

Joy Expert Report, pp. 17-18.

In addition, I indicated that even when courts or disciplinary authorities found that the fee sharing under Mass. R. Prof. C. 1.5(e) or its predecessor ethics rule was not fully complied with, neither courts nor disciplinary authorities considered an imperfect fee sharing agreement to be a violation of Mass. R. Prof. C. 7.2(b) or its predecessor ethics rule. Joy Ethics Report, pp. 17-18. I also found that leading ethics resources, treatises, and the history of American Bar Association (ABA) Model Rules of Professional Conduct 1.5 and 7.2 do not support the Special Master's conclusion that Labaton violated Rule 1.7(b), because none of these authorities have stated that "person" in any jurisdiction's version of Rule 7.2 would include a lawyer who participated in a fee sharing agreement. Joy Rep. 18-27. The Special Master does not fully address and deemphasizes the fact that in my report I identified a leading ethics authority, Cornell Law Professor Charles W. Wolfram, who states: "The prohibition in MR 7.2(c)[6] is broader in that it

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individually. Instead, I reviewed the first ten cases in alphabetical order that were decided in 2017, and then selected the first and last case or cases (some individuals had multiple disciplinary cases or rulings) for each letter of the alphabet.

[5] I reviewed all of the Admonitions issued from 1999 through March 20, 2018. I searched these using the find function and "1.5(e)" and then "7.2" to identify Admonitions that dealt with fee sharing or giving a thing of value to another person for referring a client.

[6] At the time that Professor Wolfram was writing, ABA Model Rule 7.2(c) provided: "A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that the lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and pay the usual charge of a not-for-profit lawyer referral service or other legal service organization." ABA Model Rule 7.2(c) (1986).

prohibits giving anything of value to a person for recommending the lawyer's services except for advertising and lawyer referral plans. *Its comment,*[7] *however, suggests that it is limited to traditional touting arrangements* (§ 14.2.5)" (emphasis added). *Charles W. Wolfram, Modern Legal Ethics* § 14.2.4, at 782 n.58 (1986). Joy Expert Report, p. 20. The Special Master does not cite to any case or legal commentary to support the Special Master's interpretation and application of Mass. R. Prof. C. 7.2(b) to the Labaton fee sharing with Chargois & Herron, because no such authority exists. The lack of any authority supporting the Special Master's interpretation of Rule 7.2(b), and the fact that there is authority contrary to the Special Master's interpretation, demonstrate that the Special Master's finding is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority, as well as the history of Rule 7.2 and other national ethics authority.

10. The Special Master found that as a matter of law the Notice provided to class members did not violate any Rule of Civil Procedure. Special Master's Report, p. 280. The Special Master then proceeds to analyze the Notice to the class requirement in terms of ethical obligations of Labaton. Special Master's Report, pp. 281-86. In my original Expert Report, I did not address the ethical obligations of Mass R. Prof. C. 1.2 and 1.4, because those ethical obligations have only recently been interjected by the Special Master and had not been

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[7] The comment to which Professor Wolfram referred was titled "Paying Others to Recommend a Lawyer," and it stated:

> A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommend the lawyer's services. Thus, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 182 (1987).

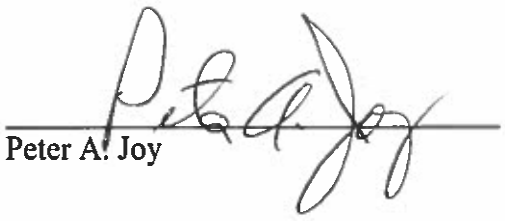
developed by the Special Master's expert. The Special Master concludes that Labaton violated its ethical duties under Mass. R. Prof. C. 1.2 and 1.4 by not disclosing the fee sharing arrangement to class members. Special Master's Report, p. 286. It is my opinion to a reasonable degree of professional certainty that such a conclusion is not supported by the facts in this matter, case law in Massachusetts, Massachusetts advisory ethics opinions, or disciplinary actions in Massachusetts. Labaton's ethical obligations to keep class members reasonably informed as to the proposed settlement are shaped by its legal obligations under the Rules of Civil Procedure, with which the Special Master found as a matter of law Labaton had met. In addition, my research into this matter did not reveal any local rule, court order, or clear precedent that required Notice to the class members of Labaton's fee sharing arrangement with Chargois & Herron. The Special Master's finding that Mass R. Prof. C. 1.2 and 1.4 imposed additional ethical disclosure obligations on Labaton when there were no legal obligations, and no ethical guidance in Massachusetts reaching a similar conclusion, is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority.

11. The Special Master alleged that Labaton and Lawrence Sucharow violated Mass. R. Prof. C. 3.3 and 8.4 by not disclosing the fee sharing agreement with Chargois & Herron. Special Master's Report, pp. 318-26. The Special Master does not substantively address the analysis in my Ethics Report or deposition testimony, which indicate that there were no such ethical violations. The Special Master's contention rests on whether the fee petition was a "joint petition to the tribunal" or "an *ex parte* proceeding" as contemplated by Comment [14A] to Mass. R. Prof. C. 3.3. Special Master's Report, pp. 320-21. The fee petition was not a "joint petition to the tribunal" because the defendants did not join in the petition. Joy 4/3/18 Dep., pp. 187:11 – 188:19. The Special Master contends that "when lawyers petition for a fee, the

proceeding is properly understood to be *ex parte*." Special Master's Report, p. 320 n.257. The only authority for this contention is the Special Master's expert. The Special Master does not cite to any case law or disciplinary authority in Massachusetts or the Court of Appeals for the First Circuit to support this contention, because there is no such case law or authority. In addition, the Special Master's Report does not reference the fact that Mass. R. Prof. C. 8.4(c)'s prescription against a lawyer engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" involves specific intent on the part of a lawyer to violate this ethics rule by engaging in fraud or deceit. The Special Master alleges that Sucharow "deliberately concealed the Chargois Arrangement from the Court . . . ." Special Master's Report, p. 322. By alleging that Sucharow acted "deliberately," the Special Master is contending that Sucharow acted with specific intent to deceive, which would be to act fraudulently. Mass. R. Prof. C. 1.0(e) states: "'Fraud' or 'fraudulent' denotes conduct that is fraudulent under substantive or procedural law and has a purpose to deceive." Comment [1] to Mass. R. Prof. C. 1.0 further amplifies this definition and explains, in pertinent part: "When used in these Rules, the terms 'fraud' or 'fraudulent' refer to conduct that is characterized as such under the substantive or procedural law and has a purpose to deceive. *This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information*" (emphasis added). Without Sucharow and other Labaton lawyers having a legal duty to inform the Court of the fee sharing agreement with Chargois & Herron, and without any Massachusetts authority indicating that there was an independent ethical duty to inform the Court, it is my opinion to a reasonable degree of professional certainty that there was no such ethical duty and that the Special Master's conclusion is not supported by the substantive or procedural law in Massachusetts or the Court of Appeals for the First Circuit.

11. The Special Master claims that the intent of the Special Master's investigation "has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and harm." Special Master's Report, p. 376. This statement is contradicted by the Special Master's own conclusion that the alleged violation of Mass. R. Prof. C. 1.5(e), without which the Special Master could not find an alleged violation of Mass. R. Prof. C. 7.2(b), was a "close call." Special Master's Report, p. 250. In my forty years of practice as a lawyer, my experience researching and writing on various legal ethics issues, and more than thirty years of experience teaching legal ethics to law students, lawyers, and judges, I have never found any lawyer disciplinary authority or court equate a "close call" with "true and unmistakable professional misconduct." The Special Master's statement of the intent of the investigation is also contradicted by the Special Master's unprecedented findings of legal ethics violations of Mass. R. Prof. C. 1.5(e), 7.2(b), 1.2, 1.4, 3.3, and 8.4, for which the Special Master cites to no controlling authority in Massachusetts or the First Circuit, because there is no such law to support the Special Master's conclusions.

June 28, 2018



Peter A. Joy

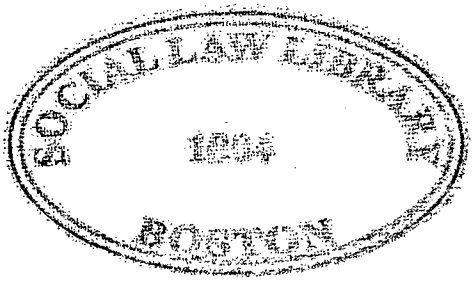
Exhibit T

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 3
Chapters 7 to 10

William B. Rubenstein
Sidley Austin Professor of Law
Harvard Law School



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settlement.[8] CAFA's settlement notice criteria are discussed in depth elsewhere in the Treatise.[9]

§ 8:17 Settlement notice content

Rule 23(e)(1) requires that a court considering a proposed class action settlement "direct notice in a reasonable manner to all class members who would be bound by the proposal."[1] Yet other than requiring that the notice be made "in a reasonable manner," Rule 23 does not dictate that the notice contain any specific content, with one caveat: if a class is certified at the same time that a settlement is reached, the court must issue notice that complies with both 23(c)(2)(B)'s certification notice requirements (that do require specific content)[2] and 23(e)'s settlement notice requirement (which does not).[3] Aside from that scenario, the content of the settlement notice itself is dictated by two other aspects of Rule 23(e): the requirement that the settlement be fair, reasonable, and adequate[4] and the guarantee that class members have the right to object to the settlement if, in their opinion, it does not hit this mark.[5] To safeguard class members' opportunity to object, notice must be sufficiently clear and informative to make those opportunities meaningful.

The content of settlement notice is committed to the discre-

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[8]28 U.S.C.A. § 1715(b).

[9]*See* Rubenstein, 3 **Newberg on Class Actions** §§ 8:18 to 8:21 (5th ed.).

[Section 8:17]

[1]Fed. R. Civ. P. 23(e)(2).

[2]*See* Fed. R. Civ. P. 23(c)(2)(B) (enumerating seven items that must be contained in certification notice). For a discussion, *see* Rubenstein, 3 **Newberg on Class Actions** § 8:12 (5th ed.).

[3]*See* Fed. R. Civ. P. 23(e)(1) (requiring that notice be sent "in a reasonable manner").

On the requirement that both types of notice need to be sent in a settlement class action situation, *see, e.g.,* In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450, 526 (D.N.J. 1997), aff'd, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998) ("The combined Class Notice must meet the requirements of both Rule 23(c)(2) and Rule 23(e).")

[4]Fed. R. Civ. P. 23(e)(2).

[5]Fed. R. Civ. P. 23(e)(5).

tion of the trial judge.[6] Indeed, courts have interpreted Rule 23(e)'s absence of specific guidance, and its use only of the "reasonable manner" standard, as creating greater discretion for judges than the discretion afforded by Rule 23(c)(2)(B), which enumerates specific items to be contained in certification notice.[7] The *Manual for Complex Litigation* has attempted to fill Rule 23(e)(1)'s content void by stating that settlement notice should:

- define the class and any subclasses;
- describe clearly the options open to the class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;

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[6]**Second Circuit**

Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 438, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007) (stating, in a discussion of 23(e) notice, that "a district court's decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion" (citing In re Agent Orange Product Liability Litigation MDL No. 381, 818 F.2d 145, 168 (2d Cir. 1987))).

Third Circuit (District Court)

In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450, 527 (D.N.J. 1997), aff'd, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998) ("The nature and extent of Rule 23(e) class notice of a proposed settlement lies squarely within the discretion of the trial judge.").

Seventh Circuit (District Court)

Kaufman v. American Exp. Travel Related Services, Inc., 283 F.R.D. 404, 406 (N.D. Ill. 2012) ("The court also has nearly complete discretion to determine the form and content of notice to class members.").

Mangone v. First USA Bank, 206 F.R.D. 222, 231 (S.D. Ill. 2001) ("[T]he form and content of the class notice are committed to the sound discretion of the court . . ." (citing In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 299, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998))).

[7]In re Motor Fuel Temperature Sales Practices Litigation, 271 F.R.D. 263, 295 (D. Kan. 2010) ("Regarding notice of class certification, subsection (c)(2) imposes more stringent requirements than subsection (e) imposes with regard to class settlement. With respect to a proposed class settlement, subsection (e) requires only that the Court direct notice 'in a reasonable manner to all class members who would be bound by the proposal.' " (internal citations omitted)).

- provide information regarding attorney's fees;[8]
- indicate the time and place of the hearing to consider approval of the settlement;
- describe the method for objecting to (or, if permitted, for opting out of) the settlement;
- explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations;
- explain the basis for valuation of nonmonetary benefits if the settlement includes them;
- provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses;
- and prominently display the address and phone number of class counsel and how to make inquiries.[9]

The *Manual's* list is, of course, not binding, and courts have found certification notice to be sufficient if it simply informs the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.[10] Courts have similarly held that notice is sufficient if it "fairly apprises" class members of the action and their

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[8]Rule 23 now independently requires this disclosure in Rule 23(h)(1). *See* Rubenstein, 3 **Newberg on Class Actions** §§ 8:22 to 8:25 (5th ed.).

[9]*See* Manual for Complex Litigation, Fourth, § 21.312.

[10]Gooch v. Life Investors Ins. Co. of America, 672 F.3d 402, 423, 81 Fed. R. Serv. 3d 832 (6th Cir. 2012) ("When a class has settled its claims, '[t]he contents of a . . . notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, . . . that any class member may appear and be heard at the hearing . . .' " (quoting **Newberg on Class Actions**)).

In re Packaged Ice Antitrust Litigation, 2011-2 Trade Cas. (CCH) ¶ 77727, 2011 WL 6209188, *5 (E.D. Mich. 2011) ("The contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." (quoting **Newberg on Class Actions**)).

In re AT & T Mobility Wireless Data Services Sales Litigation, 270 F.R.D. 330, 351 (N.D. Ill. 2010) ("The contents of a Rule 23(e) notice are

rights.[11] There is some flexibility built into this standard, however: notice need not be overly long and stuffed with every relevant bit of information,[12] and parties are not always strictly bound to the language approved by the court.[13]

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sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." (quoting **Newberg on Class Actions**)).

[11]In re Integra Realty Resources, Inc., 262 F.3d 1089, 1111, 50 Fed. R. Serv. 3d 900 (10th Cir. 2001) ("The standard for the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options.").

Thompson v. Metropolitan Life Ins. Co., 216 F.R.D. 55, 67 (S.D. N.Y. 2003) ("Although no rigid standards govern the contents of notice to class members, the notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." (quoting Weinberger v. Kendrick, 698 F.2d 61, 70, Fed. Sec. L. Rep. (CCH) P 98755, Fed. Sec. L. Rep. (CCH) P 99074, 34 Fed. R. Serv. 2d 450 (2d Cir. 1982) (internal quotation marks omitted))).

See also In re Katrina Canal Breaches Litigation, 628 F.3d 185, 197, 78 Fed. R. Serv. 3d 294 (5th Cir. 2010) (citing **Newberg on Class Actions**) ("Notice of a mandatory class settlement, which will deprive class members of their claims, therefore requires that class members be given *information reasonably necessary for them to make a decision* whether to object to the settlement." (emphasis added)).

[12]Kagan v. Wachovia Securities, L.L.C., 2012 WL 1109987, *10 (N.D. Cal. 2012) ("[The proposed notice] is simply too long. The Court is concerned that few class members will read a fifteen-page, single-spaced Class Notice . . . The parties should provide an industry-standard short-form notice that directs them to the long-form notice for details.").

Manual for Complex Litigation, Fourth, § 21.312 ("In most instances, the notice does not include the full text of the proposed settlement. If the agreement itself is not distributed, however, the notice must contain a clear, accurate description of the key terms of the settlement and inform class members where they can examine or obtain a copy, such as from the Internet, the clerk's office, class counsel, or another readily accessible source.").

Wright and Miller's Federal Practice and Procedure, Civil § 1797.6 ("[C]ourts have approved notices that did not contain some of the precise details of the settlement, such as the distribution or allocation plan, or the amount of attorney fees to be taken out, as long as sufficient contact information is provided to allow the class members to obtain more detailed information about those matters.").

[13]*See* Casey v. Coventry Healthcare of Kansas, Inc., 53 Employee Benefits Cas. (BNA) 1381, 2011 WL 8007035, *3 (W.D. Mo. 2011),

As important as the specific content is the guideline that the notice be written in simple, straightforward language. The 2003 Advisory Committee notes emphasized this goal with respect to certification notice, writing

> The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.[14]

It is equally—if not more—important that settlement notice serve the same goals.[15]

Elsewhere,[16] the Treatise's author has argued that the practice of settlement notice would be more transparent and meaningful if the text of the settlement notice was accompanied by a simple table like the FDA's nutrition label, especially if such a label was used repeatedly and hence made familiar to the public assessing the value of a settlement:

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subsequent determination, 2012 WL 860395 (W.D. Mo. 2012) ("The parties may make minor changes to the proposed notice, by agreement, without further approval of the Court.").

[14]Fed. R. Civ. P. 23 advisory committee's note (2003).

[15]*See* Wright and Miller's Federal Practice and Procedure, Civil § 1797.6 ("The 2003 amendment to Rule 23(c)(2)(B) added an express requirement to class certification that class-action notices be written in 'plain, easily understood language.' This same requirement appears equally justifiable in the settlement-notice context.").

[16]William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. Rev. 1435 (2006).

Exhibit U

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * * * * *
*ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated
Plaintiffs
vs.
*STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY, AND STATE STREET GLOBAL MARKETS, LLC,
Defendants
* * * * * * * * * * * * * * * * * * * *

CIVIL ACTION
No. 11-10230-MLW

Related cases: 11-cv-12049-MLW
12-cv-11698-MLW

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
HEARING
May 30, 2018

Courtroom No. 10
1 Courthouse Way
Boston, Massachusetts 02210

JAMES P. GIBBONS, RPR/RMR
Official Court Reporter
1 Courthouse Way, Suite 7205
Boston, Massachusetts 02210
jmsgibbons@yahoo.com

APPEARANCES:

DONOGHUE BARRETT & SINGAL, (By William F. Sinnott, Esq., and Amy McEvoy, Esq.), One Beacon Street, Suite 1320, Boston, Massachusetts 02108-3106, on behalf of the Hon. Gerald E. Rosen, Special Master

CHOATE, HALL & STEWART, LLP, (By Joan A. Lukey, Esq., and Justin J. Wolosz, Esq.), 100-150 Oliver Street, Boston, Massachusetts 02110, on behalf of Labaton Sucharow, LLP

NIXON PEABODY, LLP, (By Brian T. Kelly, Esq.), 100 Summer Street, Boston, Massachusetts 02110, on behalf of the Thornton Law Firm, LLP

LIEFF CABRASER HEIMANN & BERNSTEIN, (By Richard M. Heimann, Esq.), 275 Battery Street, 30th Floor, San Francisco, California 94111-3339, on behalf of Plaintiffs

WILMER HALE, LLP, (By William H. Paine, Esq., and Daniel W. Halston, Esq.), 60 State Street, Boston, Massachusetts 02109, on behalf of Defendants

McTIGUE LAW, LLP, (By J. Brian McTigue, Esq.), 4530 Wisconsin Ave., N.W., Washington, D.C. 20016, on behalf of various ERISA Funds

ZUCKERMAN SPAEDER, LLP, (By Carl S. Kravitz, Esq.), 1800 M Street, N.W., Washington, D.C. 20036, on behalf of various ERISA Funds

KELLER ROHRBACK, LLP, (By Laura R. Gerber, Esq., via phone), 1201 Third Avenue, Suite 3200, Seattle, Washington 98101, on behalf of The Andover Companies and James Pehoushek-Stangeland

ALSO PRESENT: George Hopkins

P R O C E E D I N G S

THE CLERK: All rise for this Honorable Court.

(Whereupon, the Court entered the courtroom.)

THE CLERK: This is Civil Action No. 11-10230, Arkansas Teacher Retirement System versus State Street Corporation.

Court is open. You may be seated.

THE COURT: Good afternoon.

There's Mr. Sinnott.

MR. SINNOTT: You may not have recognized me.

THE COURT: Would counsel please identify themselves for the record.

MR. SINNOTT: Good afternoon, your Honor. My name is William Sinnott, and I'm counsel to the Special Master.

MS. McEVOY: Good afternoon, your Honor. Elizabeth McEvoy, also counsel to the Special Master.

MR. KELLY: Good afternoon, your Honor. Brian Kelly on behalf of the Thornton Law Firm.

MR. WOLOSZ: Good afternoon, your Honor. Justin Wolosz on behalf of Labaton Sucharow.

MS. LUKEY: Good afternoon, your Honor. Joan Lukey, also on behalf of Labaton Sucharow.

MR. HEIMANN: Good afternoon, your Honor. Richard Heimann, on behalf of Lieff Cabraser Heimann & Bernstein.

MR. PAINE: Bill Paine and Dan Halson from Wilmer

Hale for State Street.

THE COURT: Okay.

MR. KRAVITZ: Your Honor, Carl Kravitz, one of the ERISA counsel for the *amicus* plaintiffs.

THE COURT: You can come in. What are you doing out there?

MR. KRAVITZ: I don't know.

(Laughter.)

THE COURT: Who just came into the enclosure?

MR. McTIGUE: Brian McTigue, representing several of the ERISA plaintiffs.

THE COURT: And Mr. Kravitz also for the some ERISA plaintiffs?

MR. KRAVITZ: Yes, your Honor.

THE COURT: And who is on the phone, please?

MS. GERBER: Good afternoon. This is Laura Gerber at Keller Rohrback for the Andover Companies, and James Pehoushek-Stangeland.

THE COURT: All right.

I apologize for the delay in starting. I wanted to get a little further organized.

Is Mr. Hopkins here from Arkansas Teachers?

MR. HOPKINS: Yes, your Honor.

THE COURT: Why don't you come in, and you can sit in the jury box.

Do you have anybody else from Arkansas Teachers with you?

MR. HOPKINS: No, your Honor.

(Whereupon, Mr. Hopkins moves to the jury box.)

THE COURT: I would like to try to assure that we have a clear and common sense of where we are at the moment.

On March 8, 2017, I appointed retired Judge Gerry Rosen to serve as Master in connection with investigating and providing a Report and Recommendation on issues relating to the $75 million in attorney's fees that I awarded in this class action.

On May 14, 2018, the Master filed his Report and Recommendations and an executive summary temporarily under seal to permit the interested parties to propose redactions.

On May 16, I issued an order relating to a process for presenting proposed redactions. I described the applicable standards as I understand them. Essentially, judicial records, or records on which judicial decisions are based, are, presumptively, public. In some circumstances redactions may be justified, and I mentioned properly invoked attorney-client privilege and certain privacy interests.

I ordered the parties to file any motions for redactions, memos, and affidavits by May 31 under seal, and I directed that redacted copies of those submissions be made

for the public record.

Labaton, Thornton, and Lieff, who I will refer to as "the Lawyers" with a capital L, filed a motion for clarification regarding what should be included in the record to be filed in support of the Report and Recommendation.

I ordered the parties to confer and report by May 24 on that issue.

On May 24, the Lawyers filed a motion for a revised schedule regarding redactions and unsealing of the Report and Recommendation.

On May 25, I issued an order scheduling today's hearing to address issues relating to redactions, to unsealing, to the record to be filed by the Master, and to discuss whether Arkansas Teacher should be replaced as lead plaintiff based on the information in the Report and Recommendation; whether there is now a conflict of interest between the Customer Class counsel, Labaton, Thornton, and Lieff, and the class; and whether new class counsel should be appointed to provide independent advice to the lead plaintiff regardless whether Arkansas Teacher continues in that role.

The Lawyers had asked for an extension of time to make their submissions concerning redactions to June 11. In my order I provide an extension to June 5 without prejudice to granting a further extension to June 11 as requested.

So it is my intention to discuss these matters today. Is there anything else that should be on the agenda?

MS. LUKEY: I don't believe so from our perspective, your Honor.

MR. SINNOTT: Nothing from the Special Master, your Honor.

THE COURT: All right.

I would like to start by telling you what my general interests are and then hearing what yours are before we get to the specifics.

My interests are in resolving the issues presented by the Report and Recommendation fairly and as expeditiously as reasonably possible.

I have an interest in recognizing the presumption of public access to judicial records and proceedings. I think it's particularly pronounced or important in this case that there be maximum appropriate public access. This case essentially was triggered by media interest, and investigations and the adversary process did not work previously. Now there is somewhat of an adversary process with the Special Master, perhaps, but there may be relevant information that should be brought to the Court's attention that is known to members of the public or others who might be interested that has not been presented. And I want to use a fair process to make informed decisions concerning

whether any exceptions to the presumption of public access to judicial records and proceedings are justified.

I also want to ensure that the interests of the class are properly represented by a lead plaintiff who at this point, as the case has evolved, satisfies the Rule 23 requirements of typicality and adequacy, and will vigorously represent the interests of the class, and I want to make sure that there is suitable counsel for the lead plaintiff.

So those are essentially my interests, my goals.

Perhaps we start with Labaton, since it seems to have taken a leading role in some of the submissions to me. What are Labaton's interests at this point?

MS. LUKEY: Your Honor, I would say that our interests do not differ materially, but we do wish to be sure that you understand certain context as we go forward.

First, I would like to be sure that you are aware that the -- that many of the findings recommended, the findings of fact and rulings of law, are very vigorously disputed. Your Honor, of course, will be obligated to make *de novo* decisions on these matters, and we do not want to go forward with you thinking that the findings, or suggested findings, set forth are undisputed or that there was not contrary evidence on many of them; indeed there was.

But, more significantly, we wish to draw to your attention some material disputes as to the law. Your Honor

has probably not, at this point in time, had the opportunity to pore through all of it. The Report and Recommendation, with its exhibits is 10,000 pages long, unless the ERISA counsel submitted something, which we wouldn't know, and then it's even longer. So it is very weighty matter to get through. And we would suggest to the Court that you will quickly come to realize that each of the proposed rulings of law forming the basis for recommendations is novel; that is, there is no case support for any of the rules which are suggestive as forming a basis for remedies, although generally not sanctions, since, for the most part, the recommendations are not sanctions.

So we do want to be sure that as you proceed today, particularly with regard to Arkansas and Mr. Hopkins, but also as to the class counsel issues, that you have only seen one side of a very, very hotly disputed story. It looks like you're reading two different books, if you put them side by side.

So, respectfully, we would suggest that it is very much premature to suggest that this would be a time, on the basis of the recommend finding and rulings, to replace Arkansas, or certainly Mr. Hopkins, who has done what can only be described as a phenomenal job as class rep.

And on a point --

THE COURT: Mr. Hopkins, have are you read the

Report and Recommendation?

MR. HOPKINS: Yes, your Honor, I have.

THE COURT: Okay. Thank you.

MS. LUKEY: On a point of special privilege here, I would like to point out that when your Honor issued the order on Friday requiring Mr. Hopkins' presence, it generated, as unfortunately often occurs, some pretty extraordinary and inflammatory online media reactions, including language such as Mr. Hopkins must have done something explosive, or there must have been shenanigans.

If I may, without violating the seal, I would simply like, since I know the room is full of reporters, to be clear, that the issue here was whether Mr. Hopkins should have taken a role in the fee allocation process after the award of fees and chose not to do so at any point.

THE COURT: And I have not studied the Report and Recommendation or the exhibits as deeply as I will.

I would say that is not the only issue with regard to Mr. Hopkins and Arkansas Teacher, in my mind, and I will also say the following.

I regretted issuing that order on Friday afternoon. This was going very fast. I do, and I think you do, too, want to get to the point where what should be public is public, and the Master's Report and Recommendations will be known, and then, by my schedule, no later than seven days

later the response will be known, and then we can get to the merits of the case.

And this is not the only matter, let alone the only particularly consequential matter I am dealing with this month. So looking at my schedule, and the schedule I have given you, I wanted to get you in quickly, and I am pleased that people, even on the eve of Memorial Day weekend, were able to arrange their schedules to be here. So that's good.

MS. LUKEY: I'm sorry.

THE COURT: No, and we will go through the specifics, and I -- I mean, we will go through some of the motions.

And I may have some thoughts for Mr. Hopkins -- well, I'm interested in his responses to certain questions I will have for him, and this may be part of a continuing colloquy.

MS. LUKEY: I am hoping that the impression would not be left that Mr. Hopkins has somehow taken a personal benefit in any way from this process, since he has himself received nothing.

THE COURT: You have evidently read more than I have.

Anyway, Mr. Kelly, what are Thornton's interests at this point?

MR. KELLY: Well, your Honor, we would echo much of what Ms. Lukey says, and we agree that to date the Court's

only heard one side of the story, and there is a second side of the story, and we do intend to object to both the accuracy of the facts and the accuracy of the law as portrayed in this Report.

We also believe at this juncture it may be premature for the Court to take action on the issues listed in Part 3 of the Court's order because it has, in fact, only heard one side of the story and it may be best for the Court to hear the rest of the story when we make or submissions.

THE COURT: I have to go look.

MR. KELLY: Part 3 would be a series of issues you suggested could lead to action by the Court, vis-a-vis Mr. Hopkins, and Customer Class counsel, and I would respectfully suggest the Court should hear the rest of the story before it take actions on those issues outlined there.

So that's how we would view Part 3.

Part 4 is the question of the 230,000 pages of discovery, and we strongly urge the Court not to make those public for a couple of reasons. First of all, there is no doubt that they are discovery materials. The Special Master's Report itself refers to these documents 19 different times as "discovery."

THE COURT: We're going to do these one at a time.

Let me tell you, and tell anybody else who might have a different view, at the moment I regard your proposal as

reasonable as to what should be in the record, but we will get to that.

So you are concerned about the dimensions -- why are you concerned about the dimensions of --

MR. KELLY: A couple of reasons.

First of all, as the Court has given us the opportunity to do, we are going to make some proposed redactions to the Court. And there are some legitimate legal redactions that must be made to the submission that went to the Court. That takes time, and we have to put eyes on these documents and make the proposal to the Court as to what should be redacted.

The Special Master's Report itself, as indicated by Ms. Lukey, with exhibits is already 10,000 pages. So, as a practical matter, to also put eyes on the additional 230,000 pages is going to take a long, long time. And I'm not sure that's in anyone's interest here. But, more importantly, unlike what has been suggested, Rule 53 on Civil Procedures does not require it to be made part of the public record; and, secondly, they are discovery documents, and the law is clear in the First Circuit that discovery documents, there's no presumption of public access. This Court ruled on this same issue over 20 years ago in the Salemme case. It said the exact same thing, discovery documents are not subject --

THE COURT: September 10, 1997, and earlier in May,

but who remembers.

(Laughter.)

MR. KELLY: But the principle remains valid today, and so we do not think we should have to --

THE COURT: Actually, it was June. It was about 21 years ago.

MR. KELLY: So I think, your Honor, there's multiple reasons we don't want to have to spend the time to go through 230,000 pages of discovery, A, because we're not required to under either Rule 53 or existing case law in the First Circuit and this Court. And, C, it would be an enormous undertaking to go through all those pages and redact them and then present to the Court our various redactions.

Thornton may have some redactions. Labaton may have some redactions. Lieff may have some other redactions. So we'll be here next year at this time arguing about redactions if we have to go through those 200,000 pages.

So I would respectfully suggest that we don't have to do that.

And the other issue the Court touched upon is the timing of our filing. We had asked for June 11. The Court gave us until June 5 but without prejudice to ask again, and we're asking again on behalf --

THE COURT: I've got a thought on that as I'll

explain to you.

I really want to, and I think you want to, get these redaction issues resolved as soon as they reasonably can on an informed basis, and then, you know, get on to the substance.

I am going be to emersed in a multi-billion-dollar patent case the week of June 11, so that's one of our considerations, but I have a thought on that, or how to deal with that.

What are Lieff's particular interests at this point?

MR. HEIMANN: I don't think I have anything to add, your Honor, to what's been said at this point.

THE COURT: And do counsel for the ERISA plaintiffs want to tell me what their interests are?

MR. KRAVITZ: I don't think we have anything to add right now. We'll just see how things play out.

MS. GERBER: This is Laura Gerber. Your Honor, we share the interests that you have already articulated regarding the matters today.

MR. McTIGUE: Your Honor, it's Brian McTigue. I share your Honor's interests. And I must say that before I practiced law, I was a journalist, and an investigative journalist, so I can appreciate the interest of the public in the proceedings as well, but I am not here in that role.

MR. PAINE: For State Street, really our interests

are exclusively the privacy interests of State Street and its customers.

And in that regard, really, all that we're looking for is to echo the idea that we need a little more time. We first got a gander at this stuff late last Friday, and it's hard to wade through.

Secondly, with respect to the expansive record, we haven't seen it, and just as soon never see it. That being said, we understand that it might have a lot of our stuff in there. So, to the extent that that's the case, then we also would be wading through a big pile, and that would be expensive and inconsistent with what we've tried to achieve at your suggestion with the whole mediation process. We forewent formal discovery and active litigation and engaged in a process that cooperatively led to an agreement that hived off these issues from State Street. And we'd just as soon not be, you know, engaging in a process of trying to figure out whether we or our clients are going to be disadvantaged by the bigger pile if, in fact, it's going to be filed.

THE COURT: Okay.

And what are the Master's interests at this point?

MR. SINNOTT: Your Honor, on behalf of the Master, who, as the Court is aware, is not present here, there are two priorities, and those two priorities are protection of

the class and the public interest in information.

Now, with respect to those two priorities, I would just note -- and I'm disappointed to hear that there has been press or blogging about Mr. Hopkins' role and allegations that he did anything illegal or nefarious.

I would note with respect to the case, and I won't elaborate on the contents of our Report unless the Court requests it, but Mr. Hopkins did an admirable job in pushing this case and proactively representing his members during the life of the case itself. I don't think it's a reach to say that he was instrumental -- and I don't think that my brother's representing State Street would argue with this, let alone counsel for the plaintiffs -- he was instrumental in securing the settlement in this case.

But, having said that, I would note, as the Court has seen in our Report, that beyond the allegations that were raised in the press that precipitated this second look at this case, a declaration was filed, and there was testimony by Mr. Hopkins that was very troubling. And not for nefarious reasons, but with respect to what he saw as his role with respect to the class and the members.

And this being an open hearing, I'll leave it at that. But I just wanted to provide some balance on that particular issue.

With respect to the public interest in access, the

Special Master finds that that is a priority because this case at its core involves issues of nondisclosure, and the Special Master, to the greatest extent possible, would ask that the Court keep that in mind. He understands that there are very valid issues, and the Court has alluded to those with respect to attorney-client privilege, with respect to --

THE COURT: Well, if there is anything in the Report that is privileged, but we'll get to that.

MR. SINNOTT: And other issues, personal issues, proprietary issues potentially. But those are his priorities. Those are his interests moving forward.

THE COURT: Thank you.

Well, let's go over some of the procedural issues, and then we'll get to Mr. Hopkins.

So, I provided the parties, I'll call them "the Lawyers," an opportunity to propose redactions, and I had indicated earlier I would do that in my orders. But what are the categories? I actually did not anticipate that this would be a major challenge. What are the categories of proposed redactions?

When I say, "the Lawyers" -- I did this in my order -- as I may have already said, I am thinking of Labaton, Thornton, and Lieff.

What are the categories of redactions you anticipate

proposing?

MS. LUKEY: Earlier you had asked about the fact that Labaton was taking the lead. You actually had appointed me as liaison counsel at the same time that you appointed the Special Master. That's the reason that I have taken the lead.

The categories, we assume, are to be tracked from the order as you provided them. And, as I recall them, that, of course, includes attorney-client privilege information, any personal information. There actually is, by the way, as I understand it, included in there all the W-2s and W-9s involved --

THE COURT: I'm not talking about the record now.

MS. LUKEY: Oh, okay.

THE COURT: The record I have put aside.

My approach to this is once I decide what information can properly be redacted from the Report and Recommendation and the Executive Summary, we would get the record, however it ends up being defined later, and the redactions, consistent with my earlier rulings, would be made on the records.

So right now you do not have the record, to my knowledge. I do not have the record. All we have is the Report and Recommendation, which admittedly, is lengthy, and an Executive Summary.

So in the Report and Recommendation, which is, of course, more complete than the Executive Summary, what are the categories of information that you expect you would ask be redacted?

MS. LUKEY: Are you including within that request the 10,000 pages of exhibits?

THE COURT: Yes. In what categories?

MS. LUKEY: The categories are attorney-client privilege, personal information, and I think that does extend to some of what I was starting to reference, that there may be some personal identifying information and personal documents, and proprietary information.

In the latter category, that would be, I assume, firm-specific as to what they consider to be proprietary.

At least as far as I am aware, no counsel anticipates attempting to redact information on the basis that they disagree with the findings, for example.

I believe you will be seeing a separate motion from Labaton that asks you to consider striking a specific phrase that appears six times and that we think is an inappropriate and inflammatory phrase. It's a simple three- or four-word phrase, but there is no intention on our part to -- there is no intent on our part, as far as I know on the part of either firm, to keep the public from understanding what the issue or issues is or are and proceeding.

The problem is when you're going into -- it's not so much the Report -- although it's, what, 375 pages, I think -- it's the exhibits. When you're going into the exhibits to do the redactions, it takes a lot of time.

THE COURT: Let me ask this. With regard to the Report, other than the exhibits, and this is not a rhetorical question, is there something in here that you or your colleagues claim is covered by an attorney-client privilege?

MS. LUKEY: In the Report itself?

THE COURT: Yes.

MS. LUKEY: Honestly, your Honor, I can't recall at the moment.

The attorney-client privilege issues are not to this case. The attorney-client privilege issues that we're talking about are generally, at least on Labaton's part, related to the identification of other clients, for example, or information --

THE COURT: Is that privileged? The existence of an attorney-client relationship I don't think is privileged.

MS. LUKEY: In those instances where we feel it is appropriate and privileged, we will make a claim of redaction -- your Honor will see the whole thing -- but it is often a difficult line to draw. But if you're talking about having discussed the same issue with other clients,

for example, and then you identify the clients, that, arguably, infringes their privilege and actually has nothing to do with this case.

More difficult, frankly --

THE COURT: Frequently I know the answers to the questions. I think I know the answers to the questions -- I am asking this time. I'm familiar with the Report and Recommendation, but I have not studied all of it, I have studied parts of it, and I haven't read all the exhibits. But, I mean, is there that type of information in the Report and Recommendation?

MS. LUKEY: As I indicated, your Honor, I can't recall and say to you off the top of my head that there is.

I have not separated -- in my consideration, I didn't separate the exhibits. I treated them as if they had been incorporated into the Report. So I apologize, but I can't make that distinction.

It may be that on the language we'll face in the Report the same issue doesn't exist, but since I take the exhibit and go to it in order to read it to make the determination, I can't give you that answer.

THE COURT: Because one of the things I could do, if there are no appropriate redactions or they're easily identifiable, is make the Report available with appropriate redactions before the exhibits are available.

MS. LUKEY: We could, your Honor, but the problem I have with that is, as I told you at the very beginning, there is a serious difference of opinion between counsel and the Master on the meaning of certain exhibits and what he says.

THE COURT: That's a different point.

MS. LUKEY: No, no, but it's not, your Honor, because this is the point. We don't want the Report released without the exhibits.

THE COURT: I know, and all of these are synergistic. I know you don't.

I doubt you are going to persuade me -- well, I want to go -- well, you may persuade me.

I want to go step by step. I want to know what the redactions are going to be, and then you should be working assiduously, all of you, on your objections because the rules give you -- Mr. Paine, have a seat. The rules give you 21 days to formulate your objections unless otherwise ordered. As a practical matter, you are going to get longer than that.

But the issue is I am going to decide the redactions at some point, and either the Report, as would ordinarily be the case, in redacted form immediately becomes part of the public record, and seven days later your objections are filed; or, as you have requested, I keep the Report sealed

seven days until your objections, your side of the story, is released simultaneously.

My intention is to go step by step on that. We'll see.

But you really want to be working to get your objections prepared because they are really independent, I think, of the redactions.

MS. LUKEY: I think they are.

THE COURT: As I said, we'll see -- the Master has a different view -- but we're not there yet. I want to have a document that I can properly make part of the public record either before you file your objections a week later or a week later. That's the present goal.

MS. LUKEY: I understand, your Honor.

What I am saying to you is, because the exhibits are incorporated into the Report, all we are asking for is what would be six additional days, which happens to include a weekend, so it's not very many business days.

We would like to see the Report and the exhibit redactions come in at the same time, so that steps you're talking about, the process to be followed, includes the incorporated materials. That's very important to us.

THE COURT: All right, then -- because one of the things I am thinking about, and tell me if this is feasible, is that you file your memos regarding the law relating to redactions. Say, We want to redact everything that's

attorney-client privilege. This is what is attorney-client privilege. You know, This is what's subject to the attorney-client privilege.

We want to redact proprietary information, and maybe give me an example or two.

And we want to redact personal information, like somebody's home address, which could be in a deposition transcript, theoretically.

And then you can spend another six days making the redactions, but not actually giving me the specific redactions.

Because I'm anxious to get to work on this when I'm not absorbed in something else.

Would that be feasible?

MS. LUKEY: If I'm understanding you, your Honor, you're suggesting that we tell you -- we go to the Report with its exhibits which we want to consider at the same time, and tell you, Here are the categories that we're going to be redacting, which, I could be wrong, it could go beyond or be different from or not include privilege, proprietary information, or personal information. You want us to give you that by the 5th and then give you the actual redactions by the 11th?

THE COURT: Correct.

MS. LUKEY: I believe that would be feasible for

Labaton and feasible for Lieff.

MR. HEIMANN: That's fine.

MR. KELLY: Yes, we can do that, your Honor.

THE COURT: Kind of give me a preview of coming attractions.

MS. LUKEY: Yes.

THE COURT: Because once there's a framework, it can be applied to the particular proposed redactions.

MS. LUKEY: We can do that, your Honor.

THE COURT: And then, in my tentative view -- and I will let the Master be heard on this, too, because I think he may want an opportunity to respond -- I would have you file those memos -- so it would be a motion, a memo, and affidavits under seal.

I would have you prepare redacted versions of those, also to be filed under seal temporarily by me. Because this is going to become, I think -- we're developing a protocol that will probably be applied in other areas. So there are certain things -- I ordered what I almost always order when there are sealed documents, that redacted versions be filed for the public record. That means simultaneously. But if you think there is a good reason for me to take the redacted version under seal and you want to make an argument why even the redacted version shouldn't be made public, I'll consider it. However, in view of the strong presumption of public

access to judicial records, you have to recognize the substantial risk that I will make the redacted version part of the public record promptly, and it would be even better if, on reflection, you just filed it. But if you want to ask me to -- you know, you want to make a special argument for the redacted version held under seal, I'll seriously consider it.

MS. LUKEY: Well, the first problem we would have is if each of us is filing our proposed redactions under seal, and that would include, of course, ERISA counsel and State Street, as well as the three separate Customer Class counsel, the redactions may differ.

THE COURT: Yes, I saw that.

Here, let me do it this way.

Right now I am talking about the memo you are going to file next week. So you have a June 5 date, and now I may give you to until June 11 to file the actual proposed redactions.

MS. LUKEY: Yes.

THE COURT: But what I am talking about is on June 5 you are going to file a memo and say, We intend to assert attorney-client privilege with regard to certain information in the Report or, not in the report, in some of the exhibits, and then, you know, Here is the law on attorney-client privilege.

And it is axiomatic that the privilege has to be asserted by the client, not the lawyer. So at the moment, Mr. Hopkins is the personification of a client.

Do you disagree with anything I've said so far?

MS. LUKEY: No, your Honor.

THE COURT: All right. So he would have to decide if there's anything as to which he thinks privilege should be asserted, if it is still him, and, therefore, the class and the public won't know that particular piece of information.

MS. LUKEY: I understand that, your Honor. That goes into the memo.

The issue was if we're each filing -- even if -- whether it's under seal or it's going to be made public immediately or later, they have to be consolidated.

THE COURT: They will be. I am going to tell you how we will do that.

MS. LUKEY: They can't be filed if you're going to turn them around at some point and make them public.

THE COURT: Yes, they can.

I thought there was one thing before that.

This relates, I think, to your request for a hearing on the proposed redactions. I want to see the submissions before I decide whether a hearing is necessary. I may well give you a hearing if you want a hearing. And I think that

hearing would have to be closed to the public because you want to discuss the redactions right --

MS. LUKEY: Yes, your Honor.

THE COURT: -- that's your position.

And the transcript would be made, and then the transcript, or a redacted version of the transcript, would be made public once I decide what redactions are appropriate or could be made public.

And do you anticipate that the Master would participate in this proceeding -- I do -- with regard to redactions?

MS. LUKEY: Well, I would assume he's not going to be making any redactions.

THE COURT: No, he can oppose the redactions.

MS. LUKEY: In opposing the redactions?

Well, we have had an issue whether the role should be as adversarial as it is if we're paying for it, but I would have to think about it.

THE COURT: This case -- let's go back to basics.

I said when I granted that $75 million in attorney's fees that the adversarial process didn't work, and this -- okay, so that's a concern I have.

I do not want to do anything without a genuine adversarial process, and this is part of my concern about Mr. Hopkins continuing in this role.

MS. LUKEY: We are not suggesting the absence of an

adversarial process --

THE COURT: Who is going to be your adversary with regard to redactions?

MS. LUKEY: More typically, your Honor, as you know, it would be done by a magistrate judge without the costs.

THE COURT: The magistrate judge, no. The magistrate judge would be a substitute for me, and right now you're dealing with me. Maybe at some point the magistrate judge will get delegated a slice of this.

No, the magistrate judge is not adversarial. The magistrate -- I mean, this is fundamental.

I think it's appropriate to remember the case started with allegations that State Street did not disclose what it should have to its clients on foreign currency exchange transactions, right. And plaintiffs' counsel artfully argued that. And there was a global settlement, and the Department of Labor agreed to it. I think the SEC and the Justice Department agreed to it, and I was the last piece, and I agreed to it. And then I awarded $75 million in attorney's fees, and I noted that the adversary process did not work at that time.

And so now, we've got a report about alleged failures to disclose things that allegedly should have should have been disclosed and that goes beyond the original questions I

put to the Special Master, but which were in the parameters of my general directions to him, and apparently you're going to want certain things redacted.

MS. LUKEY: Right.

THE COURT: If the Master wants to be heard on it, I would be interested in having the Master heard.

MS. LUKEY: Let's take that as a given then, your Honor.

The question that I had and what I was going to suggest to the Court is if we're going to end up so that you can see, or the Master can see, whoever is looking at it, which party is requesting which redaction --

THE COURT: There is a way to do that.

I've thought about this, not that deeply, but there would be two documents, two sets of documents. Each party files its own redactions, and then you make up a master that includes everybody's redactions and in some way identifies which firm wants that redaction. So you essentially consolidate it. But I do think I want to know the particular positions of the particular firms.

MS. LUKEY: Well, I had proposed to my colleagues, including ERISA colleagues, that Labaton -- that we would take on the role -- Choate Hall -- would take on the role of consolidating.

What I was going to suggest to the Court is if there is

anything that is going to be filed at that point --

(Whereupon, Mr. Hopkins rises to exit the jury box.)

THE COURT: Mr. Hopkins, where are you going?

MR. HOPKINS: I was going to ask a question of one of my attorneys, your Honor.

THE COURT: I asked if anybody -- one of your attorneys?

MS. LUKEY: Well, Labaton is his counsel, your Honor.

MR. HOPKINS: I'm sorry, your Honor. I'll sit back down.

THE COURT: Yes, sit down.

I'm sorry, who are you referring to when you said one of your attorneys?

MR. HOPKINS: Eric Belfi.

THE COURT: Mr. Belfi?

MR. HOPKINS: Yes.

THE COURT: From Labaton?

MR. HOPKINS: Correct.

THE COURT: Have you consulted anybody but a lawyer from Labaton for advice regarding this matter since I appointed the Special Master?

MR. HOPKINS: For legal advice for me?

THE COURT: For Arkansas Teacher.

MR. HOPKINS: Well, they represent Arkansas Teacher

Retirement.

In terms of legal advice on how we need to proceed to make sure we comply with the Court's order and things like that, sure, your Honor. But for legal advice on how to protect Arkansas Teacher Retirement in terms of the global issue here, no.

THE COURT: Okay, thank you.

MS. LUKEY: I'm not sure -- I think what I was going to say, your Honor, is if anything is going to be filed on the public record at that point, if we would just do the consolidated version --

THE COURT: That may make sense.

MS. LUKEY: -- with the others going in? If you wish to still have separate versions coming in --

THE COURT: I'm going to want separate versions, and then if there's a consolidated version and there is a good reason not to unseal every version, I will consider it.

But, again, step by step.

MS. LUKEY: But someone, either you or, apparently, Judge Rosen, would be reviewing the redactions and making a decision?

THE COURT: My present intention, I wrote this, is to do it myself. If I -- I mean, I could appoint another lawyer to create an adversarial, you know, sort of an *amicus* on this, and then you will have to pay for that.

MS. LUKEY: We do not.

THE COURT: It will come out of the fund.

No, but this may be a point I should think about. I mean, the Master has made a recommendation, and you are going to have objections to the Recommendation, the findings of fact, the conclusions of law, the recommendations, and I'm going to consider them *de novo*.

It may have been imprecise to call it "adversarial." In other words, I'm interested in hearing from everybody who's got an interest in the Report and Recommendation as to what should be on the public record. The Master may agree with you on all of it, or the Master may think you've drawn the line in the wrong place. And then I want to consider everybody's views. Not all the lawyers may agree on every issue. I mean, not all the lawyers for the class or the different classes, subclass.

So adversarial -- my point is I'm interested in hearing from the Master as well as from the lawyers as to what ought to be redacted.

MS. LUKEY: Perhaps we can cross the bridge later then when you see it, and we see whether there are differences of opinion or not as to what happens next.

THE COURT: Differences of opinion between?

MS. LUKEY: The Master and --

THE COURT: Precisely. That's what I want to do.

Step by step.

MS. LUKEY: So we would then be filing on the record what we will consolidate on behalf of all counsel.

If we're consolidating, way may need an extra day or two so that the individual filings come in, and then we have time to do the consolidation. If we can have to the 11th for everybody to get their individual filings in, and we can --

THE COURT: That's fine. They can file them with me on the 11th. If you want another day or two to consolidate them, you can do it.

MS. LUKEY: I will need to -- yes.

They would file with you, and then we'll consolidate when everybody's is in and try to get them to you on the 13th.

And that would be, as I understand it, a public filing. So it's everybody's redactions.

THE COURT: I hope it's a public filing.

MS. LUKEY: But you're suggesting --

THE COURT: I'm saying, if you want to make an argument that it should remain sealed until I decide which redactions are appropriate, I will probably let you -- you know, you have to file a motion, you can file it temporarily under seal, and tell me why it should be maintained under seal, and if the Master disagrees, he can tell me why he

thinks it shouldn't be maintained under seal.

MS. LUKEY: What is the date for us to do that, your Honor, because it would clearly be our preference that until you have ruled on what should be redacted --

THE COURT: I'm ordering that you file the motion, the affidavits, and the memos on categories of redactions by next Tuesday, June 5. And you can file that under seal with redacted versions that I will make public, unless you persuade me that they shouldn't be.

Then the individual filings shall be made by June 11 under seal, and those are going to be redacted versions, and your consolidated version can be filed June 13.

MS. LUKEY: Under seal until you review it?

THE COURT: Under seal.

MS. LUKEY: We will take care of that, your Honor correct.

MR. KELLY: Excuse, your Honor.

Maybe I'm misunderstanding this, but on June 5 we submit to the Court examples of what we think are legal bases to redact, not our actual proposed redactions on June 5?

THE COURT: Yes. You may want -- you don't even have to necessarily illustrate it with examples, although it may be more intelligible if you do, and you might want to redact the examples. But, like I said, "attorney-client

privilege." Here's and affidavit on behalf of the client, the class.

Or -- I haven't thought of this -- maybe it's a client in another case, but it has to be a asserted by the client, not by the lawyer.

Then you say, This is why it's privileged. Here's the lawyer concerning attorney-client privilege.

If I agree that's the law, I will say, Well, if you get an assertion by the client, if you have that, you will have that next Tuesday.

If Mr. Hopkins still has this role, or wants it, he'll say, I'm asserting attorney-client privilege regarding everything that qualifies with regard to Labaton. And then on the 11th I'll see what you think that is. But it will give my head start on law.

MR. KELLY: I really think the volume of redactions is not going to be large. It's just the volume of work needed to get there is large.

THE COURT: All right, but you told me you could do it by June 11?

MR. KELLY: Yeah, I'm not quibbling with you.

THE COURT: So I'm giving you to June 11.

But I'm glad to hear you say that you don't expect the volume of redactions to be large, because I don't either.

You know, I want to be careful and I want to be fair,

but I don't want this to be become a ponderous, protracted process.

MS. LUKEY: So that takes us through the Report and Recommendation, I think, right? We've done our redactions for that part of the --

THE COURT: Right, and once I see what it is, I'll decide whether a hearing is necessary, and if I think -- if you ask for one and I think it will be helpful to my decision-making, I'll give it to you.

MS. LUKEY: Thank you.

THE COURT: And it will probably have to be a closed hearing because we'll be discussing matters about whether certain things should continue to be under seal.

And then after I decide the redactions -- and this relates to something else I ordered you to do.

Talk with Mr. Sinnott about the categories of redactions that you are going to propose and the authority for it, because I suppose until the Master sees the proposed redactions, he can't -- well, I don't know. He can't really respond whether these are appropriate categories or not. How should we deal with this?

MR. SINNOTT: And, your Honor, I was going raise that issue. At some point, either after the June 5 filing under seal, or the June 11 filing, can I assume the Court will wish to hear the Special Master's position on what's

been proposed by counsel?

THE COURT: Yes.

MR. SINNOTT: And what is the timetable for that, your Honor?

THE COURT: With regard to the categories, if possible, and if you confer, you should know what these are starting after this hearing, you should see if you can get me a memo by June 8. Then I'll have it. And if that proves not to be possible, you can ask me for a little more time. Then they'll make their filing on the 11th, and you should read it quickly, and tell me the minimum reasonable amount much of time you want to respond, if you want to respond.

MS. LUKEY: I suspect we're tracking the categories that you put in your order, your Honor, so I don't anticipate that the categories will be disputed.

THE COURT: Mr. Paine, does State Street have a particular concern here?

MR. PAINE: Yes. We've got one extra category, which is the mediation privilege. I just didn't want that to get lost in the shuffle, since I don't think it's in your order, and it hasn't been mentioned yet today.

THE COURT: Have you read the Report and Recommendation yet?

MR. PAINE: I read the summary in detail, and I've

read some of the Report, your Honor.

THE COURT: Did you see anything in there that you think is subject to the mediation privilege?

MR. PAINE: Definitely in the exhibits. I'm not sure with respect to the Report because I haven't made my way all the way through.

THE COURT: I keep forgetting about you, which is why I put out that order without giving notice to -- I hadn't thought it was your information in there, State Street's information. So you've got to operate on this schedule that I've ordered, too.

MR. PAINE: Got it. Thank you.

THE COURT: And you need to talk to the Master about it.

All right, so at some point, hopefully relatively soon, I will decide what redactions are justified, and the redacted version will be made part of the public record. Then -- well, there's going to be a redacted version.

Then the lawyers want me to decide whether to make it immediately part of the public record, which ordinarily would occur, or make it part of the public record when they file their objections, so it -- both sides -- I mean, you asked me in your written submission to keep the Report sealed until I rule on the objections.

I think it's going to be very hard for you to persuade

me to do that. The ruling on the objections are judicial decisions. I think this is in the heart of what's supposed to be public. So people are supposed to be able to absorb in real time the decisions I am making. It's a way of holding the Court accountable, among other things.

But do you want to advocate now that I keep the Report sealed until I rule on the objection?

MS. LUKEY: Well, that would certainly be our preference, your Honor, because we think there are some items that, when you rule on the objections, you will -- you may decide to take out, and they are extremely injurious to the reputations of the three firms. And if you agree with us that they are -- that there are statements that are in the Report that are based on, in the first instance, errors of law as to what the Massachusetts law is on the subject at issue, and you recognize that this could have very substantial and existential, even, effect on these firms and perhaps others in the plaintiffs' class action bar, then it would seem to be the more prudent course, because the time period is not very long, to keep the seal in place.

That is our strong preference because we do believe so strongly there are issues that will come out and that the damage will -- that is, you will take out of the Report or not accept, but that will leave the injury to the firms, and it will be irreparable.

And if I may defer to Mr. Heimann.

MR. HEIMANN: I do need to speak.

Given the fact that the press is here, I can't let this go past.

We don't think there's anything in the Report that would be injurious to the reputation of Lieff Cabraser Heimann & Bernstein, but we do take issues with -- particularly take issues with certain of the recommendations about, particularly, financial matters that are in the Report.

THE COURT: Okay.

Well, this is not ripe for a decision by me, and you can -- this will become more concrete as we go step by step. I don't know what the proposed redactions are. I don't know what the foreseeable objections exactly are.

So if you want to advocate that the Report not become public until I rule on the objections, you make whatever arguments you want in proper form. But, as I said, it would be hard, in view of the jurisprudence, to persuade me that's appropriate, but I haven't studied the issue in the context of this case.

But basically what does remain open is whether I make -- once I decide the redactions, the redacted version of the Report and Recommendations and Executive Summary becomes public, and then the response become public when

it's filed.

You know, part of the reason it's important to -- and I don't need any more litigants, particularly this month with everything that I'm juggling, but sometimes in cases like this somebody moves to intervene -- the media moves to intervene, somebody else moves to intervene. Now, because we're doing this in public proceeding, it's known what the range of options are, and if somebody who's not a party thinks they have an interest and a right to be heard on the issue, they know it's an issue, okay.

Let's go to the motion regarding what should be in the record.

MS. LUKEY: Your Honor, on that --

THE COURT: Hold on just one second. I'm trying to find the --

So your motion was Docket No. 222, and it generated a number of filings, including a memorandum by you.

And if I understand it correctly, the lawyers' proposal is that everything the Special Master has be preserved in case, in the course of litigating this or on appeal, there is some perceived, or at least in the course of litigating it at this level, there's some perceived need for more, but that your proposal is that the record to be filed in the court and public, subject to appropriate redactions, would be the exhibits to the Report and Recommendation, any

additional documents the Master wants to provide for the record, documents he regards as relevant, perhaps relied upon by him, additional documents the parties want to offer, and anything the Court requests.

MS. LUKEY: Correct. We're not -- we want everybody to be able to take what they want. We're trying to avoid the 236,000 pages from being part of the record.

THE COURT: Okay.

MS. LUKEY: And that would be a lot of redacting, because then you've got the W-2 and W-9 issue and so forth.

THE COURT: Well, we'll have to see what the Master -- I am not sure, at quick glance, that some of those might be -- they might be relevant. One of the original triggers for this case was that it was represented to me that the regular hourly rates of certain people were about 400, 450 dollars an hour. I know what somebody gets paid is not necessarily what a client gets charged, or is not what a client -- well, may not be what a client gets charged, but it may be evidence of an hourly rate.

But, in any event, those are the four categories.

And the Special Master felt constrained by my order to preserve and file everything, but now this issue is coming into sharper focus.

Have you had an opportunity to think about the Master's view as to what ought to be in the record filed?

MR. SINNOTT: Your Honor, unlike the Report and the exhibits, which we feel were vetted by the Special Master, and, we feel everything in there is necessary to the Court's consideration, we do not take that strict view of the record as a whole. And at this point the Special Master looks upon his role as carrying out the will of the Court.

With respect to that great, massive 237,000 pages that Mr. Kelly talked about, we will review and we will vet, as deemed appropriate. The original order by the Court we felt was not ambiguous, so to that extent we would stand by that, but we will do as that Court desires.

THE COURT: Well, I would expect you would look and see if there were things that you did not make exhibits that, nevertheless, are relevant, potentially important.

I may have overlooked it, but, for example, if I had to I will request it, but it would help if you sort of anticipate what the Court would be likely -- there's a reference in there that there were a relatively small number of emails from Michael Bradley evidencing work that he did, but I don't think they were made exhibits to the Report.

I'm interested in those.

MR. SINNOTT: Let me make it clear, Judge, that, as I said before, one of the priorities of the Special Master is the public interest in information.

I'm just saying that there may be a different standard

with respect to how flexible the Special Master is, subject to the Court's direction, with respect to those things. But the Special Master is very much adamant that there is a public interest in much of what's in that broad file.

THE COURT: I would expect. I just use that as an example that quickly came to mind.

You know, what else do you think should be in the record, and then it can be supplemented during the period of *de novo* review.

MS. LUKEY: Right, at any time.

THE COURT: If we're having hearings, and there is a dispute about whether the work was done and it turns out that there are documents that are relevant that weren't included in the record, the record could be supplemented, as I understand it. Because anything I order -- I mean, I make that clear in my order. But anything I order -- any order I issue I can revise. But it seems to me that this was a reasonable approach.

MS. LUKEY: I thought it wouldn't even be by motion. If the Court were amenable to it, it would just be a notice of supplementation of some kind, and whoever needs to add, adds.

MR. SINNOTT: I think the trick is going to be in defining what's relevant.

THE COURT: But I can't do that. I don't know what

you have, and I don't know what you thought, you know, had some value, was helpful to you, but --

MR. SINNOTT: Understood, your Honor. I think we're --

THE COURT: What we're doing here is setting up a process or different processes for different things, and it will work.

All right, now I have a few questions for Mr. Hopkins. But, Mr. Hopkins, if I'm going to ask you some questions, you've got to go in the witness box and be sworn.

MR. HOPKINS: Thank you, your Honor.

GEORGE HOPKINS, sworn

THE COURT: Would you please state your name for the record.

MR. HOPKINS: Your Honor, my name is George Hopkins.

THE COURT: And what is your position?

MR. HOPKINS: I am the Executive Director of the Arkansas Teacher Retirement System.

THE COURT: How long have you served in that position?

MR. HOPKINS: Approximately nine-and-a-half years.

THE COURT: Who was your predecessor?

MR. HOPKINS: Paul -- well, my direct predecessor was Gail Bolden, who was interim Executive Director.

THE COURT: How do you spell her name?
MR. HOPKINS: G-A-I-L. Last name, Bolden, B-O-L-D-E-N.
THE COURT: And who was her predecessor?
MR. HOPKINS: Paul Doane.
THE COURT: D-O-A-N-E?
MR. HOPKINS: I think so.
THE COURT: Have you read the Special Master's Report and Recommendation and Executive Summary to it?
MR. HOPKINS: I have. Some parts more thoroughly than others. You know, it's a long report. I've been doing school-hall meetings across Arkansas, and retirees. I've been meeting with actuaries, but in my time in between those, I have. Some parts more skimming, other parts very directly.
THE COURT: What parts have you read particularly carefully?
MR. HOPKINS: Well, the parts that applied to the issues about the law firms, and basically the findings, any issue about Arkansas Teacher Retirement and the Class concerns that existed.
You know, other parts that was more factual about how the attorneys interacted with each other during that part, you know, I read through it to see if there was anything that would catch my attention, but lists or, you know, word

for word, the total basis, as most attorneys would do.

THE COURT: Have you read carefully the parts about the origins and evolution of Labaton's relationship with Arkansas Teacher?

MR. HOPKINS: I have.

THE COURT: And in my order directing you to be here, I cited my March 16, 2018 decision in the Garbowski case.

Did you read that decision, by any chance?

MR. HOPKINS: No, but Ms. Lukey summarized it for me.

THE COURT: Do you want, on behalf of Arkansas Teacher, to continue as lead plaintiff in this case?

MR. HOPKINS: I do, your Honor, to protect the class. I sure do.

THE COURT: Why do you think it's important to protect the class at this point, or for you to protect the class at this point?

MR. HOPKINS: Can I give you a little history about my views on that?

THE COURT: Okay.

MR. HOPKINS: Your Honor, when I got to Arkansas Teacher Retirement, I didn't think these cases were important, and I was more busy trying to take care of a retirement system in the middle of a financial crisis.

And when Arkansas leaders told me I needed to do this, one thing I learned was there was no instruction manual on how to be a good class representative.

Thankfully, as a practicing attorney, I've been in some national class actions at a very small level, both on the defense and plaintiffs' side of that.

And I used the skills I learned working in the log woods, watching my parents, which is, You do the best you can every day.

You -- as a fiduciary you give, essentially, all that you have and surrender that and take care of the people you have a duty to take care of it.

And, you know, in the mediations about mid points, and insurance, and how the insurance tower is developed, and all the issues about scienter, and all the different parts, you know, coming to court hearings, you know, I wanted to be, and I always tried to be, the best I can. Not for a ATRS, the Arkansas Teacher Retirement, but for the class.

And, you know, I have never -- I have never asked a law firm to hire some attorney. I have never asked a law firm to make a political contribution. And I have done everything I can to focus for the class.

I can give you two examples.

You know, when there was a circumstance that it appeared that the class period needed to be extended, which

would greatly reduce ATRS's financial interest in the class later on, I told the attorneys, Do not -- do what's right for the class. Don't try to preserve some class period that doesn't makes sense.

And a more recent case, where there was silos of recovery based upon knowledge of investment managers, and it became sort of an issue of what silo we should be in, I said, Put ATRS in the lowest silo, because I always want to represent the class interest.

And in this case, you know -- you know -- and I don't know what I'm allowed to say, because this is under seal. But I think what Judge Rosen, if you read his Report about how I acted in the class, what Mr. Sinnott said -- and I will tell you, you know -- I was always told not to brag growing up, you know. But I will brag. I'm the one who found this case. I'm the one who helped develop this case over several months before it was ever filed. I chose the law firm that would proceed in this case, because I interviewed several. I went to Chicago to meet --

THE COURT: This really isn't so much about you personally, but let me ask you this.

When you became Executive Director of Arkansas Teacher about nine years ago, did you say?

MR. HOPKINS: Nine-and-a-half years ago.

THE COURT: Did it have a contractual relationship

with Labaton?

MR. HOPKINS: It did.

THE COURT: And has it had a contractual relationship with Labaton ever since?

MR. HOPKINS: Continuously, your Honor.

THE COURT: What has Labaton's role been? What have its roles been in those nine years?

MR. HOPKINS: Well, as I said, when I first got there, I didn't move on the cases originally. Then our political leaders in Arkansas convinced me that I should.

THE COURT: The political leaders --

MR. HOPKINS: Well --

THE COURT: I'm sorry, what did you say? The political leaders convinced you that you should be interested in these class actions?

MR. HOPKINS: Right, because I was really -- as a new Executive Director with the Retirement System that was going into -- when I got to ATRS, two weeks after I got to ATRS, we started a legislative session that I had a -- about a 22-bill package to try to pass in the Legislature, and I passed every one of them.

I had to redraft a lot of legislation. So I was not focused on trying to do these cases.

THE COURT: But you said -- is Arkansas Teacher regulated in the some way by the government of Arkansas?

MR. HOPKINS: Absolutely, your Honor.

Can I explain to you how that works?

THE COURT: No. Listen to my questions. Say what's necessary to answer fully, and then I may give the lawyers a chance to --

MR. HOPKINS: And let me say this. If I don't get to say all I want, I would like -- after this hearing is over, I would like to proffer some things in the record if necessary.

THE COURT: Well, if we don't resolve this today -- I'm going to give you some time to think about what we're discussing, okay?

MR. HOPKINS: Yes, your Honor.

THE COURT: I would like to make informed decisions, too, and sometimes it takes a little while, but you have to start a process.

But okay.

So you said that political leaders persuaded you that you should give some priority to class action lawsuits, correct?

MR. HOPKINS: Yes, your Honor.

THE COURT: Who were those political leaders?

MR. HOPKINS: Well, a person I served with in the State Senate who had been a former Executive Director at Arkansas Teacher Retirement, David Malone.

I talked to several legislators.

I talked to people at the Governor's staff, and generally people in the Department of Finance Administration of Arkansas who suggested that these were important cases, and that they -- Arkansas Teacher Retirement had gone from one securities monitoring firm to five very recently before I got there, and I think the purpose of that --

THE COURT: One at a time.

So you spoke to David Malone --

MR. HOPKINS: Right.

THE COURT: Who was one of you predecessors, right?

MR. HOPKINS: -- right, yes.

THE COURT: Do you know the name Steve Faris?

MR. HOPKINS: I never spoke to Steve Faris about that, your Honor.

THE COURT: I didn't ask you that.

MR. HOPKINS: Okay.

THE COURT: Do you know the name -- do you know a man named Steve Faris?

MR. HOPKINS: I do, your Honor.

THE COURT: Who, in two thousand -- who was Steve Faris back at the time you became Executive Directer?

MR. HOPKINS: He was a state senator.

THE COURT: And did he have any involvement with Arkansas Teacher in that capacity?

MR. HOPKINS: Not directly.
THE COURT: Did he have some involvement indirectly?
MR. HOPKINS: Yes. He was a member of the Arkansas General Assembly. The General Assembly, you know, has indirect supervision of ATRS because they adopt all the laws by which we operate, you know, how our board is configured, how benefits are paid, how we proceed with investments, the type of investment rules that we have, and Mr. Faris was a member of the General Assembly. So indirectly, yes.
THE COURT: Have you ever had any conversations with Mr. Faris about class action lawsuits?
MR. HOPKINS: At any time?
THE COURT: Yes.
MR. HOPKINS: Sure.
THE COURT: Did you say "yes"?
MR. HOPKINS: Yes, your Honor.
THE COURT: Once, or more than once?
MR. HOPKINS: More than once.
THE COURT: Have you ever had any discussions with him about law firms that might participate in either monitoring the market for possible class action lawsuits or represent Arkansas Teacher?
MR. HOPKINS: I don't think I have in that context. You know, I know Mr. Faris, and I told him that we were

doing cases, and I talked him over coffee, or whatever, to say that, you know, We're involved in this case or that case and that type of thing.

THE COURT: Have you ever discussed this State Street case with him or the aftermath of it?

MR. HOPKINS: Yes, your Honor.

THE COURT: When was that?

MR. HOPKINS: I probably -- again, I think he left the State Senate in 2013 -- 2011 or '13, I'm not sure, somewhere in that time period. But I remember talking to him about this -- you know, I've talked to several people about this case because it was sort of known in Arkansas. And I don't remember the specifics, but generally that we were doing this lawsuit, and it was very interesting, and that we were proceeding forward.

THE COURT: Have you talked to Mr. Faris since the issues arose that prompted the appointment of the Special Master?

MR. HOPKINS: I have.

THE COURT: You have or have not?

MR. HOPKINS: I have, your Honor.

THE COURT: Once, or more than once?

MR. HOPKINS: More than once ones.

THE COURT: When was the first time?

MR. HOPKINS: The first time after the appointment

of the Special Master?

THE COURT: Or after the issues arose concerning the propriety of the attorney's fees that led to the appointment of the Special Master.

So let's take it back to about November 2016.

MR. HOPKINS: I don't recall when the first time I talked to him after that, you know, but I am positive I talked to him and said, you know, there is -- you know, the attorney fee thing sort of blew up, and I've got to deal with it, but I don't recall any particulars or even the exact date.

THE COURT: Did you contact him to have that communication?

MR. HOPKINS: Well, let me try to put it in better context.

I've known Steve Faris since 1980. We went to the same college.

When I was the Senate Co-Chair of the Public Retirement Committee, he was House Co-Chair. And I'd see him -- you know, we grew up in the same hometown, so -- well, I actually grew up in Donaldson, he grew up in Malvern, but same county, I should say.

But I see him very often in circumstances, and he will ask me about my children. I'll ask him about his Godson, and talk about a lot of things.

But he's always -- he's always asking about, What's going on with Arkansas Teacher Retirement? What benefit changes are we making? What are doing?

And this has been a pretty prominent part of what I had to deal with, and I'm sure I mentioned it to him, but not in the context -- just in the context of general discussion.

THE COURT: Did you ever speak with Mr. Doane -- well, when did, as you understand it, Labaton become -- well, begin working with Arkansas Teacher?

MR. HOPKINS: I think the procurement for the contract association with Labaton probably was finalized in the summer of 2008, but I don't know the exact date.

THE COURT: Did anybody ever tell you how Labaton came to be one of the lawyers for Arkansas Teacher?

MR. HOPKINS: Yes, through the Special Master.

THE COURT: Put aside the Special Master's Report.

MR. HOPKINS: No, I never knew.

THE COURT: Did you ever discuss that issue with Mr. Doane?

MR. HOPKINS: No. I've had very few discussions with Mr. Doane. The first time I talked to Mr. Doane was probably two years after I was ATR's Executive Director.

THE COURT: Did you ever discuss with Mr. Faris about -- well, did you ever discuss Labaton with Mr. Faris?

MR. HOPKINS: I've already told you I had.

THE COURT: But tell me again. I've heard a lot of things.

MR. HOPKINS: Okay.

I discussed with -- I discussed with Mr. Faris Labaton. You know, sometimes we'd get an interesting case, and I would tell him, Here's this case and Labaton represents us. The same with Bernstein Litowitz; same with Kessler Topay; same with Nix Patterson; some with Kaplan Fox.

THE COURT: Did Mr. Faris ever say anything to you about Labaton?

MR. HOPKINS: No, not -- other than, Sounds like they're a good law firm, but, not -- I think in the context you're asking, which is did he encourage me to use them in any case or -- no, no, your Honor.

THE COURT: Did he ever tell you that he had a role in introducing Labaton to Arkansas Teacher?

MR. HOPKINS: No, he never told me that.

Well, let me say, until after the Special Master --

THE COURT: Leave that.

Have you discussed this with him since the Special Master's Report?

MR. HOPKINS: Just very -- just very briefly. Because I just said, "I didn't know you had anything to do with Labaton. You've been there."

And he said, "Well, it was a long time ago," and that

he had met a couple of Labaton attorneys and met -- introduced Mr. Doane. And as far as he -- as far as how he remembered, he just said "introduced them," because he introduced some attorneys that he knew, and sort of rolled out of the room.

That's, sort of, how he presented it to me.

THE COURT: You know an attorney in Arkansas named "Herron"?

MR. HOPKINS: I have never -- as I told the Special Master, I've heard the name, but, as far as I know, I've never met him.

THE COURT: Did Mr. Doane ever mention Mr. Herron to you?

MR. HOPKINS: No.

Mr. Doane in conversations with me was very general about, you know, being a former Executive Director of Arkansas Teacher Retirement when he was at St. Paul Teachers'.

THE COURT: I'm sorry. I misspoke.

Have you ever talked with Mr. Faris -- I want to make sure I did not confuse Mr. Doane with Mr. Faris. These names are new to me.

Did you discuss Labaton with Mr. Faris?

MR. HOPKINS: Back, at the -- after -- you know, as I told you, Mr. Faris, a former state senator I knew real

well, I'm sure I discussed Labaton, like all the other securities firms.

THE COURT: Did he tell you, or discuss with you, that he had introduced Arkansas Teacher to Labaton?

MR. HOPKINS: No, not until -- I didn't discuss that with him until after I learned it through this process.

THE COURT: When did you have that discussion?

Well, was it one discussion or more than one discussion?

MR. HOPKINS: It may be -- maybe two, but, I mean, it was more casual, just --

THE COURT: No. Just when?

So when was the first of the two?

MR. HOPKINS: I'm trying to remember the context of when.

It was probably when I saw doc -- it was probably after -- probably right after my deposition here on the day after Labor Day, because I think that's when I saw documents that Ms. Lukey had that had been provided by the Special Master.

THE COURT: And did you have that conversation with Mr. Faris in person or by telephone?

MR. HOPKINS: I honestly don't remember, your Honor.

THE COURT: What, to the best of your memory, did

you say and what did he say?

MR. HOPKINS: Well, to the best of my memory, it was something more like, I didn't know that you had introduced Labaton to Teacher Retirement. And he -- and it was like it was a distant memory to him, and he said, Yeah, I think I did.

He said, I think I remember they came into town. I, you know, introduced Paul Doane to them, and sort of left them to discuss the matter.

THE COURT: When did you have the second conversation with him?

MR. HOPKINS: Well, I don't know. It could have been a couple of days later. But, as I said, it was more of a passing deal, not in terms of a, you know, some kind of a -- you know, I wasn't trying to interrogate him, let's put it that way.

THE COURT: Have you talked to him, or otherwise communicated with him, since you received the Report, the Master's Report and Recommendation last week?

MR. HOPKINS: Well, he actually -- I work every Memorial Day, because it's sort of the end of our retirement season, and we have a crew there. And he actually drove by my office, and -- to get a cup of coffee about nine o'clock on Monday morning.

And he said, What do you have this week?

And I said, I got to go up there.

And he said, Why?

And I said, Because there is a hearing on, you know about the -- you know, about the State Street case.

And that was sort of the extent of it.

THE COURT: What did he say?

MR. HOPKINS: He said, I thought that was probably already going to be over?

And I said, No, it's still going on.

And, you know, I -- you know -- you know -- I don't go -- I don't try to go around, your Honor, talking about all -- you know, I have plenty -- you know, it takes 15 minutes -- it take 15 minutes to even start explaining what's going on in State Street, and if I did that to everybody who wanted to find out what I was doing --

THE COURT: I asked you what he said.

MR. HOPKINS: Oh, okay.

I -- I -- I think he said, basically, Enjoy Boston and, good luck, kind of deal.

Then he asked me what my son was doing.

THE COURT: Had he ever come to see you on Memorial Day before?

MR. HOPKINS: I don't remember, but he comes by my office pretty regularly.

I mean, he's an old political guy who, you know, shows

up and has coffee with a lot of people I guess.

THE COURT: He's left the state Legislature?

MR. HOPKINS: Yes. He's a retiree that acts like he is retired.

THE COURT: What does that mean?

MR. HOPKINS: It means that, you know, that he shows up at the worst times, when I'm the most busy. Because on Monday I have an ATRS board meeting, and I was working on executive summaries and trying to develop resolutions, and he showed up in my office while I was wanting to be very busy, not talking to him.

THE COURT: I was here all day Monday, too. I know the --

MR. HOPKINS: We're laudable folks.

THE COURT: And the Internal Revenue Service thinks I'm retired.

All right.

Is Christa Clark still the chief counsel of Arkansas Teacher?

MR. HOPKINS: No, your Honor, she's not.

THE COURT: Do you know if she's still alive?

MR. HOPKINS: As far as I know.

THE COURT: If Arkansas Teacher continues as lead plaintiff in this case, how do you intend to discharge the lead plaintiffs' duties to the class.

MR. HOPKINS: Number one, to the best of my ability.

Secondly, selflessly as to myself and ATRS.

And, third, I would say that I will do some of the things I've already done and will continue to do concerning, you know, I'll call it the Customer Class and the others, and that is to try to do everything I can to make sure that, you know, once you decide what the attorney fees are, which is your role, not mine, that I will try to make sure that the administrator makes all the appropriate decisions.

If there's is some issue that comes up about how that administrator should divide up the funds that go back to the class, I will be highly involved and make sure it's fair and reasonable.

If there's any issue, as I told you before, about what silo ATRS would involved in there, I will defer.

And I will -- I will -- I will die honoring my father's instructions when he was dying when I was a teenager, and that is, you know, Do everything to the best of your ability. Learn from others, but do it -- do it in a way that would make me proud.

THE COURT: Let me ask you this, do you remember that you filed a declaration and affidavit with the Special Master on about March 15, 2018?

MR. HOPKINS: Is that the declaration about the

ratification of the referral fees?

THE COURT: Yes.

MR. HOPKINS: Yes, your Honor, I remember.

THE COURT: Who drafted that document?

MR. HOPKINS: Well, Ms. Lukey partly drafted it, I think. I think ms. Lukey sent it to me, I discussed it with her, and I think I -- I think I -- I almost never take a draft of something that somebody gives me and leave it alone. It's just not my nature. And I think part of that's what she put in, and part of it what I put in, and I don't know who helped her.

THE COURT: Are you still getting legal advice from Labaton or lawyers they've hired, like Ms. Lukey, in connection with this case?

MR. HOPKINS: I'm not sure what I had was legal advice from her. I -- you follow what I'm saying?

She asked me, you know, would you -- would you consider filing a declaration, and explained to me what it was.

And I said I would consider that.

I don't think I was seeking legal advice from her or obtaining it.

THE COURT: With regard to your role -- Arkansas Teacher's role as lead plaintiff, are you getting legal advice from anybody?

MR. HOPKINS: No.

THE COURT: In the course of the case have you received --

MR. HOPKINS: Well, maybe I don't understand the context.

THE COURT: Do you remember I appointed you the lead plaintiff in this case?

MR. HOPKINS: Yes, your Honor.

THE COURT: And do you recall that I approved your selection of Labaton, among others, as counsel to the lead plaintiff, counsel to the class?

MR. HOPKINS: Yes, your Honor.

THE COURT: And without telling me what it was, while you were the personification of the lead plaintiff representing the class, did you get advice in this case from Labaton?

MR. HOPKINS: Constantly, your Honor, from before the time the complaint was filed.

THE COURT: All right.

And are you now getting any legal advice from anybody, other than Labaton and other lawyers they've hired or lawyers working with them?

MR. HOPKINS: No.

THE COURT: Did you hear me have some discussion with Ms. Lukey and Mr. Kelly about the attorney-client privilege?

MR. HOPKINS: I did, and I'm sitting -- my mind's -- I'm sitting here filtering that out, if you're continuing to question me. But, as far as I'm concerned, I guess to this point I have waived the attorney-client privilege on anything I've had discussions with my client so far for any question I've answered to you.

THE COURT: Well, I don't -- I wasn't trying -- I don't know about -- well, I don't know.

But what I wanted to know is, if you're the lead plaintiff and the representative of the class, you will have to decide whether to assert attorney-client privilege with regard to any information that the Special Master receives; do you understand that?

MR. HOPKINS: Well, if you tell me that's the standard I have, I will.

I haven't researched that issue, but I will. If you tell me that's the standard, I will assume it's the standard, your Honor, and I will faithfully discharge that.

You have to understand, I live in a glass bowl, too. Arkansas has all -- is a freedom of information state. So, you know, I understand the press and all those things, and will do the best of my ability to ensure that an attorney-client-privilege assertion is appropriate to protect some viable interest and not to cover somebody's circumstance, I'll say.

That's to go back to my sawmill days. I'm sorry.

But I will say this, your Honor, I will err on the side of not asserting the privilege on anything associated with Arkansas Teacher Retirement, because that's how I handle all my duties.

THE COURT: The lawyers made some reference to what's in the Report and Recommendation, you have, too. And just answer this, I think, "yes" or "no."

Are you aware that the Special Master has recommended that Labaton and other lawyers be ordered by me to repay or return some of the fees they received, and that if I issue that order, they recommend that a lot of that money go to the class?

MR. HOPKINS: Yes, your Honor.

THE COURT: Do you understand, therefore, that I have a concern that there may be a conflict at this point between the interests of Labaton and the other Lawyers, who want to vindicate the propriety of everything they did and keep the money, and the class that would benefit if I ordered some of that money paid back?

MR. HOPKINS: You want a "yes" or "no"?

THE COURT: You don't have to answer that --

MR. HOPKINS: I would like to, if you would let me.

THE COURT: I was going to say, You don't have to answer it "yes" or "no."

MR. HOPKINS: I don't want to answer it "yes" or "no."

THE COURT: I didn't think you wanted to answer it "yes" or "no."

MR. HOPKINS: I'm totally aware of that, your Honor.

But let me tell you, I've been involved in a lot of these cases now, and I've been involved with a lot of co-counsel or our co-leads. And since this happened, not only have I talked to Mr. Faris, I've talked to other, you know, funds that are very active in this area, and -- along with Professor Joy in the back, and another professor.

And that's why I was going back to ask Mr. Belfi. I'm terrible with names, and I was going to ask the name of this professor, I think from Harvard, that's in that Report, too, that essentially says, Your job is to award attorney fees and potentially to take them back.

My job is to tell you whether I think that the aggregate awarded fee is fair and reasonable.

And if you want to take fees from these attorneys and return them to the class, that's -- you know, I will -- I understand my role, and I always try to understand my role. And I don't try to be an attorney in these case. And I don't try to be a judge, because you wouldn't let me anyway.

And I think the precedent -- in fact, Federal Rule of

Civil Procedure Rule 23 essentially says that it's the judge who awards the attorney fees.

And, by the way, I expect to see you August 2.

And I did notice in your order on Insulet that you ordered the attorneys to reveal referral fees. And I think that's great, because that's -- I think that's not my job to ferret that out, that's your job. And if they were paid referral fees, and you wanted them not to pay it, I'm happy with it. And if you say to them to give up referral fees and -- whatever you do about the attorney fees, I'm happy because you --

THE COURT: You're talking about another case before me, Arkansas Teacher v. Insulet.

MR. HOPKINS: Right, but I'm also saying in this case, whatever you do about the attorney fees, I'm not going to argue with you, because that's -- that's -- when I originally file a declaration saying I supported the attorney fees that you originally awarded, you know, I left it --

I always have tried to leave it up to the federal judge to say what's fair and reasonable, and if you think something else is fair and reasonable, you know, they may object, but I don't.

THE COURT: Have you thought about the fact that if I find there was -- well, Arkansas Teacher, you, chose

Labaton for this case, right? You chose them to represent -- did you choose them?

MR. HOPKINS: I sure did. I interviewed two or three firms. I --

THE COURT: Okay. Okay.

Now, you know -- putting aside what's even in the Report and Recommendation -- that they have been accused of misconduct.

MR. HOPKINS: I don't think so.

THE COURT: You don't think they've been accused of misconduct?

MR. HOPKINS: First of all, let me say this. I think if you read the order, you know they say -- and again, a sanction versus -- I don't think they did -- I think the recommendation is they've not done anything that was -- subjected them to a sanction of the court.

There is a reallocation remedy based upon one professor's position. Two other professors have a different one. But my point is, I don't think -- I don't think that they're accused of misconduct.

THE COURT: Oh, you don't think failure, if it's proven, to be candid with the Court is misconduct?

MR. HOPKINS: Well, I think -- I think this, your Honor. And without trying to inflame you, I think what you should have done in this case is what experience taught you

to do in Insulet, which is, if want to take a referral fee, ask.

THE COURT: I know. I was educated by this case.

MR. HOPKINS: And I'm educated by this case, too.

THE COURT: Stop.

Have you thought -- you picked Labaton to represent the class in this case. Have you thought about whether it would injure the reputation of Arkansas Teacher, and perhaps its opportunities to serve as lead plaintiff in future cases, if the Court finds Labaton engaged in misconduct?

MR. HOPKINS: No.

Well, to say I thought about -- you know, I thought about a lot of things. But, you know, I have not thought about it in a way that would motivate me to do anything differently than what I would otherwise, I think was the question you were asking.

THE COURT: No. They're two separate questions.

So, if I can parse out what you just said to me, it has occurred to you that this case, particularly if I find that Labaton engaged in misconduct, could also be harmful to Arkansas Teacher's reputation?

MR. HOPKINS: Well, I'm not -- well, let me answer it this way.

I have not thought about it the way you've presented it.

You know, any time you're in a case that blows up, you know, the impact of it affects everybody in the case. So, sure, we're impacted to a slight amount.

But I don't think you can impute any kind of misconduct finding you would make to me about what happened, and I wouldn't worry about ATRS.

Because, you know, your Honor, I think if you asked any of the main mediators -- Layn Phillips, Judge Weinstein, and all those others -- I think I will just be as effective.

But I will also say that this has taken up a lot of my time. And there may be times where I say, I would be less active just because, you know -- you know, I'm over 60, and there's a lot to be done at home, but not because of Labaton.

And I think you ought to do what's right as to all these attorneys and let the chips fall where they may.

But I'll say this --

THE COURT: Do you intend to, on behalf of the class, take a position on what the Court should do?

MR. HOPKINS: If you ask me, your Honor, I would.

But I don't think -- let me tell you two or three things. Can I tell you my view?

Number one, a class rep should be very cautious about trying to allocate attorney fees between law firms and a class.

But please give me -- let me have my -- explain my view.

Because, first of all, I've been in cases where -- not as a class rep but in other areas -- where everybody tried to impress me how great an attorney they were versus trying to do attorney work.

I don't want to be the judge in a beauty contest, and I don't see what happens in the trenches and between these law firms about which ones really have that staff really pulling together and doing great work, which ones were, you know, following in the wake of the others.

You know, I had great contact with all of them, but I was at the point of the spear in terms of what firms really, you know, pulled the load more and which ones sort of followed in behind. I don't know.

You know, if you look at all the time the Special Master has spent doing that, I -- I think that's beyond the scope of a class representative. But if you asked me to do it, I would give you an opinion, but I think -- I think it would be -- if you followed my opinion, you would probably be following the least-quality opinion that you should follow in terms of your ultimate decision.

THE COURT: Well, this all goes back to the decision I had to make without the benefit of the adversary process as to what would be fair to the class. I mean,

that's what's I was doing when I approved the settlement, and then I approved the requested attorney's fees.

And I think you just told me that you don't view it as your role at this point to tell me what would be most fair to the class.

MR. HOPKINS: Well, what I said was, you know, without doing the extensive investigation about who all pulled their weight, you know, that -- your realliance on me -- if you ask me to, I will.

No judge has ever asked me to opine on how to divide the attorney fees to the class, ever. And I know of no class rep who -- that I've talked to or I've been in a case with who has ever done it either.

But, if that's -- if that is a new role that I should have in this case or any other, I will do it.

THE COURT: Have you ever been in a case where a judge appointed a Special Master to investigate the conduct of the lawyer that you picked to represent the class before?

MR. HOPKINS: No, your Honor.

THE COURT: Have you ever heard of a case where there was a 376-page Report and Recommendation regarding the conduct of the attorneys that you selected?

MR. HOPKINS: No, your Honor.

But -- but, again, let me say, if you all ask me to make a recommendation and you give me -- if you give me a

short deadline, I will make one.

THE COURT: It depends on what the question is. I'm talking about your role here.

Today is Wednesday. I'm ordering that you file a report, that you write, where you tell me -- I mean, you can talk to whoever you want to talk to -- as to whether, on reflection, you want to continue to have Arkansas Teacher, personified by you, serve as lead plaintiff.

Based on what I know now, I continue to be satisfied that, you know, in negotiating the settlement, Arkansas Teacher, particularly you, did a good job. And this isn't really about you personally.

But when the case started, I found that Arkansas Teacher had a big stake, and that its interest was typical, it was not different in any possibly material way from the other investors, and that it was adequate, that it would vigorously litigate on behalf of the class. I expected that it would direct the attorneys and -- that's what I expected.

But now -- here's the reasons for my concern, and this is why I want -- I know you take this seriously.

Think about this, and, as I say, it's not a question of whether I made the right decision in finding Arkansas Teacher would be a good lead plaintiff originally.

But now Arkansas Teacher has one, or more than one, way in which it is not typical of the class members.

The conduct of Labaton and the other lawyers you selected has been called into question. The Special Master, as you know, recommends that what, by my standards, is a significant amount of money be returned by those lawyers and distributed to the class.

Arkansas Teacher has a relationship with those lawyers and is still getting legal advice from them.

You haven't thought in these circumstances to go to another lawyer who doesn't have a dog in this fight to advise you as to what would be in the best interest of the class that you personify, represent, at the moment.

And, I don't want to get into more detail about this, but you know that questions have been raised by the Report and Recommendation about the origins of Labaton's relationship with Arkansas Teacher, and they're just questions. But to the extent that those issues are litigated in this case, they could be at least embarrassing to Arkansas Teacher.

And that may give you an incentive, even if you're confident that you would resist it, to not vigorously represent the class the way somebody who did not have this historic relationship in these issues would.

So being as transparent as possible because I think you will think about this --

MR. HOPKINS: Well --

THE COURT: Let me just finish, because I --

MR. HOPKINS: I'm sorry.

THE COURT: My intention was to send you home so you can think about it.

So these are my concerns.

And my paramount responsibility is to the class and to make sure -- try to assure that at this point it's represented by a lead plaintiff who's typical and adequate, and will not have its or his role representing the class complicated by unique issues and potential conflicts of interest.

That's my concern. I would like you to think about that.

MR. HOPKINS: Can I respond? First, because I think you said some things that -- that I -- things right now I would like to respond to.

Please, your Honor?

THE COURT: Go ahead.

MR. HOPKINS: Number one, you know -- you know, again, your whole position assumes that the class rep should be -- the class representative should be involved in the decision about the distribution of an aggregate fee award, and I don't think that's the law. I don't think that's in compliance with Rule --

THE COURT: And I will tell you, that's not the

only issue, and the fact that you apparently can't understand that that's not the only issue is magnifying my concerns.

MR. HOPKINS: But that wasn't the only one, your Honor.

The other one is you seem to assume that, you know, how Labaton became associated with ATRS was in some way improper, illegal, or untoward, and I don't think the record shows that.

In fact, the record specifically says they didn't even inquire into that area.

That's just for the record.

THE COURT: I have not assumed anything.

What I told you is that it raises questions. And you uniquely, among all the investors, have a vested interest -- "you," Arkansas Teachers -- in the answers to those questions.

MR. HOPKINS: Thank you, your Honor.

THE COURT: I am ordering that the parties order the transcript on an expedited basis.

I am ordering that you read this when you get it, my questioning of you, and I am ordering that you think about it, because I think you're a thoughtful man.

And do not take this personally, but just think that, you know, at this point do you want to require that I decide

whether Arkansas Teacher should be allowed to continue as lead plaintiff?

And the second question is the other one I identified: If I do, tell me whether you would continue to get legal advice from the people who have given you legal advice up to now in this case or do something else?

Those are the questions.

So you think about them. If, on reflection, you do not feel you have done anything wrong but you think the class would be better served, Arkansas Teacher would be better served, by somebody else being lead plaintiff, I will expect to appoint somebody else, and if that is not your judgment -- and you are correct, this is the Judge's decision, and anything I have ordered I can reconsider. So I ordered something based upon what I knew when I appointed Arkansas Teachers; now I know something else.

If you would like to continue to be lead plaintiff, I will continue to consider this seriously, and we will see. All right?

You can take your seat.

(Whereupon, Mr. Hopkins stepped down.)

THE COURT: Okay. We have gone through my agenda for today.

Is there anything further?

MS. LUKEY: Your Honor, respectfully, I have a real

concern that in your comments just now to Mr. Hopkins, you made some statements that revealed items that are under seal.

THE COURT: Yes, the same -- just as you did earlier.

MS. LUKEY: We would like the opportunity for the public to know right now the nature, just a nugget, not all of the language, nothing else, of what you have characterized as "misconduct," because I fear, again, as happened over the weekend with Mr. Hopkins, there will be assumptions of nefarious conduct. I would request leave that we have a brief opportunity to speak with you at the bench and to make a brief statement as to the nature of what is at issue so people aren't sitting there --

THE COURT: That's fine. Okay.

Everybody.

(Transcript of sidebar conference sealed per order of the Court.)

THE COURT: Ms. Lukey, is there something you would like to say.

MS. LUKEY: Yes. Thank you, your Honor.

We wish to make it clear that the nature of the misconduct which is asserted relates to the existence of a so-called bare referral or origination or forwarding fee, as permitted under Massachusetts Rules of Professional Conduct,

which was not disclosed to the Court under the premises of Rule 54(d)(2), and which the Master feels was inappropriately withheld from the court.

I did not wish anyone publicly present to be left with the impression that there was anything more nefarious than that.

Thank you for the opportunity to speak.

THE COURT: Mr. Sinnott?

MR. SINNOTT: Thank you, your Honor.

Just to respond to my sister. This was not a referral fee. This was a finder's fee. And, more importantly, this was a finder's fee that was not disclosed to the client, to the class, to co-counsel, nor to the Court.

And that is why it is so important this the Court conduct the inquiry that it has conducted today, because it is very important that, faced with the decisions that the Court is making in this case, and the answers, and the inquiry that the Court directed the Special Master to make, that the Court be assured that the representative of the class, which has an ongoing stake in this matter and for whom there could be, to use the Court's characterization, "significant implications" in the future with respect to the monies that the class may be entitled to, that that representative be a representative that's not conflicted, and that the firm also not be conflicted within that

relationship or by the circumstances described in the Special Master's Report.

Thank you.

THE COURT: Thank you.

Those statements are helpful.

I don't have any answers to any of these issues now, but I did put to Mr. Hopkins questions that I think are important in the discharge of my duty to try to ensure that the class is properly represented and to try to get these issues resolved sooner rather than later so the Court can get the benefit of views of the class. And we'll go step by step.

I've given Mr. Hopkins a week to let me know whether he wants to continue to have Arkansas Teacher serve as class representative, and if the issue does not become moot, I think at the sidebar you have raised some questions that I will give you a chance to address.

MS. LUKEY: Thank you, your Honor.

THE COURT: All right.

I'll see counsel briefly in the lobby before I send you home.

THE CLERK: All rise for the Honorable Court.

(Transcript of lobby conference sealed per order of the Court.)

(Proceedings adjourned.)

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons
James P. Gibbons

June 1, 2018

JAMES P. GIBBONS, CSR, RPR, RMR
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Exhibit V

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

MCTIGUE LAW L.L.P.'S RESPONSES TO
SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) SECOND
SUPPLEMENTAL INTERROGATORIES TO MCTIGUE LAW

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, McTigue Law L.L.P. ("McTigue" or "Firm") responds as follows to the Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories ("Interrogatories").

McTigue's answers are based on facts presently known. McTigue's responses are made without waiving the right to amend, modify or supplement the answers stated herein, if necessary.

RESPONSES TO THE SECOND SUPPLEMENTAL INTERROGATORIES

INTERROGATORY NO. 1: Identify by name any referring attorney, forwarding attorney, local or other counsel outside of your firm who received any portion of the attorney's fees in the SST Litigation.

RESPONSE TO INTERROGATORY NO. 1:

McTigue objects to Interrogatory No. 1 to the extent it requires the Firm to provide responses regarding the receipt or disbursement of attorney's fees from the SST Litigation by other counsel subject to this investigation, for whom the Firm lacks first-hand information or any personal knowledge.

Subject to this objection, in addition to McTigue, the following firms served as counsel in the above-captioned *Henriquez et al v. State Street Bank State Street Bank and Trust Company and State Street Global Markets LLC and Does 1-20* captioned above ("*Henriquez*"), an ERISA[1] case (with McTigue, the "*Henriquez* Counsel") and received portions of the attorney's fees awarded in the case:

a. Zuckerman Spaeder, LLP ("Zuckerman"), counsel of record, contributed to the prosecution of the claims throughout the litigation;

[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

b. Beins, Axelrod, PC ("Beins"), counsel of record, contributed to the prosecution of the claims throughout the litigation

c. Feinberg, Campbell & Zack, PC ("Feinberg"), counsel of record, served as local counsel, primarily in the initial phases of *Henriquez.*

d. Richardson, Patrick, Westbrook & Brickman, LLP ("Richardson") counsel of record (entering March 2012, effectively ending its participation in September 2012), contributed to the prosecution of the claims early in the ERISA litigation.

McTigue has no knowledge there was a referring or forwarding counsel in *Henriquez*.

INTERROGATORY NO. 2: For each firm or lawyer identified above, describe what work, if any, it/she/he performed in exchange for receiving its/her/his portion of the fee.

RESPONSE TO INTERROGATORY NO. 2:

McTigue and its attorneys performed a range of services for the *Henriquez* plaintiffs through the course of the litigation. These services are detailed in McTigue's statement of attorney fees and expenses provided by Lead Counsel to the Court (ECF No. 104-19, filed September 15, 2016).[2] Beins, Zuckerman, Richardson and Feinberg each provided a statement of attorney fees and expenses to Lead Counsel to submit to the Court that similarly describe their lodestars and services performed. *See* ECF No. 104-22 (Beins), No. 104-20 (Zuckerman), No. 104-23 (Richardson), No. 104-21 (Feinberg).

INTERROGATORY NO. 3: State whether such fees, if any, were disclosed a) to the Court; b) to ERISA class members; c) to the customer - side law firms; and d) to each other.

[2] The docket entries herein refer to ECF entries in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.* captioned above.

RESPONSE TO INTERROGATORY NO. 3:

The five *Henriquez* Counsel statements of fees and requests, which included their lodestars, were submitted to the Court by Lead Counsel[3] on September 15, 2016, as indicated in Response No. 1. The five firms' loadstars totaled $4,133,076.75. These statements for fees and expenses were disclosed to the ERISA class members.[4]

Numerous written agreements between Customer Counsel,[5] *Henriquez* Counsel, and Keller Rohrback, LLP ("Keller")[6] determined the actual distribution to ERISA counsel from the $74,541,250.00 fee award (plus interest) ordered by the Court.[7] *See* December 11, 2013 letter (agreement that five ERISA counsel would receive 9 percent of fees awarded);[8] October 26, 2016 letter (agreement that Lead Counsel would distribute at least 9 percent of fees awards equally between McTigue, Zuckerman, and Keller).[9] These agreements were not disclosed to the Court or to ERISA class members.

[3] Labaton.

[4] Lead Counsel was required to make each firms' lodestar submission available on both the settlement website (www.StateStreetIndirectFXClassSettlement.com) and the Lead Counsel website (www.labaton.com). *See* ECF No. 95-3, filed August 10, 2016 ("Notice"), approved at ECF No. 97, filed August 11, 2016. The Notice also stated that copies of these Court submissions listing each firm's lodestar would be available from Lead Counsel upon request.

[5] Labaton, Lieff, and Thorton.

[6] Keller represented ERISA plaintiffs in *The Andover Companies Employee Savings and Profit Sharing Plan et al., v. State Street Bank and Trust Company*, a second ERISA case captioned above.

[7] ECF No. 111, filed November 2, 1016.

[8] *See* MCTLAW000001.

[9] MCTLAW000642. The actual amount disbursed to ERISA Counsel was $7,459,180.77, or 10 percent of the Court's total attorney fee award with interest.

Pursuant to these agreements, McTigue received $2,486,393.60 in gross fee reimbursement from Lead Counsel. Zuckerman and Keller were each to receive the same gross amount, $2,486,393.60, from Lead Counsel. Pursuant to written agreements, between McTigue, Zuckerman, Beins, Richardson and Feinberg, both McTigue and Zuckerman were obligated to share a portion of their gross fee awards with Beins, Feinberg and Richardson.[10] McTigue disbursed the amounts owed to Beins, Richardson and Feinberg reflecting those agreements. These agreements were not submitted to the Court, or disclosed to ERISA class members. McTigue disclosed to Beins, Richardson, and Feinberg the method by which its fee disbursement was calculated, but did not disclose to them the amounts disbursed to the other two firms. Zuckerman and McTigue were generally aware of the payments disbursed to Beins, Feinberg and Richardson, but not of the exact disbursement amounts made by the other firm.

Neither McTigue, Beins, Richardson, nor Feinberg received a fee disbursement that was more than 90 percent of its lodestars filed with the Court.[11] Neither the Court nor the ERISA class members were made aware that McTigue, Beins, Richardson, and Feinberg received less than their lodestars. Customer Counsel, which agreed to the three-way split of the 9 percent of the Court award (which was increased to 10 percent) would have been aware that McTigue received less than its lodestar. McTigue, which was to further distribute the award, did not disclose to Customer Counsel the division of fees among *Henriquez* Counsel. The *Henriquez* Counsel fee disbursements were complicated by the untimely ending of Richardson's

[10] *See, e.g.* March 13, 2102 agreement (McTigue and Richardson) MCTLAW000015; May 14, 2012 agreement (McTigue, Zuckerman, and Beins) MCTLAW000011; September 25, 2012 agreement (McTigue and Zuckerman) MCTLAW000007.

[11] McTigue originally believed it had received 91 percent.

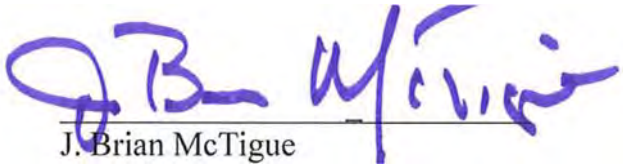
participation in the *Henriquez* case in September 2012. Zuckerman assumed the duties of Richardson at that time. Zuckerman received a fee disbursement above its lodestar.

INTERROGATORY NO. 4: State whether such firm's or lawyer's fees, if any, are included in the respective ERISA - firm fee petitions provided to Labaton Sucharow for filing with the Court.

RESPONSE TO INTERROGATORY NO. 4:

Each of the ERISA Counsel lodestars were included in the respective ERISA-firm statements of attorney fees and expenses described in Response No. 2 that were provided to Labaton Sucharow for filing with the Court on September 15, 2016.

RESPECTFULLY SUBMITTED this 6th day of October, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, the forgoing document was served by electronic mail upon the following counsel for Special Master Gerald E. Rosen:

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/s/ J. Brian McTigue

Exhibit W

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, On behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	§	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants. v.	§	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	§	No. 12-cv-11698 MLW

ZUCKERMAN SPAEDER LLP'S ANSWERS TO
SPECIAL MASTER'S SECOND SUPPLEMENTAL INTERROGATORIES

Zuckerman Spaeder LLP responds as follows to the Special Master's second supplemental interrogatories.

Interrogatory 1: Identify by name any referring attorney, forwarding attorney, local or other counsel outside of your firm who received any portion of the attorneys' fees in the SST Litigation.

Answer: This interrogatory appears to ask whether Zuckerman Spaeder paid any money from its share of the fee in the SST Litigation to any referring attorney, forwarding attorney, local or other counsel outside of Zuckerman Spaeder. Zuckerman Spaeder made no such payment to any referring or forwarding attorney. Zuckerman Spaeder made payments from its share of the fee only to these three firms: Feinberg, Campbell & Zack, P.C.; Beins, Axelrod, P.C.; and Richardson, Patrick, Westbrook & Brickman LLC.

Each of the three above-named firms had entered appearances as counsel in the case, prepared declarations describing their work that were submitted to the Court by Labaton Sucharow in support of plaintiffs' fee petition, and were identified to the Court in Lawrence Sucharow's September 15, 2016 declaration in support of the fee petition. *See* Sucharow Decl., ¶ 175 & footnote 6 (identifying the following Plaintiffs' Counsel and noting that a lodestar and expense declaration from each was attached to the declaration: Labaton Sucharow; TLF [Thornton Law Firm LLP]; Lieff Cabraser; Keller Rohrback; McTigue Law; Zuckerman Spaeder; Feinberg, Campbell & Zack, P.C.; Beins, Axelrod, P.C.; and Richardson, Patrick, Westbrook & Brickman, LLC.).

Thereafter, in a November 2, 2016 order awarding fees, the Court determined the amount of fees "to award Lead Counsel Labaton Sucharow LLP . . . on behalf of itself and all other counsel for Plaintiffs."

Labaton Sucharow, as lead counsel, next received the entirety of the attorney's fee as a lump sum.

Then, pursuant to an October 26, 2016 agreement made by Labaton Sucharow and the other customer class firms (the Thornton Law Firm and Lieff Cabraser) with Zuckerman Spaeder, McTigue Law and Keller Rohrback regarding Labaton Sucharow's distribution of fees (copy attached as an exhibit hereto), Labaton Sucharow distributed the "ERISA Counsel Portion" of the fees "1/3 to Zuckerman Spaeder LLP, 1/3 to McTigue Law LLP, 1/3 to Keller Rohrback L.L.P." More fully, the October 26, 2016, distribution agreement provides:

> To the extent that Beins, Axelrod, P.C., Richardson, Patrick, [] Westbrook & Brickman LLC, Feinberg, Campbell & Zack, P.C. have a right to fees, it shall be from the funds distributed to Zuckerman Spaeder and McTigue Law LLP, per the agreements between those firms; to the extent that Hutchings Barsamian Madelcorn, LLP has a right to fees, it shall be from the funds distributed to Keller Rohrback L.L.P., per the agreement between those firms. Other than the firms listed above, we [ERISA Counsel] are unaware of any other attorneys or firms that are entitled to share in ERISA Counsel Portion of Awarded fees.

As envisioned in the October 26, 2016 agreement, Zuckerman Spaeder ultimately made payments from its share of the attorneys' fees in the SST Litigation to the Beins Axelrod, Richardson Patrick, and Feinberg Campbell firms. Zuckerman Spaeder did not make a payment from its share of the fees to any other firm, counsel or attorney.

Interrogatory 2: For each firm or lawyer identified above, describe what work, if any, it/she/he performed in exchange for receiving its/her/his portion of the fee.

Answer: The declaration of each of the above-named law firms that was submitted to the Court as an exhibit to the Sucharow declaration contains a description of the work done by the firm providing its declaration. Zuckerman Spaeder believes that the Special Master also has obtained each firm's time records related to the SST Litigation and that those records show the work done by each firm.

More generally as to the firms receiving payments from Zuckerman Spaeder's portion of the attorneys' fees in the SST Litigation, Richardson Patrick was McTigue Law's co-counsel before Zuckerman Spaeder entered its appearance; Beins Axelrod was McTigue Law's local counsel when *Henriquez* was initially filed in Maryland and then did additional work on the case after the Maryland action was dismissed and the action was refiled in Massachusetts; and Feinberg Campbell was retained by McTigue Law to serve as local counsel in Massachusetts.

Interrogatory 3: State whether such fees, if any, were disclosed a) to the Court; b) to ERISA class members; c) to the customer-side firms; and d) to each other.

Answer: "[S]uch fees" appears to refer to the payments made by Zuckerman Spaeder. The only firms to which Zuckerman Spaeder made payments (the three firms specified above) had entered appearances in the litigation and, after the proposed settlement was reached, had made lodestar and expense declarations that were attached to the Sucharow declaration that was filed on the public record in support of a motion for an award of fees and expenses to Lead Counsel on behalf of all Plaintiffs' Counsel.

The Court, the customer-side law firms and the ERISA-side firms all were aware that Beins Axelrod, Richardson Patrick, and Feinberg Campbell had been identified in the fee petition as plaintiffs' counsel and had submitted lodestar and expense declarations.

Further, the customer side firms (Labaton Sucharow, the Thornton Law Firm and Lieff Cabraser) were aware from the October 26, 2016 agreement that, to the extent they were entitled to fees, Beins Axelrod, Richardson Patrick, and Feinberg, Campbell would be compensated "from the funds distributed to Zuckerman Spaeder and McTigue Law."

ERISA class members had actual or constructive notice. The Court's November 2, 2016 fee-award order found that "[n]otice of Lead Counsel's application for attorneys' fees, litigation expenses, and service awards was given to all Settlement Class Members. . . ." The Sucharow

declaration, as well as the other law firm declarations accompanying it, were publicly available via the ECF system to all class members who received that notice.

If this interrogatory also asks whether the precise dollar amounts of payments to Beins Axelrod, Richardson Patrick, or Feinberg Campbell were disclosed, the answer is that the precise amounts were not disclosed.

Interrogatory 4: State whether such firm's or lawyer's fees, if any, are included in the respective ERISA-firm fee petitions provided to Labaton Sucharow for filing with the Court.

Answer: Zuckerman Spaeder did not provide a fee petition to Labaton Sucharow. Labaton Sucharow, as Lead Counsel, filed the sole fee petition, which was on behalf of itself and the other plaintiffs' counsel.

Zuckerman Spaeder provided a declaration to Labaton Sucharow regarding Zuckerman Spaeder's lodestar and expense information, as did Beins Axelrod, Richardson Patrick, and Feinberg Campbell regarding their respective lodestar and expense information. Labaton Sucharow attached all these declarations to the Sucharow declaration, which Labaton Sucharow filed in support of a lump-sum award of fees to be divided by plaintiffs' counsel.

If this interrogatory asks whether the time of any law firm or counsel other than Zuckerman Spaeder was included in Zuckerman Spaeder's declaration that was attached to the Sucharow declaration, the answer is no.

Respectfully submitted,

/s/ Carl S. Kravitz

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DECLARATION

Pursuant to 28 U.S.C. § 1746, as the Zuckerman Spaeder attorney who has knowledge of the information provided, I declare under penalty of perjury under the laws of the United States of America that the foregoing interrogatory answers are true and correct. Executed in Washington, D.C. on October 3, 2017.

/s/ Carl S. Kravitz
Carl S. Kravitz

CERTIFICATE OF SERVICE

I, Carl S. Kravitz, hereby certify that I have caused a copy of the foregoing document to be served by electronic mail this 6th day of August, 2017 upon counsel for the Special Master:

William F. Sinnott
DONOGHUE BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, MA 02108
wsinnott@dbslawfirm.com

/s/ Carl S. Kravitz
Carl S. Kravitz

Exhibit X

From: Keller, Christopher J. <ckeller@labaton.com>
Sent: Monday, May 23, 2011 6:36 PM
To: Garrett Bradley
Subject: #755904 v1 - Letter Agreement -- State Street
Attachments: G79C01!.DOC

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Christopher J. Keller
Partner
212 907 0853 direct
212 883 7053 fax
email ckeller@labaton.com

May 4, 2011

VIA ELECTRONIC MAIL
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Re: *Arkansas Teacher Retirement System v. State Street Corporation*
Civil Action No. 11-cv-10230-MLW (D. Mass.)

Dear Counsel:

I am pleased we were able to come to terms and will be working together in this matter. I have outlined below the terms of the agreement we have reached.

Arkansas Teacher Retirement System ("Arkansas Teacher") will be represented in the action by Labaton Sucharow LLP ("Labaton Sucharow") as Lead Counsel, and Thornton & Naumes LLP ("Thornton & Naumes") and Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") will serve as additional counsel for Arkansas Teacher in this action.

Arkansas Teacher has made an application to the Court for appointment of its selection of Labaton Sucharow as Interim Lead Counsel. In the event that the Court appoints Labaton Sucharow as interim Lead Counsel and subsequently as Lead Counsel, we agree as follows:

We agree that our firms will act in good faith to divide the work so that each of the firms performs at least 20% of the work and each will receive at least 20% of the fees awarded in this matter. The remaining 40% of the fees awarded shall be allocated in good faith at the conclusion of the case based on each firms' actual time spent on this matter..

There is an "off the top" obligation to referring counsel of 6% of the fees awarded. In addition, we agree to exchange on a quarterly basis our then current lodestar reports showing quarterly and aggregate billings in this matter.

We also agree that any dispute arising under this agreement or in this case may not be litigated in court and that all such disputes or claims shall be resolved, upon election of any party, through binding arbitration conducted pursuant to the applicable rules of the American Arbitration Association in any jurisdiction in which any of the firms reside.

Please sign below indicating your agreement to these terms.

Very truly yours,

Christopher Keller, Esq.

Accepted and agreed by:

Thornton & Naumes LLP

_____ Date: _____

Michael P. Thornton, Esq.

Lieff Cabraser Heimann & Bernstein, LLP

_____ Date: _____

Steven E. Fineman, Esq.

Exhibit Y

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

CONSOLIDATED RESPONSE BY LABATON SUCHAROW LLP, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, AND THORNTON LAW FIRM LLP TO SPECIAL MASTER'S JULY 5, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Labaton Sucharow LLP ("Labaton Sucharow"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton," and collectively with Labaton Sucharow and Lieff Cabraser, the "Firms"), respectfully provide this consolidated response to the Special Master's July 5, 2017 Request for Supplemental Submission.

I. PRELIMINARY STATEMENT

The Special Master invites the Firms to now "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation." The Firms wish to note for the record that in the course of the Special Master's investigation, the Firms have provided an abundance of information that should inform the Special Master's findings, conclusions, and recommendations. Specifically, the Firms each participated in multi-hour informal interviews with the Special Master, his counsel, and his technical advisor on April 4 and 5, 2017; collectively responded to 193 interrogatories on June 1, June 9 and July 10, 2017; collectively responded to 104 document requests by producing more than 176,000 pages of requested documents; and produced witnesses for a total of 27 depositions between June 5 and July 17 2017.

The Firms respectfully submit that the substantial factual record developed by the Special Master during his investigation does not warrant any change in the Court's November 2, 2016 Fee Award [Dkt. No. 111] nor the imposition of sanctions on any of the Firms. The reasonableness of the Firms' Fee Petition is further supported by the accompanying declaration of William B. Rubenstein ("Rubenstein Decl."), the Sidley Austin Professor of Law at Harvard Law School, and one of the nation's leading national experts on class action law and practice.

II. RESPONSE TO AREAS OF CONCERN RAISED BY THE COURT AND ADDRESSED BY THE SPECIAL MASTER

The Firms submit that the extensive factual record, along with the declaration of Professor Rubenstein, should lead the Special Master to make the following findings:

- The Firms employed the correct legal standards in their request for an award of attorneys' fees and expenses. *See* Mem. of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Brief") [Dkt. No. 103-1] at 3-5, 24; Rubenstein Decl. at 7-12, 27-34.

- Except as stated below and previously on the record in this case, as well as in the Firms' discovery responses to the Special Master, the representations made by the Firms in the request for awards of attorneys' fees and expenses were accurate and reliable, and counsel asserted a proper factual basis for what was represented to be the lodestar for each firm. *See* LS Interrog. Resp. Nos. 17-19, 23-25, 27-29, 32, 33, 36, 37, 40, 41, 44-47, 51, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 47, 48, 53, 57, 62, 63, 64, 72, 73; Thornton Interrog. Resp. Nos. 49-51, 55, 64, 66.

- The Firms acknowledge, as they did in their November 10, 2016 letter to the Court [Dkt. No. 116], that some Staff Attorney lodestar was "double-counted" in the Firms' request for attorneys' fees. These errors were unintentional and brought to the Court's attention by the Firms promptly upon their learning of the mistakes. *See* LS Interrog. Resp. Nos. 63-66; LCHB Interrog. Resp. Nos. 39, 40, 67, 68; Thornton Interrog. Resp. Nos. 67, 69, 74, 75. The factual record submitted to the Special Master during the course of this investigation confirms the Firms' position that the errors were unintentional.

- The representations made in the November 10, 2016 letter to the Court [Dkt. No. 116] were and are materially accurate and reliable. LS Interrog. Resp. Nos. 63, 66, 67, 71; LCHB Interrog. Resp. Nos. 65, 68, 69, 72, 73; Thornton Interrog. Resp. Nos. 70, 71, 74-76.

- Labaton Sucharow submits that its representations requesting a service award to Arkansas Teacher Retirement System were accurate and reliable. *See* LS Interrog. Resp. Nos. 4, 17; Belfi Dep. at 33:23-34:9, 37:12-41:6; Goldsmith Dep. at 18:6-23:18.

- Neither Lieff Cabraser nor Thornton had clients in this matter for which they sought service awards.

- None of the Firms made representations to the Court concerning the service awards sought by counsel for the ERISA plaintiffs.

- The attorneys' fees, expenses and service award to Arkansas Teacher Retirement System were reasonable, and none should be reduced beyond the $2 million the Firms already have contributed to the cost of the Special Master's investigation. In addition to this $2 million, the Firms have incurred substantial other costs relating to this investigation, including, for Labaton Sucharow and Thornton, the costs of outside counsel; and, for all three firms, the substantial time spent by senior members of each firm participating in this investigation. The costs already associated with this investigation shall continually serve as an important reminder to the Firms to double check future fee petitions to ensure their clarity and accuracy to the court. The Firms are fully cognizant of the lessons of this investigation, as reflected in the Firms' recommendations on best practices described below. That fact notwithstanding, the net effect of the errors in reported lodestar were modest with respect to the lodestar multiplier that was used as a cross-check against the requested percentage-based fee, and still well within the bounds of what is considered acceptable in this Circuit. *See* LS Interrog. Resp. Nos. 59, 63; LCHB Interrog. Resp. Nos. 59, 61; Fee Brief at 7, 24-25; Rubenstein Decl. at 30-34.

- No misconduct occurred in connection with the attorneys' fees, expenses, or service award to Arkansas Teacher Retirement System previously ordered. The double-counting of lodestar at the center of the Special Master's inquiry, while regrettable both in terms of the initial confusion caused to the Court and the subsequent substantial time and expense devoted to explaining the matter, was an inadvertent and honest mistake. LS Interrog. Resp. Nos. 33, 36, 37, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 39, 65, 67; Thornton Interrog. Resp. Nos. 67, 69, 75.

- None of the Firms should be sanctioned in this matter.

III. SPECIAL MASTER'S REQUEST FOR INPUT ON SPECIFIC TOPICS

A. Request No. 1 – Billing Practices Relating To Staff Attorneys

For all three of the Firms, billing rates for Staff Attorneys are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of an appropriate market rate for the legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22; Politano Dep. at 35:22-37:2, 38:19-42:2, 45:6-49:4; Johnson Dep. at 12:5-16; 13:4-17. This approach is consistent with the general practice of the marketplace and applicable case authority. *See* Rubenstein Decl. at 2, 12-30. Billing Rates for Staff Attorneys are not dependent on what they are actually paid, in the

same way that billing rates for associates and partners are not dependent on what they are actually paid. Fineman Dep. at 48:3-17, 50:6-11; Rubenstein Decl. at 29-30; Johnson Dep. at 20:5-22:13, 25:7-19.

With respect to the second part of this request, Labaton Sucharow responds that all of its Staff Attorneys were Labaton Sucharow employees, and accordingly the question of whether "agency" versus non-agency Staff Attorneys should appropriately be billed at the same rate does not apply to it. *See* Johnson Dep. at 19:4-11, 22:5-13.

Lieff Cabraser responds that those of its Staff Attorneys who were paid directly by the firm (versus those paid through an agency) performed the lion's share of Lieff Cabraser's document review in the litigation. *See* LCHB Interrog. Resp. No. 24. Some Staff Attorneys actually began their work on the litigation as agency attorneys before being hired directly by Lieff Cabraser. *Id.* By the time the Staff Attorneys were working on the detailed issue memoranda discussed during discovery in this matter (which entailed a deeper analysis of the documents reviewed), only one LCHB Staff Attorney was still being paid through an agency—Virginia Weiss. *Id.* The remaining LCHB Staff Attorneys were all being paid directly by Lieff Cabraser, and their hours heavily outnumbered those contributed by agency attorneys. *Id.* Throughout the litigation, LCHB Staff Attorneys were given the same type of assignments, supervised in the same manner, and expected to produce the same quality of work regardless of whether they were paid directly by the firm or through an agency. *See, e.g.*, LCHB Interrog. Resp. Nos. 19, 22, 29-30; Chiplock Dep. at 113:14-116:10; Dugar Dep. at 95:7-99:12; Fineman Dep. at 41:4-8, 43:14-44:11; Heimann Dep. at 51:18-53:2.

For instance, while being paid through an agency in 2015, Ms. Weiss authored detailed issue memoranda just as the other Staff Attorneys did. These memoranda have been produced to

the Special Master. *See* LCHB-0028663-0028672 (and exhibits at LCHB-0028677-0029118); LCHB-0029119-0029124 (and exhibits at LCHB-0029125-LCHB-0029182). So, for that matter, did the two Staff Attorneys (Ann Ten Eyck and Rachel Wintterle) who were physically situated in LCHB's San Francisco offices for several months but contracted through an agency that was paid directly by Thornton. These memoranda have also been produced. *See* LCHB-0003314-0003319; LCHB-0029183-0029200 (and exhibits at LCHB-0029201-0031489); LCHB-0031490-0031528 (and exhibits at LCHB-0031529-0039667). The only two (2) other LCHB Staff Attorneys who were still paid by an agency in 2015 (Jade Butman and Andrew McClelland) did not produce memoranda simply because they had stopped working on the State Street Litigation well before those assignments were given. *See* LCHB Interrog. Resp. No. 24.

Billing rates for Staff Attorneys at Lieff Cabraser are not impacted by whether they are being paid directly by the firm or are being paid through an agency; they are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of appropriate market rates for similar legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22. Even so, in 2015, the amount paid by the firm to an agency for an agency attorney's work, on an hourly basis, was comparable to the hourly pay the firm would have made directly to a Staff Attorney being paid directly by the firm. *See* Fineman Dep. at 36:21-38:7.

B. Request No. 2 – The Appropriate Venue For Determining Hourly Billing Rates

The Firms set their billing rates based on what they perceive to be, as described under applicable Supreme Court and First Circuit authority, "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *See Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) (quoting *Blum v. Stenson*, 465

U.S. 886, 895 n.11 (1984)); LS Interrog. Resp. No. 51; Johnson Dep. at 12:5-14:19; LCHB Interrog. Resp. Nos. 47, 48, 53, 64; Fineman Dep. at 76:7-77:8; Thornton Interrog. Resp. Nos. 49, 50, 51, 55. Labaton Sucharow is in New York, Lieff Cabraser is principally in San Francisco, and Thornton is in Boston. *Id.* Each of the Firms, however, maintains a national class action practice and litigates in many locations other than these home bases. Given the specific role that hourly rates play in determining the reasonableness of the overall fee award in this case, the Firms' rates should not be adjusted to Boston rates for purposes of analyzing the fee petition. *See* Rubenstein Decl. at 19-20 and n.31.

As was mentioned above, the Firms' rates were not provided in the fee application as the "basis" for their requested fee, but rather simply to enable a "cross-check" of the overall time and effort expended on the case against the requested "percentage-of-fund" fee. The First Circuit, it should be noted, is predominantly a percentage-of-fund jurisdiction, and does not mandate a lodestar cross-check. *See In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting the "distinct advantages" of the percentage-of-fund method over the lodestar method of calculating fees); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005); Rubenstein Decl. at 8-9. When a lodestar cross-check is performed regardless, the focus is not on the "necessity and reasonableness of every hour" expended by counsel, but rather on whether the fee broadly reflects the degree of time and effort expended by counsel. These points were briefed before Judge Wolf in support of the Firms' fee award, and were not disputed. *See* Fee Brief at 3-4, 24. Indeed, when David Goldsmith revealed to Judge Wolf that the Firms were "contemplating [a percentage of the fund] in the 25 percent range" for the attorneys' fees, Judge Wolf responded, "That's great . . . I usually start with 25 percent in mind." Trans. of Status Conference (Dkt. No. 85), June 23, 2016, at 15:5-22.

As noted above, Labaton Sucharow, Lieff Cabraser and Thornton all maintain complex class action practices that are national in scope. Accordingly, the Firms' billing rates – which were based on rates used by national peer plaintiff and defense law firms that litigate matters of a similar magnitude – are appropriate and were set using the correct legal standard. *See* LS Interrog. Resp. Nos. 44, 51, 62; Thornton Interrog. Responses 49, 51, 55, 66; LCHB Interrog. Resp. Nos. 47, 48, 53, 64.

To the extent that rates prevailing in the Boston legal market have particular or greater relevance, Professor Rubenstein has opined that Plaintiffs' counsel's billing rates were reasonable. Professor Rubenstein forms these opinions on the basis that (a) Plaintiffs' counsel's rates are consistent with rates that courts in Massachusetts have awarded in approving class action fee petitions in recent years; (b) the rates fall far below those that have been judicially approved in the context of fee petitions submitted by defense firms in bankruptcy cases in this District; and (c) the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in the District of Massachusetts and in $100-$500 million cases throughout the country. *See* Rubenstein Decl. at 1-3, 12-27. Professor Rubenstein has also shown that if one goes to the trouble of adjusting the out-of-town rates to the Boston market, it has about a 3% effect on the total lodestar, meaning that the cross-jurisdictional rate differentials are immaterial, especially for cross-check purposes. *Id.* at 21-22. Moreover, Thornton has many years of experience in the Boston market, and its court-approved rates are comparable to those of the other firms here.

C. Request No. 3 – The Role Of Lead Counsel In Preparing And Filing Fee Petitions In Multi-Firm Class Actions

In multi-firm class action cases, lead counsel has overall responsibility for preparing and filing a fee petition. This responsibility generally includes researching and drafting the

supporting brief, drafting the principal fee declaration or portion of the omnibus settlement and fee declaration in support of the fee petition, securing individual fee and expense declarations from co-counsel (often by circulating a model declaration), and securing any client or expert declarations that may be submitted. Lead counsel may and often will delegate certain research and drafting assignments to co-counsel.

Lead counsel's responsibility with respect to the accuracy of individual fee declarations other than its own has limitations. For example, lead counsel supplies a template for such declarations, but does not require the use of any particular language. Moreover, because lead counsel does not have access to co-counsel's internal timekeeping records, lead counsel must rely on co-counsel to report their own lodestar accurately. *See* LS Interrog. Resp. No. 56; Goldsmith Dep. at 119:3-20; Chiplock Dep. at 228:7-9 ("I don't view it as Labaton's ultimate responsibility to ensure that Lieff Cabraser's lodestar was reported accurately.").

Lead counsel has a responsibility to make reasonable efforts to detect and remedy errors in co-counsel's fee declarations to the extent they may be apparent on their face. *See* Goldsmith Dep. at 119:3-120:17. Here, the existence of double-counting between the Thornton and Labaton Sucharow fee declarations, and between the Thornton and Lieff Cabraser fee declarations, was not apparent on the face of any single fee declaration, but rather would become apparent only if the fee declarations were compared with one another. *Id.*

Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys, all of whom were Labaton Sucharow employees, to Thornton and invoiced it on a monthly basis for the work those Staff Attorneys performed. *See* Goldsmith Dep. at 91:20-92:3, 95:19-22; Rogers Dep. at 70:3-73:3; Politano Dep. at 22:8-24:23, 26:11-19, 28:15-23; LS Interrog. Resp. Nos. 23, 32, 37. Labaton Sucharow

invoiced Thornton at a rate of $50 per hour for each staff attorney. *See e.g.* TLF-SST-000153; TLF-SST-003418 – TLF-SST-003420; TLF-SST-000415. The $50 hourly rate included a share of the overhead costs associated with each staff attorney. Garrett Bradley Dep. at 93:23-95:5.

In reaching and implementing this cost-sharing arrangement, Labaton Sucharow and Thornton did not discuss which firm would claim the hours expended by these Staff Attorneys in its individual fee declaration. *Cf.* Sucharow Dep. at 26:20-22, 38:20-39:4; Belfi Dep. at 59:6-15; Goldsmith Dep. at 104:12-107:5, 122:6-13; Rogers Dep. at 95:16-96:2; Zeiss Dep. at 24:19-25:4; Politano Dep. at 22:22-25; LS Interrog. Resp. No. 33. It has since become apparent that the Firms had different views as to which firm would claim which Staff Attorneys on its respective fee petitions. *See* Chiplock Dep. At 135:20-137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."); Garrett Bradley Dep., at 76:6-77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application."); Rogers Dep., at 91:18-96:2 ("Q: And did you have an understanding . . . whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up front," and later stating that he had "no knowledge" of any discussions concerning why Thornton was allocated staff attorneys, nor any discussions concerning whether or how Thornton would claim staff attorneys on its fee petition)"; Goldsmith Dep., at 105:9-106:13 (also acknowledging that there was never an agreement concerning how Labaton Sucharow and Thornton would claim

staff attorneys on their respective fee petitions, but clarifying that he "certainly never made" an assumption "that the Thornton firm would put those people on its lodestar report").

In other cases involving staff attorney cost-sharing, Labaton Sucharow's general practice has been to report all hours billed by its staff attorney employees on its own fee declaration, and to work out any associated economic issues with co-counsel separately. *See* Politano Dep. at 22:18-25 (Q: "Did you have any understanding of whether those staff attorneys would be reported on the firm's fee petition? 'The firm' being Labaton." A: "The common practice was that it would be on Labaton's fee declaration, but there was no discussion at that point as to the way it would be handled."), 23:14 (testifying that this "common practice" was followed "[n]inety percent of the time"); Rogers Dep. at 96:13-17 ("I've seen it done both ways. I think it's more common to do what Judge Rosen's referring to as the latter . . . one big omnibus fee petition and then kind of dole it out at the end."); Johnson Dep. at 32:3-4 (alternative practice of cross-reporting has been used in "very, very few cases"); Goldsmith Dep. at 97:11-99:16 (alternative practice used in two other cases); Goldberg Dep. at 46:10-11 (alternative practice used in "[o]nly one case that I remember"); LS Interrog. Resp. No. 32; *see also* Zeiss Dep. at 24:21-25:2 ("[F]rom my perspective . . . the lodestar reports are reports of each firm's personnel based on their own time records. . . . It would never occur to me that one firm could be reporting personnel from Labaton.").

Indeed, among the 16 class action matters that Labaton Sucharow has identified in discovery as involving staff attorney cost-sharing, *see* LS Interrog. Resp. No. 32, ten (10) have proceeded to a court-approved settlement to date.[1] Labaton Sucharow adhered to its general

[1] The 10 settled cases are *City of Providence v. Aeropostale*, *Broadcom*, *Celestica*, *Countrywide*, *J. Crew Group*, *Lehman Brothers*, *Massey Energy*, *Nu Skin*, *Regions Morgan Keegan*, and *Semtech*.

practice of reporting staff attorney time exclusively in its own fee declaration in at least seven (7) of the ten (10) settled cases. Still, Labaton Sucharow acknowledges that, like here, other law firms have occasionally claimed Labaton Sucharow employed staff attorneys on their fee petitions. Johnson Dep. at 28:24-29:7.

Here, the lack of discussion (both internally and externally) as to which firm would report the hours on its individual fee petition, Labaton Sucharow's familiarity with its own general practice, and Thornton's reasonable belief that it would list the Staff Attorneys for whose labor and overhead it had paid, caused a good faith error to occur: Labaton Sucharow followed its general practice, while Thornton acted in accord with its own reasonable beliefs, and a good faith mistake was made.[2]

Nicole Zeiss, Labaton Sucharow's Settlement Counsel, reviewed each fee declaration individually for form, pursuant to her usual practice at the time. *See* Zeiss Dep. at 11:15-22, 55:25-56:3; LS Interrog. Resp. No. 54. She did not compare the declarations to each other, however. It was not her usual practice to do so; there is ordinarily no reason to believe that there should be any overlap between employees of different firms; and she was not told by anyone at Labaton Sucharow that there was the potential for attorney time to be reported in more than one fee declaration. *See* Zeiss Dep. at 24:19-25:4, 56:3-10; LS Interrog. Resp. No. 56.

Additionally, the existence of double-counting between Thornton and Lieff Cabraser fee declarations was smaller in kind and less obvious on its face, and would not have been immediately clear on first comparison, particularly to a reviewing attorney from Labaton

[2] The differential in hours reported by the two firms for some Staff Attorneys appears to have occurred at least in part because the firms used different sources. Thornton used numbers that were in a report sent to Thornton by Todd Kussin in an email dated August 25, 2015 (TLF-SST-031158); Labaton Sucharow used numbers that it pulled from its system approximately a year later (LS Interrog. Resp. No. 54).

Sucharow. Although the Thornton and Lieff Cabraser fee declarations include a handful of overlapping Staff Attorney names, the numbers of hours and lodestars for such Staff Attorneys consistently differ, and Labaton Sucharow in any event was unaware of any agreement between Thornton and Lieff Cabraser regarding which of those two firm's fee declarations should reflect the time of attorneys hosted by Lieff Cabraser but paid for by Thornton. See LS Interrog. Resp. No. 36; Goldsmith Dep. at 122:8-10. Moreover, of the six (6) attorneys who reported time that was listed by both Lieff Cabraser and Thornton in their fee declarations, the hours for two (2) of them (Virginia Weiss and Andrew McClelland)[3] were ***correctly*** allocated between Lieff Cabraser and Thornton and not double-counted—meaning there actually were no errors as to these two particular attorneys for Labaton Sucharow to detect. *See* LCHB Interrog. Resp. No. 40; Chiplock Dep. at 151:8-152:2.

This leaves only four (4) attorneys who reported at least some time that was inadvertently duplicated and incorrectly included in both Lieff Cabraser's and Thornton's fee declarations—Christopher Jordan, Jonathan Zaul, Ann Ten Eyck, and Rachel Wintterle.[4] *See* LCHB Interrog.

[3] It bears mentioning that both Ms. Weiss and Mr. McClelland were agency attorneys who were not paid directly by Lieff Cabraser, meaning Thornton paid an outside agency (not Lieff Cabraser) directly for the hours spent by Ms. Weiss and Mr. McClelland reviewing documents assigned to Thornton. *See* LCHB Interrog. Resp. Nos. 19, 24, 31; Hoffman Dep. at 60:2-8; 60:19-61:16; 80:8-13. Lieff Cabraser accordingly did not send invoices to Thornton for these two attorneys. Furthermore, Ms. Weiss worked remotely and thus was not making use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

[4] Messrs. Jordan and Zaul were the only Staff Attorneys who were directly paid by Lieff Cabraser but who also performed at least some work (roughly 9 weeks) that was reimbursed by Thornton (and later included in Thornton's fee declaration). *See* LCHB Interrog. Resp. Nos. 24, 31, 38; Hoffman Dep. at 61:17-62:5. Messrs. Jordan and Zaul were accordingly the only two Lieff Cabraser lawyers whose time (again, 9 weeks' worth) was invoiced to Thornton. Messrs. Jordan and Zaul, like Ms. Weiss, also worked remotely, and therefore did not make use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

Ms. Ten Eyck and Ms. Wintterle, meanwhile, were lawyers hired from and paid via an outside agency for the entirety of the 3 to 4 months they worked on the case. *See* LCHB

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Resp. Nos. 31, 65; Chiplock Dep. at 152:3-154:20, 156:7-21. And for each of these four (4) attorneys, the duration of the cost-sharing or hosting arrangement (and the resulting inadvertent redundancy in time-reporting) ranged from just 9 weeks to roughly 3 ½ months—modest, in other words, in comparison to the more than 5-year lifespan of the litigation. *See* LCHB Interrog. Resp. Nos. 31, 38, 65; Hoffman Dep. at 61:17-62:5 (describing sharing relationship as to Messrs. Jordan and Zaul "[t]hat didn't go on for maybe more than a month or two."). This factor (combined with the correct allocation of the lodestar by the two (2) other shared Lieff Cabraser/Thornton Staff Attorneys named above) made any timekeeping duplication between Lieff Cabraser's and Thornton's fee declarations even less readily detectable by Labaton Sucharow than the duplication between Labaton Sucharow's and Thornton's fee declarations.

Notwithstanding the foregoing, Labaton Sucharow acknowledges that it, as lead counsel, bore final responsibility to avoid errors in the Fee Petition that reasonably could be detected. *See* Goldsmith Dep. at 117:4-11. The double-counting in both pairs of fee declarations regrettably was not detected before the Fee Petition was filed. Upon learning of the double-counting, however, Labaton Sucharow disclosed it to the Court promptly, publicly, and candidly. *See* Goldsmith Dep. at 165:15-166:15.

D. Request No. 4 – Accuracy Of Fee Declaration Language

The language concerning "hourly rates" that was contained in the individual fee declarations was never intended to mislead the Court, but rather was intended to inform the Court that the hourly rates were the same as or materially similar to rates accepted by courts in other class action matters in which the Firms had filed fee petitions, and were not special rates

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Interrog. Resp. Nos. 19, 24, 31, 40. Lieff Cabraser did not send invoices for the hours worked by these two attorneys because Thornton paid the agency directly for their time. *See* LCHB Interrog. Resp. Nos. 19, 24, 38, 40.

for this action. *See* LS Interrog. Resp. Nos. 61, 71; LCHB Interrog. Resp. No. 63. For Labaton Sucharow and Lieff Cabraser, the fee petitions were also meant to impart that the same annual rates for each attorney and non-lawyer staff person listed therein are used in the lodestar reports for all fee petitions in a given year (typically for purposes of a lodestar cross-check). *Id.*; *see also* Rubenstein Decl. at 12 n.14.

Nonetheless, we recognize that the Court and perhaps others have interpreted this sentence in a manner other than as intended. In particular, we understand that the Court read this sentence to mean that the law firms' rates are billed to clients that pay for the firms' services on an hourly basis. Labaton Sucharow and Lieff Cabraser have in limited circumstances had clients who have paid by the hour that were actually billed at those rates, or the analogous rates in a given year, and the rates in question (or comparable rates in earlier years) were in fact the "regular" rates charged in such circumstances. *See* LS Interrog. Resp. Nos. 45, 46; Johnson Dep. at 53:13-16; Politano Dep. at 43:4-11; LCHB Interrog. Resp. Nos. 49, 54, 63; Heimann Dep. at 87:7-89:7; Chiplock Dep. at 194:24-198:5, 204:6-205:3. Therefore, even if the word "charged" were read in the literal fashion described above (rather than in the manner it was intended), the "hourly rates" sentence on its face is not misleading as to Labaton Sucharow and Lieff Cabraser. It nonetheless remains true that the overwhelming majority of these firms' clients (and all of Thornton's clients) retain the Firms' services on a contingency basis.

As concerns the language in Garrett Bradley's declaration that refers to the rates as those of attorneys and professional support staff "in my firm," Thornton responds that it did not intend through this language to suggest that all persons listed in the fee declaration were employees of Thornton. This language resulted from Thornton's use of a template declaration provided to all firms by Labaton Sucharow. Unfortunately, Thornton did not modify the template language

stating that all of the individuals listed in its fee petition were its own employees. As Thornton has acknowledged in its responses to the Special Master's inquiries and in depositions of its partners – *see, e.g.*, Garrett Bradley Dep. at 81:12-83:13 – it should have modified the language in the template Labaton Sucharow provided to make it more precise (for example, by inserting an additional phrase after "in my firm," such as "or performing work on behalf of my firm").

In an effort to avoid any potential confusion, misinterpretation, or perceived lack of transparency going forward, we recommend that counsel be encouraged to use the following revised and expanded language:

> The hourly rates for the attorneys and professional support staff in my firm, ***or performing work on behalf of my firm***, included in Exhibit A are the ~~same as my~~ firm's regular rates charged for their type of services ***in contingent-fee matters.*** ~~charged for their services, which~~ ***These rates (or materially similar rates)*** have been accepted ***by courts*** in other complex class actions ***for purposes of "cross-checking" lodestar against a proposed fee based on the percentage-of-fund method or determining a reasonable fee under the lodestar method.***
>
> ***Based on my knowledge and experience, these rates are within the range of rates normally and customarily charged in their respective cities by attorneys and professional support staff of similar qualifications and experience in cases similar to this litigation.***
>
> ***To the extent the firm represents clients in non-contingent/ hourly fee matters, these rates are also the regular rates that generally would be charged to those clients for services rendered. The firm's current clients, however, do not typically pay an hourly rate and instead retain the firm's services on a contingent-fee basis.***

This revised and expanded language is derived in part from the individual fee declarations submitted in the similar *Bank of New York Mellon* Indirect FX class action in which Lieff Cabraser and Thornton, but not Labaton Sucharow, were involved. *See* LCHB Interrog. Resp. No. 63; Chiplock Dep. at 195:14-202:22. The language is intended to clarify, among other

things, that the hourly rates used in connection with the lodestar cross-check of the requested fee—while fully supported, customary in the industry, and accepted by courts in other complex class actions—are used for all lodestar reports in a given year but are not typically billed to the firms' clients because the firms' clients do not typically pay by the hour. *See* Chiplock Dep. at 200:3-201:7, 208:15-209:18; Chiplock Dep. Ex. 2 (Lieff Cabraser fee declaration in *Bank of New York Mellon*); *see also* LS Interrog. Resp. Nos. 46 (setting forth rates charged to clients that paid by the hour), 71; LCHB Interrog. Resp. No. 63.

E. Request No. 5 – Factors To Consider In Setting Hourly Billing Rates Of Staff Attorneys

Labaton Sucharow submits that the appropriate factors and criteria law firm management should consider in setting hourly billing rates of "off-track" staff attorneys, including the Staff Attorneys referenced in the Fee Petition, are described in Labaton Sucharow's Responses to Interrogatory Nos. 44 and 45. *See also* Politano Dep. at 38:2-42:2.

Lieff Cabraser, for its response, refers to the response to Sections A and B above (and the testimony and discovery responses cited therein), in addition to the documents produced by Lieff Cabraser and the declaration by Professor Rubenstein.

Thornton, for its response, states that given the contingency nature of its work, Thornton does not set hourly billing rates annually or as a routine matter. *See* Thornton Interrog. Resp. Nos. 49, 51, 52, 55. In this case, Thornton used a rate of $425 per hour for the Staff Attorneys for whose labor and overhead it paid because that rate had been used and accepted by the court in *In re Bank of New York Mellon Corp.*, 12-MD-02335, S.D.N.Y., and because it was Thornton's understanding, from communications with co-counsel more than a year prior to the submission of the Fee Petition, that a rate of $425 per hour therefore would be reasonable to use in the State

Street Litigation. *See* Hoffman Dep. at 58:17-59:18; Garrett Bradley Dep. at 48:20-49:5; Thornton Interrog. Resp. Nos. 27, 52.

Thornton submits the following information concerning the hourly rate of Michael Bradley, the outside attorney who performed document review work on the matter, and for whose work Thornton used an hourly rate of $500 in its lodestar calculation. As Thornton has previously identified in its interrogatory responses, Mr. Bradley is an actively practicing, Massachusetts-admitted lawyer who occasionally performs work for Thornton and its clients. *See* Thornton Interrog. Resp. No. 45; Michael Bradley Dep. at 29:11-16. As detailed in his deposition and in Thornton's responses to interrogatories, Mr. Bradley is an experienced lawyer who has been practicing since 2005, including for the government and as a solo practitioner. *Id*. at 11:7-12:9. Michael Bradley is not an employee of the firm, but rather has provided legal services to the firm and its clients on occasion.

A need for Mr. Bradley's services arose in 2013, when the Firms began to receive documents in the State Street matter and, consequently, began staffing a document review. Garrett Bradley believed that Michael Bradley's experience as an attorney and his background, specifically his service as the former head of the Massachusetts Underground Economy Task Force, might make him particularly qualified to potentially provide a unique perspective on the documents he reviewed. As such, Garrett Bradley approached Michael Bradley, who agreed to assist Thornton with the document review. Garrett Bradley sought and received the approval of Michael Thornton, then-managing partner of Thornton, for this arrangement.

Michael Bradley was justified in requesting and receiving $500 per hour for his services. Michael Bradley Dep. at 28:17-29:5. Mr. Bradley and Garrett Bradley have testified that Michael Bradley's rate of $500 per hour was based on two key benchmarks. First, Michael Bradley had

been paid $450 per hour by a private client prior to beginning his work on the State Street matter.[5] Michael Bradley Dep. at 28:17-29:5. Second, Michael Bradley's $500 per hour rate was also benchmarked to his risk of receiving nothing for his time. Unlike in the case of his paying client, in the State Street matter Michael Bradley performed the work on a contingent basis, thus saving Thornton the upfront cost of paying him for his work, and taking on the risk that, if the case did not have a positive resolution for the Plaintiffs, he would not be compensated for his work. *See* Thornton Interrog. Resp. Nos. 43, 44; Michael Bradley Dep. at 28:17-29:5; Garrett Bradley Dep. at 53:22-54:10. Michael Bradley took this risk and performed work, without pay, for more than two years. Charging a slightly higher rate for Mr. Bradley's work than for the work of attorneys who were paid concurrently for their work accords with commonly accepted principles governing contingent fee matters. *See United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 13 (1st Cir. 2010) (quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969)) ("[T]he fact that a fee arrangement is contingent upon success is a relevant factor in determining the appropriate fee level. The reason is that 'the fact that the attorney is willing to take an all-or-nothing-arrangement might justify a fee which is higher than the going hourly rate in the community'"); *see also* Restatement (Third) of the Law Governing Lawyers § 35, Comment c, "Reasonable contingent fees" (2000) ("A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk.") *See also* Rubenstein Decl. at 30, n. 48.

[5] Indeed, Michael Bradley charged a private client $500 per hour in early 2017 as well. Michael Bradley Dep. at 16:17-17-3.

Finally, Thornton submits that, as his testimony and documents produced by Thornton demonstrate, Michael Bradley consistently reviewed documents in the Catalyst database over a two-year period. Mr. Bradley's work during this period totaled 449.1 hours. Thornton mistakenly undercounted this time in its lodestar chart, accounting for only 406.1 hours of his time. *See* Michael Bradley Dep. at 30:5-12; 55:13-56:10; 58:19-59:11; *see e.g.* TLF-SST-005020; TLF-SST-000588 – TLF-SST-000611; TLF-SST-010790; TLF-SST-010826; TLF-SST-010832; TLF-SST-013319.

F. Request No. 6 – Reasoning For Entering Into The Cost-Sharing Agreement In This Matter

Labaton Sucharow states that the principal reasons for entering into a cost-sharing agreement by which a firm employing staff attorneys invoices another firm for the work performed by one or more of those staff attorneys are to share costs and risk, so that the firm receiving and paying the invoices has "skin in the game" with respect to an ongoing and expensive project. Staff attorney cost-sharing is simply one example of the arrangements that law firms in multi-firm class actions make in an effort to share work, costs, and associated risk equitably. *See* Belfi Dep. at 50:19-51:16; LS Interrog. Resp. 30, 32 ; *see also* Chiplock Dep. at 127:11-128:16; Garrett Bradley Dep. at 43:4-13.

Here, as noted in No. 3 above, Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys to Thornton and invoiced Thornton on a monthly basis for the work those Staff Attorneys performed. While attorneys from both firms recall the cost-sharing arrangement, no one from either firm recalls an explicit agreement about how these hours would be accounted for on eventual fee declarations, which led to the reasonable assumptions and good-faith error described above.

Lieff Cabraser, for its part, assumed (like Thornton) that Thornton would include any Staff Attorney hours for which Thornton had borne financial responsibility, and thus the risk of non-payment, in its own lodestar report. LCHB Interrog. Resp. Nos. 34, 39, 40; Thornton Interrog. Resp. Nos. 31, 36. As noted above, four of the Staff Attorneys for whom Thornton shared financial responsibility with Lieff Cabraser were agency lawyers, for whom Thornton paid outside agencies directly. *See supra n.* 3, 4. Only two of the Staff Attorneys shared between Lieff Cabraser and Thornton were ordinarily paid directly by Lieff Cabraser. For just those two attorneys, therefore, Lieff Cabraser prepared invoices for the time to be reimbursed by Thornton (roughly 9 weeks' worth). *See supra* n. 4.

G. Request No. 7 – Recommendations On Best Practices

The Firms collectively submit the following recommendations that the Special Master may wish to include in his Report and Recommendation to the Court. Together we respectfully submit five global reforms that, taken together, will significantly reduce the likelihood of confusion, misinterpretation, or any perceived lack of transparency regarding counsel's disclosure concerning hourly rates, and will significantly reduce the likelihood of recurrence of errors of the kind found here. In addition, we submit individual policy changes that each firm will implement in order to further safeguard against the inadvertent errors that occurred in this case.

First, the Firms agree that, promptly after a court grants preliminary approval to a proposed settlement,[6] lead counsel shall commence or revisit a substantive dialogue with all

[6] *See* Goldsmith Dep. at 115:23-116:22 (116:17-22:"[I]n my mind, one of the reasons this happened is because you had a very large passage of time between the end of the review project and putting in the papers where the review project impacted the presentation."); 123:23-124:7 (preliminary approval is "the right time to do it because that's the time you have an actual settlement . . . . That is the point the lawyers are looking ahead to filing a settlement motion and

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counsel in the case concerning protocols for reporting lodestar in a forthcoming petition for attorney's fees. The subjects of this dialogue shall include, without limitation, which law firms will submit an individual fee declaration; the hourly rates used for professionals and paraprofessionals; whether certain categories of time should be excluded in whole or in part; whether certain timekeepers should be excluded in whole or in part; and how time logged by staff attorneys or other attorneys engaged on a temporary basis will be reported. Lead counsel shall ensure that the lodestar reporting protocol is documented and circulated among all counsel, and that all counsel are in agreement before individual fee declarations are prepared and filed.[7]

Second, in cases where the costs of any staff may have been shared, lead counsel, upon receiving draft fee declarations from co-counsel, shall promptly circulate all such draft

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fee petition. So people are going to naturally have those issues in mind."), 124:8-18, 130:15-24; *see also* Chiplock Dep. at 174:24-176:17, 181:10-182:21 (testifying that significant and unusual factor here was passage of more than a year between (1) agreement in principle to settle litigation and discussions among counsel concerning lodestar reporting issues and (2) filing of fee petition).

[7] *See* Goldsmith Dep. at 122:4-127:3 (123:7-14: "[W]hen the court issues an order granting preliminary approval to the case, that should be the point, or at least the latest point, where all the counsel get together and discuss . . . how this is going to be handled."); Rogers Dep. at 105:12-15 ("[I]t probably would have been good for the three parties to have literally memorialized some kind of agreement."); Chiplock Dep. at 221:12-18 ("I think there should have been more coordination and communication amongst the firms before the individual fee declarations were submitted, in order to assure that we did not confuse the court."); Lesser Dep. at 90:13-15 ("Case of this size with this many firms, this number of attorneys involved, obviously, you can have better communication, more coordination . . . ."); Zeiss Dep. at 56:14-57:3 ("So now what I do is, when a settlement's passed to me, I ask our accounting department if there is any STA cost sharing, I speak with the litigation team, see if there's any STA cost sharing. . . . And then, if there is, yes, we talk internally about how we think it should be handled, and speak with the firms that are . . . sharing the costs and make sure we're all on the same page about how the time will be reported.").

declarations to all counsel before the fee petition is filed. All counsel shall review all the draft fee declarations closely and share any perceived errors or concerns with all other counsel.[8]

Third, each individual firm declaration submitted in support of a petition for attorney's fees shall include clear and accurate language concerning that firm's billing practices. For instance, the revised and expanded model language set forth in Section D above, or substantially similar language, will be used by the Firms in future fee applications. *See* Goldsmith Dep. at 126:3-11.

Fourth, the Firms agree that further direction from the presiding judge is necessary to ensure that all facts relevant to the court's analysis of a fee petition are brought to its attention. To that end, the firms suggest that the Special Master recommend that each judge presiding over a class action lawsuit draft a standing order that sets forth those facts which the presiding judge believes are important to his or her analysis of an eventual fee petition. Such direction would

[8] *See* Goldsmith Dep. at 125:4-9 ("Another issue that I would suggest or reform that I would suggest is that lead counsel, upon receiving drafts of all of the fee declarations from cocounsel, circulate them to all of the counsel in the case."), 125:18-24 ("What I would suggest going forward is that we particularly circulate them, everyone to everyone, so you've got multiple eyes, you got redundancy. And I think, again, it will prompt people to point out potential issues or problems."); *see* Johnson Dep. at 55:23-56:11 ("The second thing we have done is to work with Nicole Zeiss to expand the checklist that she uses for all settlements. In the past we focus[ed] that checklist on areas that we thought would potentially be more problematic, and those related primarily to expenses. We have now expanded that so that a cross check is done with all of the attorneys listed on the main fee application and any small fee declaration."); Chiplock Dep. at 159:5-18 ("So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger. Had I seen the other two petitions and seen the overlapping names, . . . it might have spurred me to say, ' . . . I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in.'"), 225:8-13 ("I think there would have been a benefit to the people who had been involved in the nitty gritty of the litigation maybe being more involved in eyeballing the fee declarations."), 228:10-16 ("[O]nly one firm [Labaton] had access to all the fee declarations before they were filed. And if there was an opportunity to catch a mistake, that was it, in addition to the opportunities that I had and missed before my individual fee declaration was filed."); Lesser Dep. at 90:16-18 ("[A]s far as reviewing critical documents, build some more redundancy into the system so that things don't get missed.").

ensure that class counsel do not mistakenly fail to identify facts that the court wishes to consider, enable class counsel to staff each case according to that judge's preferences (if any), and encourage the compilation and recordation of relevant information from the beginning of the case. *See, e.g.*, Heimann Dep. at 91:17-100:20.

Fifth, the Firms recommend that in complex class cases involving multiple firms, where there is a leadership structure amongst counsel imposed, the firms should report their lodestar to lead counsel on at least a semi-routine basis for the lifetime of the case. While typical in the multi-district litigation ("MDL") context (and often made mandatory in MDL orders appointing a leadership structure or committee), this practice is less regularized in class cases that are not MDLs. While such exchange was done in this case on several occasions and on an ad-hoc basis, regulating this process will aid in the capturing and correcting of errors or inadvertent duplication between the Firms as to any of their shared Staff Attorneys. Accordingly, it may be beneficial to make such periodic reports amongst plaintiffs' counsel a more regular and required feature of complex class cases such as this one, particularly if any timekeepers are performing work for more than one firm, and for lead counsel to be more specifically tasked with implementing and enforcing this requirement (*i.e.*, in the order appointing lead counsel) in addition to its other functions.

In addition to the above global recommendations, to avoid possible double-counting clerical errors like the ones that occurred here, Labaton Sucharow has now adopted for all cases going forward the following policy to formalize its general practice for the reporting of staff attorney hours in a fee petition: In all future class actions in which Labaton Sucharow serves as lead or co-lead counsel, all hours billed by staff attorneys who are Labaton Sucharow employees will be reported to the court exclusively in Labaton Sucharow's individual fee declaration and

lodestar report, regardless of whether or to what extent costs relating to such staff attorney were paid or reimbursed by another law firm during the pendency of the case.[9] Lieff Cabraser, for its part, will follow the same practice going forward.

For its part, when it enters into cost-sharing arrangements by which non-employee attorneys have performed work on a case, Thornton will disclose the existence of such agreements to the court in its individual fee declaration.

These reforms will be effective because they are straightforward, easy to implement, and widely if not universally applicable to the Firms' class action matters. We respectfully submit them for the Special Master's and the Court's consideration.

Dated: August 1, 2017

Respectfully submitted,

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[9] *See* Johnson Dep. at 55:2-8 ("[W]e are now prohibiting the practice of allowing staff attorneys to work as Labaton employees and for their hourly rates to be reimbursed to us by another firm. So that is prohibited in all cases."); Goldsmith Dep. at 126:12-127:3 ("I think personally that our firm should have a specific policy going forward on how this will be done. . . . And the policy that I would advocate is that all Labaton Sucharow staff attorney time should be on the Labaton Sucharow lodestar."); *see also* Belfi Dep. at 55:2-15; G. Bradley Dep. at 78:17-79:1; Chiplock Dep. at 138:3-21; Lesser Dep. at 55:15-20; Rogers Dep. at 93:2-11; Sucharow Dep. at 26:7-15; Thornton Dep. at 74:16-75:6 (remarks of Special Master describing method of reporting staff attorney lodestar and cost-sharing consistent with this policy).

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third*, the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier.*** (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

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[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
>
> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
>
> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.

- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.

- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc.*, No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc.*, No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

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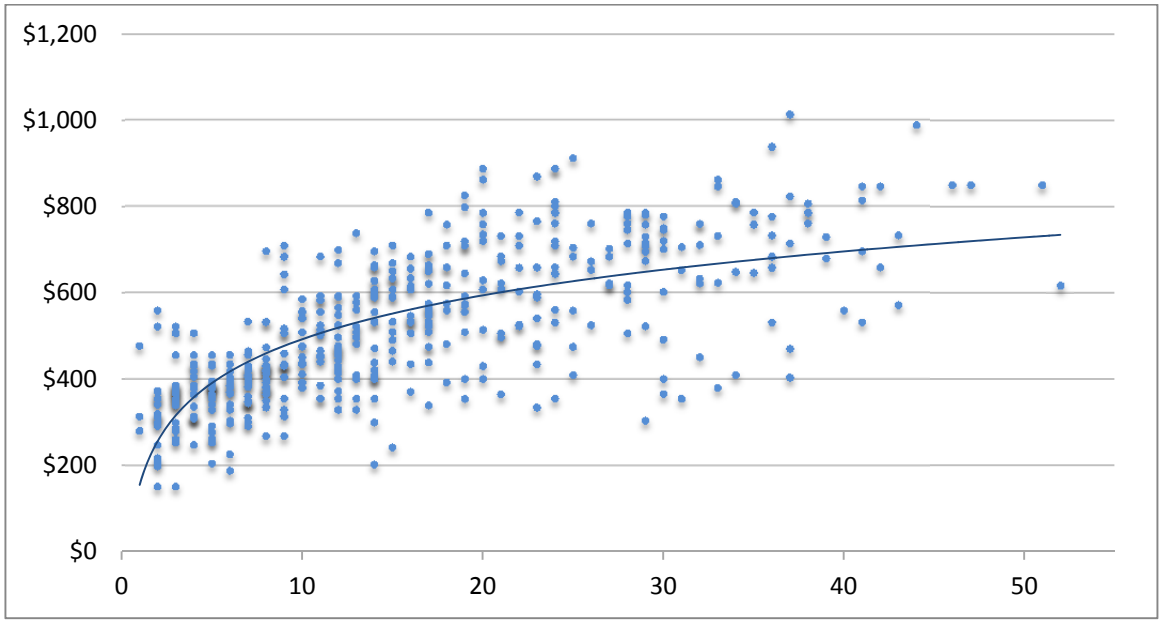
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



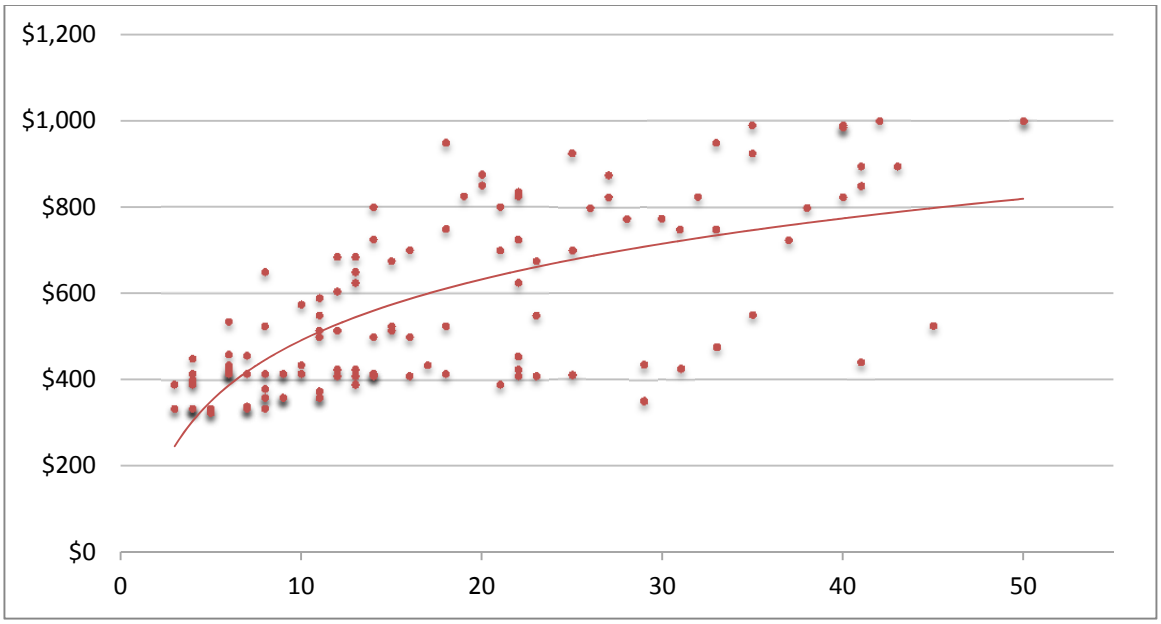
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

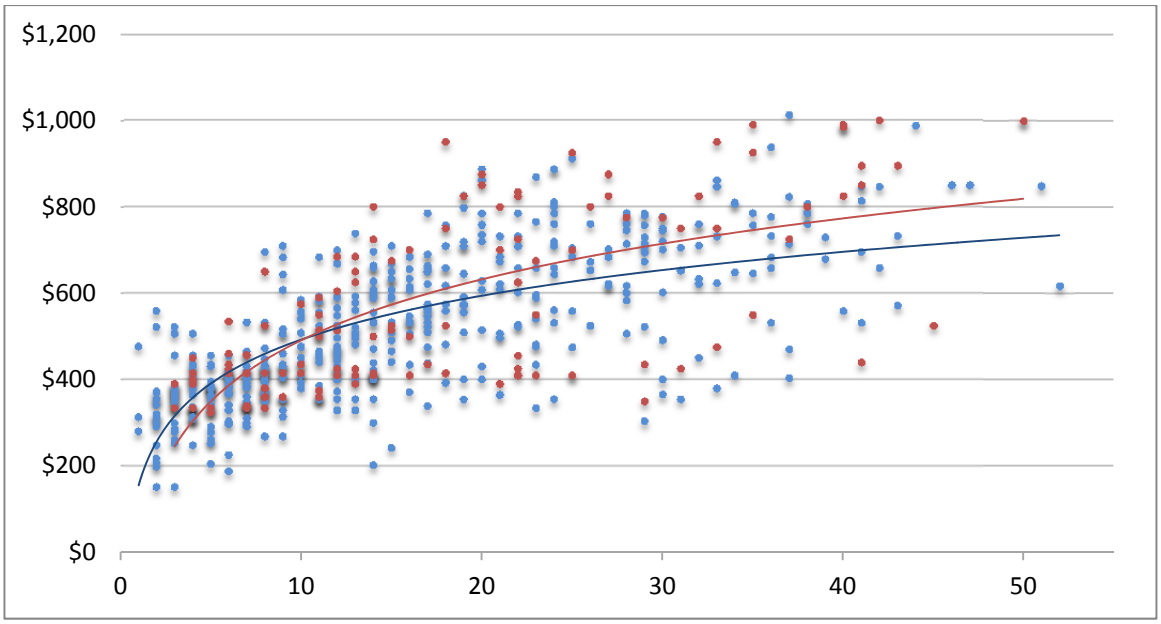
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

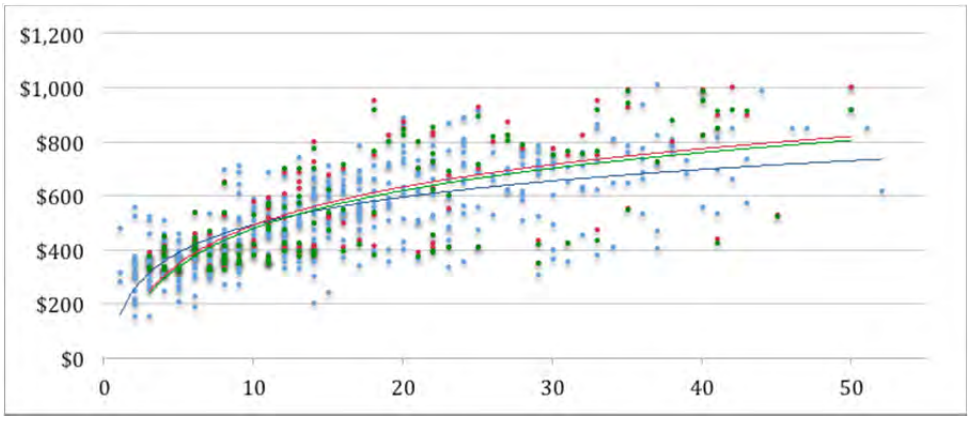
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

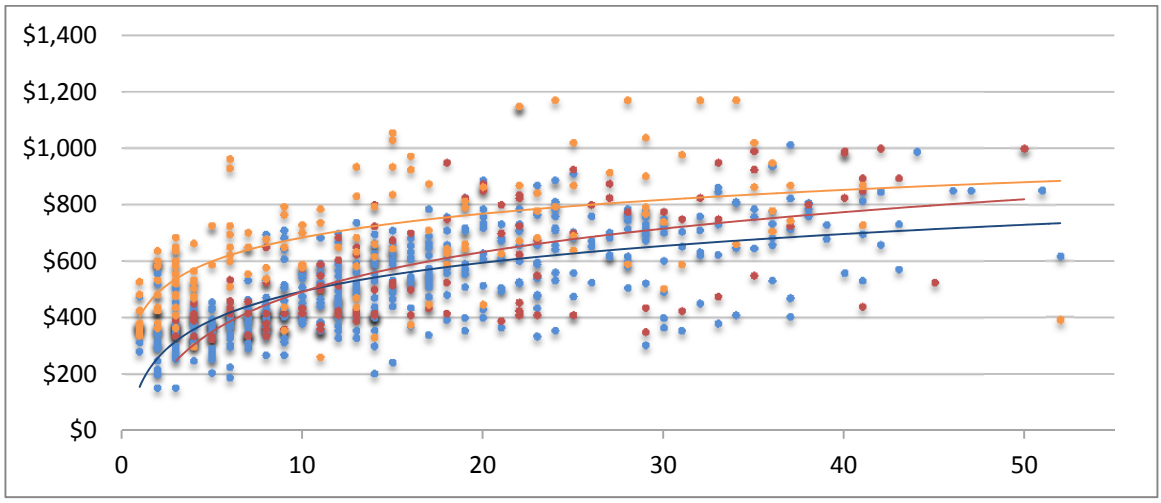
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

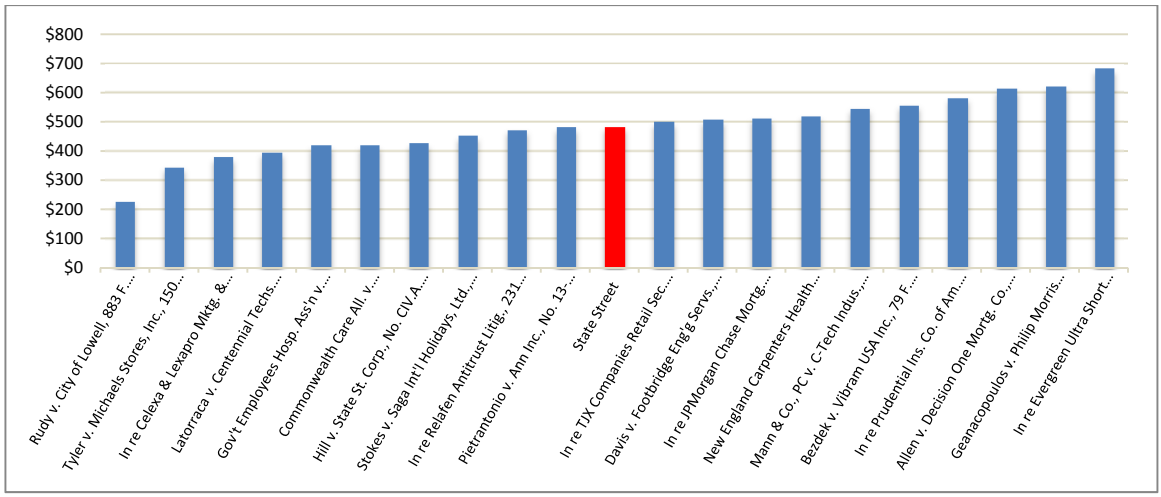
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

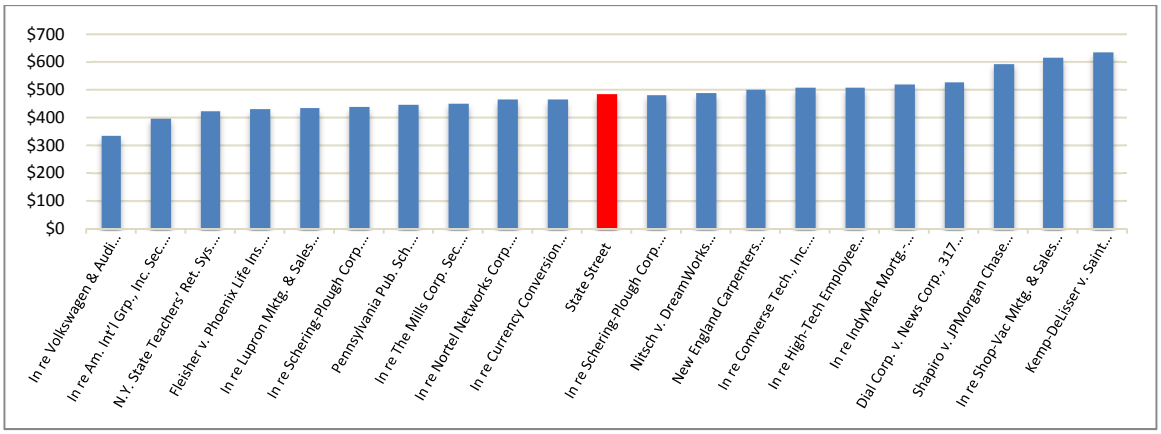
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

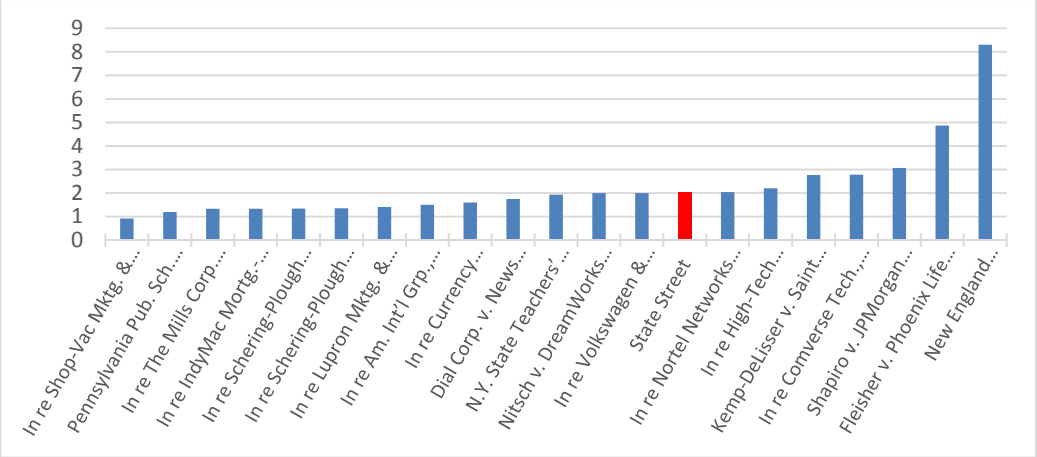
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

EXHIBIT A

PROFESSOR WILLIAM B. RUBENSTEIN

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Cambridge, MA 02138

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rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-present
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

♢ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

♢ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016))

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

♢ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

♢ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

♢ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

♢ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

♢ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

♢ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

♢ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

♢ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

♢ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

♢ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

♢ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

♢ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

♢ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

♢ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

♢ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

♢ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

♢ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

♢ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

♢ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

♢ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

♢ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

♢ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

♢ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

♢ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

♢ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

♢ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

♢ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

♢ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

♢ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

♢ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

♢ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

♢ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

♢ Retained by a Fortune 100 Company as an expert consultant on class certification issues

♢ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

♢ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

♢ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

♢ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

♢ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

♢ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

♢ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

♢ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

♢ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

♢ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

♢ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

♢ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

♢ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

♢ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

♢ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

♢ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

♢ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

♢ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

♢ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

♢ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

♢ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

♢ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

♢ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

♢ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

♢ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

♢ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

♢ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

♢ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

♢ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

♢ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (***Rosebrock v. Hoffman***, 135 S. Ct.1893 (2015))

♢ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (***AT&T Mobility v. Concepcion,*** No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (***Salazar v. Buono***, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (***Lawrence v. Texas***, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (***Illinois v. Perkins***, 496 U.S. 292 (1990))

Attorney's Fees

♢ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (***In re Indymac Mortgage-Backed Securities Litigation***, 94 F.Supp.3d 517 (S.D.N.Y. 2015), ***aff'd sub. nom.***, ***Berman DeValerio v. Olinsky***, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in ***Laffitte v. Robert Half Int'l Inc***., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (***Dydyk v. Apple Inc.,*** 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (***In re Google Buzz Privacy Litigation,*** 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

♢ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

♢ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

♢ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

♢ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

♢ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
♢ *Play It Straight*, NEW YORK TIMES, October 16, 2004
♢ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
♢ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
♢ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
♢ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

♢ Massachusetts (2008)
♢ California (2004)
♢ District of Columbia (1987) (inactive)
♢ Pennsylvania (1986) (inactive)

♢ U.S. Supreme Court (1993)

♢ U.S. Court of Appeals for the First Circuit (2010)
♢ U.S. Court of Appeals for the Second Circuit (2015)
♢ U.S. Court of Appeals for the Fifth Circuit (1989)
♢ U.S. Court of Appeals for the Ninth Circuit (2004)
♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
♢ U.S. Court of Appeals for the D.C. Circuit (1993)

♢ U.S. District Courts for the Central District of California (2004)
♢ U.S. District Court for the District of the District of Columbia (1989)
♢ U.S. District Court for the District of Massachusetts (2010)
♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT B
Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

1. Class Action Complaint, ECF No. 1
2. Amended Class Action Complaint, ECF No. 10
3. Memorandum of Law in Support of Plaintiff's Assented-to Motion for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, ECF No. 8
4. Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 19
5. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 22
6. Reply Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 29
7. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, ECF No. 33
8. Stipulation and Joint Motion to Continue Stay, ECF No. 66
9. Stipulation and Joint Motion to Continue Stay, ECF No. 71
10. Stipulation and Joint Motion to Continue Stay, ECF No. 75
11. Stipulation and Agreement of Settlement, ECF No. 89
12. Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 91
13. Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 92
14. Exhibit A: Letter Dated March 18, 2011, ECF No. 92-1
15. Exhibit B: Labaton Sucharow Firm Resume, ECF No. 92-2
16. Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, ECF No. 97
17. Defendants' Memorandum in Support of Class Action Settlement, ECF No. 99
18. Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, ECF No. 100
19. Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses of Service Awards to Plaintiffs, ECF No. 102
20. [Proposed] Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 103-1
21. Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of

Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 104

22. Exhibit 1: Declaration of George Hopkins in Support of Final Approval of Class Settlement, Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Award to ARTRS, ECF No. 104-1
23. Exhibit 2: Letter Dates March 18, 2011, ECF No. 104-2
24. Exhibit 3: Motion to Dismiss, ECF No. 104-3
25. Exhibit 4: Lobby Conference Before Chief Judge Mark L. Wolf, ECF No. 104-4
26. Exhibit 5: Declaration of Jonathan B. Marks, ECF No. 104-5
27. Exhibit 15: Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15
28. Exhibit 16: Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-16
29. Exhibit 17: Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-17
30. Exhibit 18: Declaration of Lynn Sarko on Behalf of The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Strangeland in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-18
31. Exhibit 19: Declaration of J. Brian McTigue in Support of Motion for Attorneys' fees, Reimbursement of Expenses, and Incentive Awards to Certain Class Representatives, ECF No. 104-19
32. Exhibit 20: Declaration of Carl S. Kravitz in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-20
33. Exhibit 21: Declaration of Catherine M. Campbell on Behalf of Feinberg, Campbell & Zack, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-21
34. Exhibit 22: Declaration of Jonathan G. Axelrod on Behalf of Beins, Axelrod, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-22
35. Exhibit 23: Declaration of Kimberly Keevers Palmer on Behalf of Richardson, Patrick, Westbrook & Brickman, LLC in Support of Lead Counsel's Motion for an Award of Attorneys' fees and Payment of Expenses, ECF No. 104-23
36. Exhibit 24: Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, ECF No. 104-24
37. Exhibit 25: Rate Tables, ECF No. 104-25
38. Defendant's Statement of Reporting Status of Class Action Settlement, ECF No. 106
39. Reply Memorandum of Law in Further Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 108

40. Supplemental Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion, ECF No. 109
41. Order and Final Judgment, ECF No. 110
42. Order Awarding Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 111
43. Order Approving Plan of Allocation, ECF No. 112
44. Hearing Transcript, ECF No. 114
45. Letter Dated November 10, 2016, ECF No. 116
46. Memorandum and Order, ECF No. 117
47. The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master, ECF No. 127
48. Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master, ECF No. 128
49. Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master, ECF No. 129
50. Order Regarding Class Notice, ECF No. 172
51. Memorandum and Order Regarding Appointment of Judge Rosen as Special Master, ECF No. 173
52. The Competitive Enterprise Institute's Center for Class Action Fairness's *Amicus* Response to Court's Order of February 6 – Leave to File granted March 8, 2017 (Dkt. 172), ECF No. 174
53. Memorandum and Order Regarding Class Notice, ECF No. 187
54. Memorandum and Order Regarding Motion for Relief from Fee Order, ECF No. 192
55. Special Master's Order Regarding the Law Firms' Objection to Retention of John W. Toothman as Advisor to Counsel to the Special Master, ECF No. 193
56. Objection of Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceeding Before the Special Master, ECF No. 194
57. Objection Plaintiffs' Law Firms' Objection to Special Master's Order Regarding Retention of John W. Toothman, ECF No. 199
58. Memorandum and Order Regarding Emergency Motion, ECF No. 200
59. Exhibit A: Notice of Proceedings that Could Result in an Additional Award to Class Members Who Have Claims, ECF No. 200-1
60. Exhibit B: Notice of Proceedings that Could Result in an Additional award to Class Members Who Have Claims, ECF No. 200-2
61. Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel, ECF No. 202
62. Order Regarding Email Addresses, ECF No. 203
63. Memorandum and Order – Toothman Order, ECF No. 204
64. Labaton Sucharow's Response to the Court's April 26, 2017 Order, ECF No. 205
65. Exhibit A: Declaration of Nicole M. Zeiss in Response to the Court's April 26, 2017 Order, ECF No. 205-1

66. Exhibit B: Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Response to the Court's April 26, 2017 Order, ECF No. 205-2
67. Memorandum and Order Regarding Special Master Billing Rate, ECF No. 206
68. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 1 Response
69. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017
70. Thornton Law Firm, LLP's June 1, 2017 Responses to Special master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
71. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 9 Response
72. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 9, 2017
73. Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
74. Lieff Cabraser Heimann & Bernstein LLP's Corrected Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Interrogatories Nos. 43 and 44
75. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response
76. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017
77. Thronton Law Firm, LLP's July 10, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories

EXHIBIT C

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT C
Massachusetts Cases Affirming Class Action Fee Awards

1. *Allen v. Decision One Mortg. Co., LLC*, No. CIV.A. 07-11669-GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
2. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324 (D. Mass.), aff'd, 809 F.3d 78 (1st Cir. 2015)
3. *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
4. *Davis v. Footbridge Eng'g Servs., LLC*, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
5. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536 (Mass. Super. Feb. 24, 2016)
6. *Gov't Employees Hosp. Ass'n v. Serono Int'l, S.A.*, 246 F.R.D. 93 (D. Mass. 2007)
7. *Hill v. State St. Corp.*, No. CIV.A. 09-12146-GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015), appeal dismissed, 794 F.3d 227 (1st Cir. 2015)
8. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
9. *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
10. *In re JPMorgan Chase Mortg. Modification Litig.*, 18 F. Supp. 3d 62 (D. Mass. 2014)
11. *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
12. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005)
13. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass. 2008)
14. *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25 (D. Mass. 2011)
15. *Mann & Co., PC v. C-Tech Indus., Inc.*, No. CIV.A.08-11312-RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
16. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
17. *Pietrantonio v. Ann Inc.*, No. 13-CV-12721-RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
18. *Rudy v. City of Lowell*, 883 F. Supp. 2d 324 (D. Mass. 2012)
19. *Stokes v. Saga Int'l Holidays, Ltd.*, 376 F. Supp. 2d 86 (D. Mass. 2005)
20. *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015)

EXHIBIT D

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT D

Massachusetts Bankruptcy Cases Containing Corporate Firm Billing Rates

1. *In re Houghton Mifflin Harcourt Publishing Company*, 12-BK-15610 (Bankr. D. Mass. 2012), ECF. No. 168
2. *In re Lexington Jewelers Exch., Inc.*, No. 08-10042-WCH, 2013 WL 2338243 (Bankr. D. Mass. May 29, 2013), ECF No. 439-1
3. *In re McCabe Grp.*, 424 B.R. 1 (Bankr. D. Mass.), *aff'd in part, rev'd in part sub nom. McCabe v. Braunstein*, 439 B.R. 1 (D. Mass. 2010), ECF No. 404-8
4. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 485
5. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 487-6
6. *In re The Educ. Res. Inst., Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010), ECF No. 1196-1

EXHIBIT E

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT E
Class Actions Settlements with Funds of $100-$500 Million

1. *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016)
2. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), ECF No. 310
3. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013), ECF No. 634-23
4. *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
5. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009)
6. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)
7. *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015)
8. *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833 (D. Mass. Aug. 17, 2005)
9. *In re Nortel Networks Corp.*, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), ECF No. 194
10. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Schering" settlement]
11. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Merck" settlement]
12. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
13. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155 (D. Mass. 2015)
15. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016)
16. *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226 (E.D. Mich. 2016)
17. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009), ECF No. 769
18. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161 (N.D. Cal. June 5, 2017)
19. *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 23 (S.D.N.Y. 2016)
20. *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

EXHIBIT F

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT F
Reported Class Action Fee Decisions
Containing Billing Rates for Contract or Staff Attorneys

1. *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), ECF No. 218-8
2. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015), ECF No. 61-4
3. *In re Am. Apparel, Inc. S'holder Litig.*., No. CV1006352MMMJCGX, 2014 WL 10212865 (C.D. Cal. July 28, 2014), ECF No. 188-3
4. *In re Animation Workers Antitrust Litig.*, No. 14-CV-4062-LHK, 2016 WL 6663005 (N.D. Cal. Nov. 11, 2016), ECF Nos. 331-2, 331-3, 331-4
5. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), ECF No. 1083-20
6. *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016), ECF No. 1963-1
7. *Long v. HSBC USA INC.*, No. 14 CIV. 6233 (HBP), 2016 WL 4764939 (S.D.N.Y. Sept. 13, 2016)
8. *McGreevy v. Life Alert Emergency Response, Inc.*, No. 14 CIV. 7457 (LGS), 2017 WL 1534452 (S.D.N.Y. Apr. 28, 2017)
9. *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008 (S.D.N.Y. Sept. 30, 2015), ECF No. 52
10. *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289 (M.D.N.C. May 9, 2016), ECF No. 145-1
11. *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
12. *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086 YGR, 2014 WL 3945655 (N.D. Cal. Aug. 11, 2014)

EXHIBIT G

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT G
List of Exemplary Cases With Multipliers Over 3.5

1. In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000) (19.6 multiplier)

2. Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., NO. CIV.A. 03-457, 2005 WL 1213926, at *17-18 (E.D. Pa. May 19, 2005) (15.6 multiplier)

3. Kuhnlein v. Department of Revenue, 662 So.2d 309, 315 (Fla. 1995) (15 multiplier reduced to 5)

4. In re Doral Fin. Corp. Sec. Litig., No. 05-md-1706 (S. D. N.Y. July 17, 2007) (10.26 multiplier)

5. Weiss v. Mercedes-Benz, 899 F. Supp. 1297 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier)

6. Doty v. Costco Wholesale Corp., No. 05-3241 (C. D. Cal. May 14, 2007) (9 multiplier)

7. Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998) (8.9 multiplier)

8. Cosgrove v. Sullivan, 759 F. Supp. 1667, 167 n.1 (S. D. N.Y. 1991) (8.74 multiplier)

9. New England Carpenters Health Benefits Fund v. First Databank, Inc., Civil Action No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3 multiplier)

10. Newman v. Caribiner Int'l, Inc., No. 99 Civ. 2271 (S.D. N.Y. Oct. 19, 2001) (7.7 multiplier)

11. Hainey v. Parrott, No. 02-733 (S. D. Ohio Nov. 6, 2007) (7.47 effective multiplier)

12. In re Rite Aid Corp. Sec. Litigation, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier)

13. Steiner v. Amer. Broadcasting Co., Inc., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier)

14. In re UnitedHealth Group, Inc. PSLRA Litig., No. 06-1691 (D. Minn. Aug. 10, 2009) (6.49 multiplier)

15. The Music Force, LLC v. Viacom, Inc., No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier)

16. In re Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890 (1st Cir. 1985) (6 multiplier)

17. In re Cardinal Health Inc. Securities Litigations, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier)

18. In re Krispy Kreme Doughnuts, Inc. Sec. Litig., No. 04-416 (M.D. N.C. Feb. 15, 2007) (6 multiplier)

19. In re RJR Nabisco, Inc. Securities Litigation, No. 88 Civ. 7905(MBM), 1992 WL 210138, at *5-6 (S.D. N.Y. Aug. 14, 1992) (6 multiplier)

20. Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141 (D. S.C. Aug. 15, 2006) (6 multiplier)

21. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S. D. Ohio Dec. 31, 2007) (5.85 multiplier)

22. Dutton v. D&K Healthcare Res., Inc., No. 04-147 (E. D. Mo. June 5, 2007) (5.6 multiplier)

23. In re Charter Communications, Inc., Securities Litigation, No. MDL 1506, 2005 WL 4045741, at * 22 (E.D. Mo. June 30, 2005) (5.6 multiplier)

24. Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D. N.Y. 1997) (5.5 multiplier)

25. Warner v. Experian Info. Solutions, Inc., No. BC362599 (Cal. Super. Ct. Los Angeles Co. Feb. 26, 2009) (5.48 multiplier)

26. Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier)

27. Di Giacomo v. Plains All American Pipeline, No. Civ.A.H-99-4137, 2001 WL 34633373, * at 11-12 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier)

28. Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1123-25 (C.D. Cal. 2008) (5.2 multiplier)

29. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (5.2 multiplier)

30. In re Beverly Hills Fire Litig., 639 F. Supp. 915, 924 (E. D. Ky. 1986) (5 multiplier to attorney who performed the bulk of work on the case)

31. In re Fernald Litigation, No. C-1-85-149, 1989 WL 267038, at *4-5 (S.D. Ohio Sept. 29, 1989) (5 multiplier)

32. In re Cendant Corp. Securities Litigation, 404 F.3d 173, 183 (3d Cir. 2005) (multiplier in "mid-single digits")

33. In re United Rentals, Inc. Sec. Litig., No. 04-1615 (D. Conn. May 26, 2009) (4.79 multiplier)

34. Castillo v. General Motors Corp., No. 07-2142 (E. D. Cal. April 19, 2009) (4.77 multiplier)

35. Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 (E. D. Pa. Aug. 14, 2006) (4.77 multiplier)

36. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (4.7 multiplier)

37. Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier)

38. Teeter v. NCR Corp., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier)

39. Holleran v. Rita Medical Sys., Inc., No. RG06302394 (Cal. Super. Ct. Alameda Co. Aug. 1, 2007) (4.57 multiplier)

40. Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1991 WL 275757 (S.D. N.Y. Dec. 19, 1991) (4.4 multiplier)

41. Agofonova v. Nobu Corp., No. 07-6926 (S. D. N.Y. Feb. 6, 2009) (4.34 multiplier)

42. Buccellato v. AT & T Operations, Inc., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (4.3 multiplier)

43. In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier)

44. Shannon v. Hidalgo County Board of Comm'r, No. 08-369 (D. N.M. June 4, 2009) (4.2 multiplier)

45. Simmons v. Andarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct. Caddo Co. Dec. 23, 2008) (4.17 multiplier)

46. In re OSI Pharm., Inc. Sec. Litig., No. 04-5505 (E.D. N.Y. Aug. 22, 2008) (4.11 multiplier)

47. Blackmoss Inv., Inc. v. Gravity Co., No. 05-4804 (S. D. N.Y. Nov. 20, 2007) (4.0 multiplier)

48. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2003) (4.0 multiplier)

49. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (3.97 multiplier)

50. Karpus v. Borelli (In re Interpublic Secs. Litig.), No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D. N.Y. Oct. 26, 2004 (3.96 multiplier)

51. Vizcaino v. Microsoft Corp., 290 F.3d 1045, 1050-51 (9th Cir. 2002) (3.65 multiplier)

52. Donkerbrook v. Title Guar. Escrow Servs., Inc., No. 10-00616 LEK-RLP, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011) (3.6 multiplier)

53. Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869 (E.D. La. 2007) (3.5 multiplier)

54. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (3.5 multiplier)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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 THE JOINT MOTION TO THE 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 Joint Motion to the Court (Under Seal), to be filed under seal until further Court order.

WHEREFORE, Special Master respectfully requests that the Court permit the Joint Motion to the Court be filed under seal.

Dated: August 9, 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 August 9, 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,

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 THE JOINT MOTION TO THE COURT (UNDER SEAL)

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WHEREFORE, Special Master respectfully requests that the Court permit the Joint Motion to the Court be filed under seal.

Dated: August 9, 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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/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,

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 THE JOINT MOTION TO THE COURT (UNDER SEAL)

This Motion is hereby ALLOWED and the submission, Docket No. 438, shall be sealed at least temporarily. Any future motions to seal by any party shall include a statement concerning why impoundment is warranted.
WGH, DJ 8/9/18

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

No. 11-cv-10230-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 11-cv-12049-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 12-cv-11698-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

SPECIAL MASTER'S MOTION FOR CHAMBERS CONFERENCE WITH THE COURT AND ALL COUNSEL

Now comes the Special Master, with the concurrence of Customer Class Counsel, who requests a chambers conference with the Court and all counsel prior to today's scheduled hearing to discuss recent developments concerning possible resolution of this matter for the Court's consideration.

Dated: August 9, 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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/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. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 11-10230-MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 11-12049-MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 12-11698-MLW

ORDER

WOLF, D.J. August 10, 2018

For the reasons stated in court, with the agreement of the parties except as noted in footnote 1, it is hereby ORDERED that:

1. Customer Class Counsel's Motion for an Accounting and Clarification that the Master's Role has Concluded (Docket No. 302) is DENIED.

2. Pursuant to Federal Rules of Civil Procedure 23(h)(4) and 53(f)(1), the Master's Report and Recommendation (the "Report") is resubmitted to the Master to respond to the objections to the Report. In addition, the Master is authorized to: (a) participate in any oral argument concerning the Report; (b) question witnesses if an evidentiary hearing is conducted concerning the Report; and (c) address any issues related to the Report if requested by the court or authorized by the court in response to a request by the Master. See, e.g. Fed. R. Civ. P. 23(h)(4) ("the court may refer issues related to the amount of the [attorney's] fee award to a special master . . . as provided in Rule 54(d)(2)(D)"). The Master and the individuals and organizations he employs shall continue to be compensated in the manner provided in the March 7, 2017 Order, (Docket No. 173) ¶¶13, 14, as amended on May 25, 2017, see Docket No. 206.[1]

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[1] On June 22, 2018, the court issued an order granting Labaton Sucharow LLP's Motion for Relief from Order Awarding Fees, Expenses, and Service Awards (Docket No. 178). See Docket No. 331. That Order vacated the Order Awarding Attorneys' Fees, Payment of

3. The Competitive Enterprise Institute's Center for Class Action Fairness's (the "CCAF") Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master (Docket No. 126) is ALLOWED to the extent it requests leave to file amicus briefs that are invited by the court or authorized by the court in response to a request by CCAF. CCAF's request to serve as a Guardian Ad Litem for the class is taken under advisement.

4. The proposed protocol for adding documents to the Record (Docket No. 259)(the "Protocol") is ADOPTED except as to paragraphs 3 and 4. The Master shall file any exhibits to his response to the objections contemporaneously with the response. The Master and the lawyers shall confer concerning proposed redactions to any exhibits that are not yet part of the Record and file them for the

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Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket No. 111). See Fed. R. Civ. P. 60(b), 1946 Advisory Committee Note ("Rule 60(b) [which provides for "Relief from a Judgment or Order"] does not assume to define the substantive law as to the grounds for vacating judgments . . . .") (emphasis added). The court has not vacated the Order and Final Judgment approving the $300,000,000 settlement of this case (Docket No. 110). However, as the court has vacated the award of $75,000,000 for attorneys, expenses, and service awards, it deems those funds to now constitute class funds. At the August 9, 2018 hearing, the lawyers for the class objected to the court's conclusions that granting the motion for relief from judgment "vacated" the award of attorneys' fees and that the $75,000,000 previously awarded are now again "class funds."

public record, with a motion to impound the redacted information, within 14 days of filing the response. The same procedure shall apply concerning any replies to the Master's response.

5. By August 16, 2016, the Master and the lawyers for the class shall:

(a) Confer and propose a schedule for the Master's response to the objections to the Report and any replies;

(b) File for the public record any exhibits to the objections that were not exhibits to the Report, and any documents the Master added to the Record on August 6, 2018 pursuant to paragraph 3 of the July 9, 2018 Order, and explain the reasons for any proposed redactions. In the alternative, they shall file a motion and affidavit seeking to establish good cause for an extension of time to do so; and

(c) Report any other obligations under the Protocol (Docket No. 259) or the July 9, 2018 Order that have not been satisfied, and propose a deadline by which they will do so.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM LLP'S
NOTICE OF FILING OF OBJECTIONS
TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

On June 28, 2018, the Thornton Law Firm LLP filed under seal its Objections to the Special Master's Report and Recommendations and exhibits in support thereof. A redacted copy of the Objections was filed on the public docket as ECF 361. The Thornton Law Firm hereby files on the public docket a version of its Objections with a more limited set of redactions. The only redactions remaining are those necessary to reflect the redactions set forth on the exhibits to the Special Master's Report and Recommendations, as filed publically by the Special Master with agreement of all counsel at ECF 401. The exhibits in support of the Objections are hereby filed on the public docket in unredacted form, with the exception of exhibits 18 and 19, to which

minor redactions have been made to protect information subject to the attorney work product doctrine.[1]

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: August 10, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on August 10, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Joshua C. Sharp

Joshua C. Sharp

[1] To the extent such redactions require a Motion to Impound, the Thornton Law Firm respectfully refers the Court to its Motion to Impound Objections to Special Master's Report and Recommendations (ECF 360) and modifies the Motion to request impoundment only of the redacted information in exhibits 18 and 19 and the limited set of redactions to the Objections.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
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THORNTON LAW FIRM LLP'S OBJECTIONS TO
THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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INTRODUCTION

Following a sixteen-month, $3.8 million investigation, the Special Master has produced a Report and Recommendations (and Executive Summary) that is riddled with factual and legal errors and mischaracterizations of the record, not to mention internal contradictions. Ironically, and disturbingly, in a case in which the Special Master recommends a draconian sanction based on Garrett Bradley's role in "causing" an inadvertent mistake, the number of clear factual and legal mistakes in this Report is stunning. Indeed, if this Report were subjected to the same extreme, misguided analysis being applied to Garrett Bradley's mistakes, the submission of the Report itself would be sanctionable conduct. The Report repeatedly mischaracterizes the applicable law and actual facts of this matter.

Even though the Report concludes that "the $300 million settlement reflected an excellent result for the class members and was the product of the highly professional and skilled work of the class's law firms," R&R at 125, the Special Master goes on to malign the hard-earned reputations of the lawyers who achieved this result with novel theories of ethical improprieties and sanctionable conduct that are unprecedented, unreasonable, and unsupported by evidence. This Court must conduct a thorough *de novo* review and ensure that the facts are all weighed carefully and accurately, and that the law is applied consistently and dispassionately. The Thornton Law Firm is confident that this *de novo* review will reveal what has been evident all along: that Thornton's efforts were instrumental to the excellent result in this case, and that it should not be penalized any more than it already has been for mistakes that are deeply regrettable but inadvertent and immaterial to the attorneys' fee award.

A. Double Counting

This case began after a media inquiry prompted the self-disclosure of inadvertent double counting of certain staff attorneys on the lodestars of the Thornton Law Firm, Lieff Cabraser,

and Labaton Sucharow (collectively, "Customer Class Counsel"). The Special Master's investigation found, as Customer Class Counsel asserted from the very beginning, that the double counting error was an inadvertent mistake. Moreover—and as the Special Master fails to acknowledge—this error has **no effect** on the objective reasonableness of the flat percentage of fund attorneys' fee award. It is important to remember that neither Thornton Law Firm nor any firm in this case was awarded fees for hours worked. The attorneys' fee in this case was, like other cases in this district, a simple percentage of the class recovery amount, 25%. The firms provided hours worked and rates (in lodestars) to the Court not for the purpose of seeking fees for hours worked, but only as a **cross-check** to ensure that the percentage award was reasonable. Of course, this is not to say that firms receiving percentage of fund awards are excused from ensuring that information they submit to the Court is accurate. But the limited function of the lodestar here cannot be ignored. In undertaking a lodestar cross-check, courts look to the "multiplier" (*i.e.,* total lodestar divided by fee award) as the touchstone of their inquiry. If the multiplier is reasonable, the lodestar cross-check is satisfied. Harvard Law School Professor William B. Rubenstein, the author of the leading treatise on class actions, testified in this investigation that multipliers much higher than the one here—indeed, up to 4—are reasonable in cases like this. Rubenstein Dep., 4/19/18, at 216:1-218:4 (SM Ex. 235). In this case, removing the double-counted attorney time from the firms' lodestars increases the multiplier from 1.8 to 2.01. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1). In other words, although certainly unfortunate, the double counting had no material effect on the fee award. The Special Master himself concedes that "all other things being equal, the attorneys' fee award was fair, reasonable, and deserved." R&R at 6.

As described in further detail herein, the double counting was the result of a very basic error. Customer Class Counsel were prosecuting an extremely complex case that included the review of millions of pages produced by their opponent. As co-counsel, they came to an agreement to share both the costs of this work and the work itself, which also had the effect of spreading the risk should the case never produce a monetary settlement. The Thornton Law Firm, which is smaller than both Labaton and Lieff, does not have document review attorneys. Accordingly, after all three firms agreed to split the cost of the document review work, it paid for its share of the work by reimbursing Lieff and Labaton for staff attorneys housed at their firms or, in some cases, by directly paying legal staffing agencies that supplied the staff attorneys. When the time came to submit lodestars to the Court for purposes of the cross-check, through administrative errors and miscommunication, some of the Thornton Law Firm's staff attorneys' time was included on the other firms' lodestars.

Despite finding that the double-counting was "inadvertent," R&R at 363, the Special Master recommends that the three firms "disgorge" the amount of the double counted time—$4,058,000—such that it can be "returned" to the class. This is the first of many logical fallacies in the Report. In urging "disgorgement" of monies, the Special Master **confuses the function of the lodestar cross-check with a lodestar-based fee**. When, as here, the lodestar is used as a cross-check of a percentage award (which the Special Master does not dispute is how the Court awarded the fee), the proper course, taken by numerous courts in similar circumstances, is for the Court to recalculate the multiplier and reassess whether the higher multiplier is reasonable. Because the attorneys' fees were not awarded on a one-to-one basis, "disgorgement" of an amount that was, in actuality, a piece of a piece of a cross-check, is nonsensical. The Special Master did not attempt to calculate an adjusted multiplier (for this or any other of his

recommendations), perhaps because he recognized that the multiplier would still be well within the realm of reasonableness, and therefore there would be no basis for "disgorgement" of any money relating to the double counting error.

B. Intent

The Special Master's most outlandish finding in his Report is that Garrett Bradley intentionally included staff attorneys on Thornton's lodestar—staff attorneys for whom it paid, but who were housed at, and in some cases employed by, Lieff and Labaton— to deceive Thornton's own co-counsel and the Court. The alleged purpose was either to convince co-counsel to give the Thornton Law Firm a greater share of the aggregate fee award, or to mislead the Court into approving the fee award. Indeed, the Special Master's allegation of intentionality is particularly unbelievable because, as he himself concludes, a simple side-by-side comparison would have revealed (and did ultimately reveal) that the same attorneys were incorrectly listed on more than one lodestar.

Unfortunately for the Special Master, "Facts are stubborn things."[1] Here, the facts show that: (1) Customer Class Counsel jointly developed the plan to share the cost of staff attorney work and the risk of failure, and neither Lieff nor Labaton has ever stated they were deceived; (2) the final fee agreement among counsel was executed **before** the fee declarations submitted to the Court ever existed, thereby negating any possibility that the submitted lodestars had any bearing whatsoever on the fee split among counsel; and (3) the fee agreement was the result of a negotiation among sophisticated and experienced counsel who had expressly agreed to split the risk of jointly funding the staff attorneys. More to the point, the Special Master's finding that Thornton intentionally included staff attorneys on its lodestar in order to deceive co-counsel is

[1] Summation of John Adams, *Rex v. Wemms* (Suffolk Superior Court, 1770).

flatly contradicted by his finding that there was an understanding among some of the attorneys at all three firms that Thornton would include the staff attorneys on its lodestar. *See* R&R at 45 n.27, 363. As all firms had attorneys who understood that Thornton would include the staff attorneys on its lodestar, it is impossible that Thornton was attempting to deceive—or ever could have deceived—Lieff or Labaton.

In terms of any alleged deception of the Court, there was simply no motivation to increase the lodestar submitted to the Court in order to generate a larger fee or to get a greater share of the aggregate fee. The Special Master chooses to ignore a basic fact: by the time the lodestar was submitted to Court in September 2016, all of the lawyers had already agreed that they would seek no more than an aggregate 25% fee[2] and the Thornton Law Firm had already agreed to a final fee split agreement with Lieff and Labaton. Additional lodestar would not have generated any additional fee award for the Thornton Law Firm. The only possible motivation would have been to decrease the aggregate multiplier, which is highly implausible for at least two reasons: (1) the multiplier was already well within the range of reasonableness; and (2) the Thornton Law Firm accounted for only 18% of the total lodestar submitted to the Court, so it would not have been able to "move the needle" on the aggregate multiplier. These are important facts that the Special Master ignores. Further, the Special Master insinuates that there was something wrong about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. In fact, Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage.[3]

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[2] In fact, the Court remarked during the pre-filing hearing on June 23, 2016 that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

[3] In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%. These calculations were made using the lodestars submitted to the Court in September 2016.

In a transparent attempt to generate a soundbite, the Special Master and his counsel quote repeatedly (and entirely out of context) an email in which Garrett Bradley states that paying for additional staff attorneys is the "best way to jack up the loadstar [sic]." The Special Master knows that there is nothing wrong with the concept expressed in the email, which is from February 2015 (well over a year before the fee declaration or lodestar was filed with the Court) and contains an invoice for staff attorneys *from Labaton*. The concept was that if the Thornton Law Firm bore more risk by investing in additional staff attorneys vis-à-vis the other law firms (and pursuant to their agreement), Thornton would eventually be able to pursue a greater share of the fee vis-à-vis co-counsel. This would in no way increase the total lodestar submitted to the Court or the amount of fees the class paid to its attorneys. There was always only a finite number of documents to be reviewed and reviewers who could review those documents; the only difference was, for purposes of spreading the internal risk among the firms, which firm would be financially responsible for which staff attorneys. In other words, as is clear from the context, Bradley uses "lodestar" as shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* It is typical of the Special Master and his counsel's approach that they choose to ignore this context (which is clear from the record) in order to generate a catchy—albeit totally misleading—soundbite.

Ultimately, the Special Master is left with a strained theory by which the Thornton Law Firm deceived co-counsel and the Court not by inflating hours worked—the Special Master found all of the hours worked by Thornton Law Firm attorneys reasonable and sufficiently supported—but by correctly listing on its lodestar staff attorneys that the Thornton Law Firm paid for pursuant to an agreement among co-counsel. As the Special Master acknowledges, names of the staff attorneys were listed on the lodestars such that anyone who placed the

lodestars side by side would immediately realize that certain attorneys' time had been double counted. The idea that this could be intentional deception—an idea which the Special Master advocates —is ludicrous.

C. The Boilerplate Affidavit

Failing to find any true evidence of deception—because there was none— the Special Master rests his case for Rule 11 sanctions and professional misconduct on immaterial misstatements in a boilerplate affidavit that was provided to all counsel by Labaton. Bizarrely, the Special Master recommends sanctions only for Garrett Bradley even though almost every law firm in this matter used an identical boilerplate affidavit and therefore could be held responsible—under the Special Master's dubious theories—for similar misstatements. Even stranger, after characterizing the Chargois matter as "[t]he most troubling issue in this case," R&R at 303, the Special Master declines to recommend any sanctions or disciplinary action related to Chargois, but recommends a massive sanction of Garrett Bradley for his role in an inadvertent error that was obvious to anyone who closely read the submissions to the Court.

Garrett Bradley's statements are described in further detail herein, but as an example, the Special Master faults the Thornton Law Firm for stating the rates in the lodestar "have been accepted in other complex class actions." The Special Master's criticism is that the rates for the *individual* staff attorneys listed in the Thornton Law Firm's declaration had not previously been accepted in class actions for those *individual* staff attorneys. Of course, the sentence is intended to convey that the rates for the staff attorney *role* had been accepted in other class actions— which is true— and not that particular staff attorneys had previously performed document review for those same rates in other class actions. The Special Master alleges "deception" with respect to Garrett Bradley, but his investigation made no attempt to inquire whether each of the 20 staff attorneys listed in Lieff's affidavit and each of the 35 staff attorneys listed on the Labaton

affidavit (as well as all of the attorneys in the ERISA firms' declarations) had ever been listed on a lodestar at the same rate.

The fact of the matter is that the rates for Thornton Law Firm staff attorneys—which ranged from $425 to $500 with a weighted average (overall fees divided by overall hours) of $428— was **lower** than both the range and weighted average of the Lieff staff attorneys, $415 to $515, and $438, respectively. As Prof. Rubenstein testified, rates of up to $550 have been accepted for staff attorneys in class actions. Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1). What is more, the Special Master himself found that the staff attorneys' rates in this matter—which for Lieff ranged up to $515—were reasonable. *See* R&R at 176-81.

In what appears to be the crux of his case against Garrett Bradley, the Special Master presents the Court with an opinion from the Rhode Island Supreme Court, *In re Schiff,* which he claims is "eerily similar" to the case at bar. *See* R&R at 244. Nothing can be further from the truth. In *Schiff*, there were not immaterial misstatements in a boilerplate affidavit, but a "grossly inflated" lodestar in a fee-shifting case. The attorney in *Schiff* sought costs and fees 47 times greater than amount of her client's recovery—4,000 billable hours for a case that was "based on a relatively simple sequence of events occurring over a limited period of time." The Court found that "The billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] *sought payment for time not worked*." *Matter of Schiff*, 677 A.2d 422, 423 (R.I. 1996) (emphasis added). In this case, however, the Special Master has made no finding whatsoever of false or unreasonable billings—indeed, to the contrary, he has concluded that "the total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable." R&R at 216. The extensive reliance on *Schiff* is indicative of the fact that the Special Master and his

counsel have acted, and are acting, as overly-aggressive litigants who are accusing their perceived adversaries of not being candid with the Court.[4]

D. Michael Bradley

The Special Master finds that "the total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable," R&R 217, and that such time "is supported by reasonably reliable contemporaneous time records." R&R at 366. The Special Master's concern is not with hours, but with Michael Bradley's rate as listed on the lodestar ($500 per hour), because Bradley's work "most closely resembles that of a junior level associate." R&R at 196. Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in the Report ($325 to $725 per hour). R&R at 164. Moreover, it is substantially less than the $415 per hour rate of another staff attorney who performed exactly the same work and, like Michael Bradley, performed it remotely. There is no basis for reducing Michael Bradley's rate by 50% when the Special Master himself found that staff attorney rates of up to $515 were reasonable in this very case. *See infra* § VII. Even if Michael Bradley's rate is reduced (whether to the rate of the other Thornton Law Firm staff attorneys, or to the $415 per hour rate of the staff attorney who performed exactly the same work, or to the Special Master's arbitrary $250 per hour), the effect on the lodestar and multiplier, as discussed herein, is completely immaterial to the attorneys' fee award.

E. Contract Attorneys

[4] As further detailed herein, the Report and Recommendations is replete with mischaracterizations of the record and propositions that unreasonably stretch the meaning of their purported supporting authorities.

The Special Master recommends that the time agency/contract attorneys expended reviewing State Street's documents—the same work performed by staff attorneys—should be listed as a "cost" rather than as a legal service on Customer Class Counsel's lodestars. The Special Master has **failed to identify a single case** holding that contract attorneys must be charged as expenses. When Customer Class Counsel provided the Special Master with various case law demonstrating that agency/contract attorneys—who are, in terms of work performed and qualifications, entirely indistinguishable from firm-hired staff attorneys—are properly included in fee applications at an hourly rate, the Special Master said that he would simply agree to disagree with those courts. But he has done more here, for he falsely asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue," R&R at 187, which **is simply not true**. Case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar. *See infra* § VI. The Special Master cites a particular case, *In re Citigroup,* in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically *drew* this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his **market rate**." 965 F. Supp. 2d at 395 (emphasis added). Whatever the Special Master's personal policy preference may be in terms of how work performed by contract attorneys should be accounted for, it is clear that there is no legal or factual basis for his recommendation to this Court that contract attorney work be charged as a cost.

Accordingly, for the reasons set forth more fully below, this Court should reject the Special Master's recommendations. His Report, which relies in large part on the ever-changing

musings of a self-proclaimed "legal expert" from NYU Law School, is replete with clearly erroneous legal and factual findings and should not be the basis for taking any further action against the attorneys in this case. Besides the substantial expense of the investigation itself (as well as lost opportunity costs), the attorneys have already suffered serious reputational harm, and there is simply no fair or legally sensible reason to continue punishing attorneys who achieved such an excellent result for the class.

ARGUMENT

I. The Double Counting Error Was Inadvertent And The Special Master's Recommendation Of $4 Million Disgorgement Is Unjustified

Although the parties to this investigation dispute many issues, one thing on which everyone agrees is that counsel achieved an outstanding result for the class. *See* Exec. Summ. at 7 ("By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class' law firms, a view with which the Special Master wholly agrees.").

Through their diligent and hard-fought prosecution of this matter, Plaintiffs' counsel ensured the return of hundreds of millions of dollars to pension funds subjected to State Street Bank and Trust's standing instruction foreign exchange ("FX") trading practices. The Thornton Law Firm, which brought the first cases involving standing instruction FX trading, played a critical role in this case from inception to resolution, bringing to bear substantial expertise in the subject matter as well as developing the damages theory for the case.

The Thornton Law Firm and its co-counsel also incurred substantial risk in bringing suit against a large, well-funded bank with no guarantee of any recovery. In approving the 25% fee at a hearing on November 2, 2016, the Court remarked:

> [I]n this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain.
>
> The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that.

11/2/16 Hr'g Tr. at 36:2-14 (SM Ex. 78).

In its ruling on November 2, 2016, the Court identified the factors it considered in approving a 25% fee: (1) the reasonableness of the multiplier produced by the lodestar cross-check (1.8); (2) the Court's tendency to award between 20% and 30% in class action common fund cases; and (3) consideration of awards in comparable cases, and, in particular, the reasonableness of the percentage in the context of other First Circuit cases with comparable settlements (*i.e.,* settlements in the $250 million to $500 million range). *Id.* at 35:3-36:2. The Court's approval of the 25% fee was consistent with its initial remarks during the pre-filing hearing on June 23, 2016, at which the Court stated that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

Throughout the investigation and in his Report, the Special Master likewise recognizes the tremendous efforts of counsel that produced this substantial settlement. Noting the "risks, complexities and legal challenges inherent in the litigation," the Special Master concludes in his Report that the skill and dedication of counsel produced "an excellent result for the class," and was an "undeniable accomplishment" by counsel engaged in "fine and highly effective lawyering." R&R at 6-7. Specifically as to Thornton, the Special Master finds that the rates listed for Thornton partners and associates were justified and reasonable in light of the complexity of the case, R&R at 175; that the number of hours listed for Thornton partners and

associates was justified and reasonable, R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); and that the number of hours listed for Michael Bradley also was reasonable. R&R at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable").

A. The Double Counting of Staff Attorney Hours Was Inadvertent And Not Thornton's Fault

As the Special Master concludes, and as all firms confirmed numerous times during the investigation, the double counting errors made in the fee declarations submitted to the Court were inadvertent. R&R at 7, 352, 363. Without question, the mistakes in the fee declarations should have been caught before filing. But the failure to do so was just that: a mistake. Within two days of realizing the double counting, counsel submitted a letter to the Court alerting it to the errors. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). As explained below, these inadvertent errors in the lodestar calculation, while unfortunate and regrettable, have no impact on the reasonableness of the attorneys' fees awarded pursuant to the percentage of fund method in this case. The impact of these mistakes on Customer Class Counsel already has proven significant, costly, and lasting. Further redress for these inadvertent errors would be needlessly punitive, and is unwarranted.

B. The Proposed "Disgorgement" of $4,058,000 Is Unjustified And Misapprehends the Function of the Lodestar Cross-Check

Despite expressly finding that the errors in the fee declarations were inadvertent, the Special Master asserts that the three firms must "disgorge[]," in equal shares, the amount at issue ($4,058,000),[5] and that the amount should be "returned" to the class. R&R at 364. The Special

[5] The exact amount at issue as a result of the double counting error is $4,058,654.50. *See* Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). However, the Special Master uses a rounded amount ($4,058,000) throughout his Report. Accordingly, undersigned counsel uses the rounded figure ($4,058,000) herein.

Master's terminology reveals the logical fallacy that underlies his conclusion. The attorneys were not paid $4,058,000 that otherwise would have gone to the class. The Special Master's recommendation that Customer Class Counsel "disgorge[]" this amount is based on a fundamental misunderstanding of how attorneys' fees were awarded in this case, and specifically of the function of the lodestar cross-check.

As the Court knows, and as the Special Master acknowledges, R&R at 143-46, the attorneys' fee award in this case was calculated using the percentage of fund method (also called the "common fund" method), which is typically used in cases in the First Circuit.[6] Under the percentage of fund method employed by the Court in this case, the lodestar numbers submitted by counsel **are not the basis for counsel's fee award**; the percentage granted by the court is. *See* Rubenstein Decl., 7/31/17, at ¶¶ 13, 17, 18 (TLF Ex. 1); Rubenstein Decl., 6/20/18, at ¶¶ 18-19. The lodestar cross-check is used **only** as a means of verifying the reasonableness of the percentage of the recovery being awarded to the attorneys. Rubenstein Decl., 6/20/18, at ¶ 18-19. If there are errors in the lodestar, the only inquiry the court must perform is to analyze the revised lodestar number and its impact on the multiplier. Rubenstein Decl., 6/20/18, at ¶¶ 19-20;[7] *see also* Rubenstein Decl., 7/31/17, at ¶ 15 (TLF Ex. 1) ("[U]sing a lodestar cross-check

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6 *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995) (cited in the Report at p. 144); Rubenstein Decl., 7/31/17, at ¶¶ 13, 17 (TLF Ex. 1).

7 Professor Rubenstein explains the relevant authority as follows: *In re Polyurethane Foam Antitrust Litig.,* 168 F. Supp. 3d at 1013 (reducing lodestar in cross-check in part because of contract attorney rate and then re-assessing acceptability of new multiplier); *In re: Cathode Ray Tube (CRT) Antitrust Litig.,* No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("[E]ven if the Court were to reduce the Plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an acceptable range. . . . A lodestar reduction is unnecessary when the effect on the multiplier is not material."); *In re Citigroup Inc. Bond Litig.,* 988 F. Supp. 2d 371, 378 (S.D.N.Y. 2013) ("If the Court reduces the blended hourly rate for staff attorneys to $300—a rate that appears to be either appropriate or slightly high—the modified lodestar is approximately $73.5 million. Such a reduction would make the multiplier closer to 1.59. Assuming even a blended hourly rate for staff attorneys of $250—perhaps somewhat on the low end—the result is a modified lodestar of approximately $65 million and a multiplier of nearly 1.8. All of these figures are within the range of reasonableness. The lodestar cross-check has therefore performed its function, satisfying the Court that an award of 16%—which it has already determined represents a reasonable percentage of the settlement fund—adequately compensates plaintiffs' counsel for their time and effort based on

enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall."). Errors in the lodestar—and particularly if they are inadvertent and self-disclosed—do not warrant return of monies to the class as long as they do not have a material effect on the multiplier and the multiplier is still reasonable. Rubenstein Decl., 6/20/18, at ¶¶ 19-20. The Special Master does not seem to understand this concept. The First Circuit is **not** a lodestar-based jurisdiction, where fees are awarded solely on the attorney's hours and rates. Yet the amount the Special Master recommends be "disgorged" is the amount of the **lodestar** that was inadvertently double counted. When the fee is *percentage-based*, as it was here—which the Special Master does not dispute (Exec. Summ. at 7)—it is black-letter law that the attorneys are not paid dollar-for-dollar for time they submit to the Court. Instead they are paid a percentage of the recovery in the case, with lodestar information only supplied to cross-check the reasonableness of that percentage. As long as the percentage remains reasonable, the fee is reasonable. The Special Master repeatedly admitted that the fee in this case was reasonable and therefore he has no basis—nor is there basis in logic or case law—to recommend "disgorgement" of monies based on inaccurate lodestar numbers.

Indeed, the Special Master's recommendation that the firms "disgorge[]" an amount corresponding to errors in their lodestar submissions is incomprehensible given the role of the lodestar in the fee award in this case. To properly measure the effect of the lodestar mistake, it is only necessary to revisit the two-step lodestar cross-check inquiry. This means reducing the raw

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estimations of reasonable market rates and factoring in an appropriate multiplier."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009) ("[I]f the charges for the contract attorney time were decreased, the multiplier in this case would still be a reasonable multiplier."); *In re Royal Dutch/Shell Transp. Sec. Litig.,* No. CIV.A. 04-374 JAP, 2008 WL 9447623, at *32 (D.N.J. Dec. 9, 2008) ("Even if Lead Counsel reduces plaintiffs' counsel's total lodestar by $7,287,396.25 (the lodestar of the discovery attorneys employed by Lead Counsel)—from $56,891,317.50 to $49,603,921.25—that reduction increases the multiplier only from 1.002 (based upon the total fee of $57 million) to 1.15, an immaterial difference.").

lodestar to account for the errors, recalculating the multiplier, and then reassessing whether that multiplier is still reasonable in the context of the percentage award. Numerous courts in cases in which lodestars have been adjusted post-filing have addressed the issue this way.[8]

This reassessment, as applied to the attorneys' fee award in this case, undeniably shows that, even assuming *arguendo* that *all* of the Special Master's proposed reductions to the overall lodestar should be made, the 25% fee award remains reasonable and entirely justified by the lodestar cross-check:

- Reducing the lodestar by the double counted time ($4,058,000) results in a multiplier increase from 1.8 to **2.01**. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1).

- Reducing the lodestar by (1) removing the double counted time and (2) adjusting the lodestar to reflect contract attorney time as an expense results in a multiplier increase from 1.8 to **2.07.** Rubenstein Decl., 6/20/18, at ¶ 19.

- Reducing the lodestar by (1) removing the double counted time, (2) adjusting the lodestar to reflect contract attorney time as an expense, and (3) adjusting Michael Bradley's hourly rate to $250 results in a multiplier increase from 1.8 to **2.07.**[9]

Every one of these hypothetical multipliers is well within the range of reasonableness for a class action case of this size, duration, and complexity. Lodestar cross-check multipliers as high as 4 have been accepted in similar cases. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1) (concluding that a multiplier of 2.01 "falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past" and "fully supports the reasonableness of the fee the Court awarded Counsel in this matter"); *see also* Rubenstein Dep., 4/9/18, at 56:24-57:2, 216:1-218:4 (SM Ex. 235) (concluding that "for what the attorneys accomplished here a two multiplier is a perfectly reasonable—in fact, quite a modest fee for them," describing

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8 *See supra* footnote 7.

9 The value of the double counted time is taken from the Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). The contract attorney adjustment is taken from the Report and Recommendations at 367.

the factors underscoring the multiplier in this case, and opining that "**I wouldn't have been surprised in a 300-milllion-dollar settlement to see a three or a four multiplier.** I should add multipliers are often higher the higher the settlement. And so I wouldn't have been surprised, and I think it would have been justified to see a three or four.") (emphasis added); Rubenstein Decl., 6/20/18, at ¶ 19 (finding that a 2.07 multiplier, which results if double-counted and contract attorney time are removed, is "fully reasonable, indeed modest").

The Special Master's proposed disgorgement of the lodestar cross-check errors misapplies the applicable law and would result in an unfair and unsupportable result. The inadvertent lodestar errors simply do not materially affect the result of the lodestar cross-check and, therefore, do not affect the reasonableness of the fee.

C. Thornton Is Not Responsible For The Inadvertent Double Counting

The Special Master concludes that Labaton bears "ultimate responsibility" for the double counting because, as lead counsel, it had a duty to cross-check the individual fee petitions of the firms, but failed to do so. Exec. Summ. at 18-19.

Despite concluding that Labaton bears ultimate responsibility for the inadvertent double counting errors, the Special Master recommends that Labaton, Lieff, and Thornton should equally share the remedy he proposes to address the errors, *i.e.,* the "disgorgement" of $4,058,000. As discussed above, disgorgement is unjustified and misapprehends the function of the lodestar cross-check. The double counting errors simply have no material effect on the cross-check, and the multiplier that results when those hours are excluded is well within the range of reasonableness.

The Special Master contends that a remedy is necessary to address the inadvertent double counting, but imposing that remedy on Thornton would be unjustified for reasons additional to the ones stated above. The Special Master attributes the double counting mistakes in the fee

declarations to two core failures: (1) Labaton's failure to inform its partner preparing the omnibus fee declaration, Nicole Zeiss, of the firms' agreement to share the cost of staff attorneys; and (2) the failure of the firms to reduce their agreement regarding the staff attorneys to writing. R&R at 363.

The Special Master also concludes that, as to the firms' agreement to share the cost of staff attorneys, Thornton reasonably understood that it would list the staff attorneys for whose work it paid in its lodestar, and that "at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate[.]" *See also id.* at 220-21, 363 (Special Master concluding "there is sufficient evidence in the record to find that at least some attorneys at both Labaton and Lieff believed that the staff attorneys paid for and allocated to Thornton would be included on Thornton's lodestar petition.").[10]

The Special Master further notes that correspondence contemporaneous with the drafting of the November 10, 2016 letter to the Court, and the November 10, 2016 letter itself, showed Labaton and Lieff acknowledging that the inadvertent double counting was in **their** lodestars, not Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)).

Despite these findings, the Special Master concludes that Thornton shares in the "responsibility" for the double counting errors because Garrett Bradley did not adequately describe the firms' staff attorney agreement in his declaration. Exec. Summ. at 15-16. The

[10] *See also* Thornton Law Firm's Resp. to SM, 11/3/17 (TLF Ex. 2); Thornton's Resp. to Request for Add'l Submission, 4/12/18 (TLF Ex. 3); B. Kelly Ltr. to Sinnott, 4/17/18 (TLF Ex. 4).

statements in Garrett Bradley's declaration are discussed in detail elsewhere in this response. *See infra* § III(B). The Special Master concludes that Thornton shares responsibility for the "administrative confusion" that led to the double counting because it did not modify the boilerplate language in the Labaton-prepared template declaration. Exec. Summ. at 19. This conclusion is wholly speculative, without any basis in the Record, and logically inconsistent.

The Special Master concludes, without **any** supporting evidence, that "[i]t is probable that, had Thornton's petition contained fully truthful and accurate statements describing the actual affiliation and rates of the loaned staff attorneys and agency attorneys, Labaton Settlement Attorney Nicole Zeiss, or the Court, would have been alerted that something was amiss and thereby have detected the double-counted hours." Exec. Summ. at 16. The Special Master drew this conclusion (and went so far as to deem it "probable") despite having never asked Nicole Zeiss—who sat for two depositions in this investigation—what would have happened if Thornton had modified the boilerplate language.

Moreover, this wholly speculative assertion is contradicted by the Special Master's own conclusion that Labaton "fail[ed] to perform a side-by-side comparison" of the declarations. R&R at 56 n.39. It is difficult to imagine, and impossible to conclude based on any fact, that modified boilerplate language would have led to a different result when a basic side-by-side comparison was not done.[11] If a simple comparison of the fee declarations would have revealed the double counting, as the Special Master concludes, it was Labaton that should have, but did not, perform this comparison. *See* Exec. Summ. at 19.

[11] Indeed, Nicole Zeiss testified that, while some firms changed the language in their fee declarations, she did not discuss any changes with any firm, and does not recall whether she noticed the changes before filing, or only after the fact. Zeiss Dep., 6/14/17, at 42:22-43:14 (SM Ex. 79).

The Special Master also concludes that because Labaton did not circulate the individual declarations among the group, the other law firms were not in a position to notice and rectify the double counting.[12] *See* R&R at 224. Though the Special Master mentions only Lieff and ERISA Counsel, the record is clear that Thornton also did not see any other firm's fee declaration before Labaton filed the omnibus fee declaration—and therefore Thornton, like Lieff and ERISA Counsel, did not have an opportunity to identify the double counted time before filing. Evan Hoffman of Thornton confirmed this in response to the Special Master's explicit inquiry during his deposition:

> THE WITNESS: And then it was sent back to Labaton for their review and maybe an edit or two and that was the last we saw of it until it was submitted on ECF for the final, when it was actually given to the judge.
>
> JUDGE ROSEN: You never saw Labaton's fees or Lieff's fees in the declaration?
>
> THE WITNESS: Correct.
>
> JUDGE ROSEN: In the actual fee declaration, did you ever see their fees?
>
> THE WITNESS: No, not until it was already filed.
>
> JUDGE ROSEN: Not until it was filed?
>
> THE WITNESS: Correct.

Hoffman Dep., 6/5/17, at 94:18-95:10 (SM Ex. 63).[13]

The inadvertent double counting of staff attorney time was undoubtedly a regrettable mistake. The evidence in the record, however, does not support holding Thornton accountable

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[12] The Special Master uses the term "double-billing," not "double counting," here. R&R at 224. To be clear, there was no "billing" in this case. This repeated wording is a conscious choice of the Special Master and further demonstrates his fundamental misunderstanding of the purpose of the lodestar cross-check in a percentage of fund scenario. Rather, as described in detail *infra,* the submission of fee declarations showing the time spent on the case was made in conjunction with the lodestar cross-check that was used to support, **not replace**, the percentage of fund method by which attorneys' fees were awarded.

[13] The Special Master does not mention this piece of relevant testimony in the Report, wrongly inferring, and suggesting that the Court infer, that Thornton had an opportunity to review the other firms' fee declarations prior to filing.

for these errors. To the contrary, Thornton acted consistent with the firms' agreement regarding staff attorneys. Even if there was imperfect knowledge of this agreement within the other law firms, due to compartmentalization or other issues, it does not mean that Thornton acted unreasonably. As the November 10, 2016 letter to the Court and contemporaneous correspondence stated, the inadvertent double listing of these staff attorneys' time occurred on the Labaton and Lieff lodestars, not on Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)). And as the Special Master also concludes, the duty to review and cross-check the individual petitions belonged to Labaton, which, as lead counsel, was responsible for drafting and submitting the omnibus fee declaration to the Court. It is notable and illogical that, unlike his suggestion for Thornton and Garrett Bradley, the Special Master proposes no Rule 11 sanction for Labaton despite finding that Labaton "was ultimately responsible for preparing an accurate and reliable fee petition that the Court could rely upon" and failed in its responsibility to ensure the accuracy of the papers it filed with the Court. Exec. Summ. at 19.[14]

As a result of the double counting mistake and this ensuing investigation, the law firms, Thornton included, have no doubt identified areas where there is room for improvement. To that end, the firms jointly proposed a number of best practices recommendations in a submission to the Special Master that, for reason unknown, the Special Master does not include as an exhibit to the Report. *See* Consolidated Resp., 8/1/17, at 20-24 (TLF Ex. 5). Among other things, the firms agreed that, in future complex class cases involving multiple firms, they will report their draft lodestar to lead counsel during the pendency of the litigation, and any firms sharing costs

[14] Such sanction would, of course, be unjustified.

also will review each other's draft fee declarations before filing, so that they can discuss any perceived errors or concerns with all other counsel. *Id.* at 21-22. That did not happen here, and is deeply unfortunate. But hindsight is 20/20, and in light of the record evidence demonstrating that Thornton is not responsible for the double counting, any disgorgement is unjustified.

D. The $425 Per Hour Rate Used By Thornton For Staff Attorney Work Is Reasonable And Justified

The Special Master's Report endorses, with two exceptions, the hours and rates in the firms' fee declarations. The Special Master concludes that, with two exceptions, "the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work." Exec. Summ. at 21-22; R&R at 365-67. The two exceptions are the rate of Michael Bradley and the rate of the agency-employed "contract" attorneys, both of which are addressed *infra* at sections VI and VII.

The Recommendations section of the Report does not recommend any adjustment to the $425 per hour rate assigned to the staff attorneys in Thornton's fee declaration, and none should be applied. However, in the narrative section of the Report, the Special Master states: "Although the Special Master finds nothing unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms, an adjustment of the amounts billed in Thornton's lodestar for staff attorneys will be required."[15] R&R at 181. This sentence is accompanied by a footnote that reads: "Fees for these staff attorneys will be calculated at the same rate as they were billed on the Labaton and Lieff petitions." *Id.* at n.150.

[15] The terminology used here—"billed in Thornton's lodestar"—demonstrates the Special Master's continued confusion of lodestar as the basis of a percentage award cross-check with lodestar as the direct basis for a fee.

Although the Special Master does not ultimately recommend any adjustment to the lodestar on this basis, because his earlier remarks in the narrative section of the Report may be read to call for a reduction, Thornton addresses the reasonableness of the $425 per hour rate as follows.

First, the $425 per hour rate assigned to staff attorney hours by Thornton is an empirically reasonable rate, within the range of court-accepted rates for staff attorney work. In his expert declaration submitted to the Special Master with the Law Firms' Consolidated Submission on August 1, 2017, Harvard Law School Professor William Rubenstein cites empirical research showing that courts have accepted staff attorney rates in the range of $250-$550 per hour in a dozen class action cases decided since 2013. *See* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1); *see generally id.* at ¶¶ 34-38.

Moreover, contrary to the Special Master's assertion that this rate evidenced the "unempirical nature" of the rates used by Thornton, R&R at 70, the Southern District of New York accepted $425 per hour as a rate for staff attorney work in **another FX trading class action case**, *In re Bank of New York Mellon Corp. Forex Transactions Litigation*,[16] a year before the fee declaration filings in this case.

Second, Thornton's use of a $425 per hour rate was reasonable under the circumstances here, and was based on its understanding of previously accepted rates in other litigation and its discussions with co-counsel.[17] Specifically, the Special Master finds that Thornton understood, at the time of the filing of the State Street fee application, that the $425 per hour rate had been

[16] Referred to herein as *BNY Mellon*.

[17] *See also* Hoffman Dep., 6/5/17, at 59:5-12 (SM Ex. 63) ("It was suggested by Dan Chiplock of Lieff and Mike Rogers of Labaton, that we should use for purposes of fee petition rates that had been approved by Judge Kaplan in the Mellon case for the reviewers, which was $425 an hour and that was what was put in on Thornton's end.").

used by Lieff and had been accepted by the Court in the *BNY Mellon* case. R&R at 70. The Special Master further finds that Thornton believed Lieff to be suggesting this rate in the State Street case, R&R at 180 n.146, as Lieff itself surmised in deposition testimony referencing an email exchange between Lieff, Labaton, and Thornton after the staff attorney work was completed:

> And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425.

Chiplock Dep., 6/16/17, at 184:20-25 (SM Ex. 10) (discussing 9/11/15 Email, LCHB-0052627 (SM Ex. 192)).[18]

Without any other basis, the Special Master unreasonably suggests that the passage of time between this email (September 2015) and the filing of fee declaration (September 2016) makes the email less reliable. Such a conclusion ignores the fact that the staff attorneys' work on the case was fully completed as of July 2015, when the parties reached an agreement in principle to settle the case. Although it took more than a year for the parties to finalize the settlement and appear before the Court, the agreement in principle and thus the conclusion of substantive work on the matter, including the document review, was reached in the summer of 2015. Accordingly, it is neither surprising that counsel were discussing their eventual lodestar petitions at this time in 2015, nor is it unreasonable for Thornton to have relied on this information in preparing its fee declaration. Because Labaton did not circulate the fee declarations among the parties before filing, R&R at 224, Thornton did not know that Labaton and Lieff were applying staff attorney rates different from $425 per hour. While perhaps a more perfect practice would have been to

[18] For unknown reasons, the Special Master does not cite this deposition testimony in his discussion of the issue, but it immediately follows the portion of Mr. Chiplock's testimony he does cite. *See* R&R at 180 n.146 (citing to Chiplock Dep., 6/16/17, at 182:5-183:5 (SM Ex. 10)).

exchange this information prior to filing, Thornton reasonably relied on an established, court-accepted hourly rate. It did not simply pluck $425 per hour out of thin air.

Third, applying the Special Master's proposed formula for adjusting the $425 per hour rate (*i.e.,* that the rates on the Labaton and Lieff petitions should be used instead (R&R at 181 n.150)) would not result in any material difference to Thornton's lodestar, much less the overall lodestar or the multiplier resulting from the cross-check. As to staff attorneys overlapping with Labaton, reducing their rates on Thornton's position would result in a cumulative reduction of $412,627 from Thornton's lodestar (5.5% of the Thornton lodestar submitted to the Court, and less than 1% of the overall lodestar submitted to the Court). As to staff attorneys overlapping with Lieff, using Lieff's rates for the staff attorneys on Thornton's lodestar would result in no reduction.[19]

Finally, reducing Thornton's lodestar to adjust the rates as suggested by the Special Master would result in an unjustified double reduction, as overlapping time billed at a higher rate was already accounted for in the double counting reduction. In the November 10, 2016 letter to the Court alerting it to the double counting errors, David Goldsmith of Labaton explained that, "[w]hen a given SA [staff attorney] had different hourly billing rates, we removed the time billed at the higher rate." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178). This approach was not taken because the firms believed that the time on Thornton's lodestar was less legitimate—to the contrary, at least "some attorneys at Labaton, Lieff and Thornton independently assumed that Thornton would claim the SA time on its lodestar." R&R at 220. Rather, the firms took a lowest-rate approach to reducing the overlapping time as a conservative measure.

[19] This is because, as the Special Master notes, Lieff billed two of the overlapping staff attorneys at a rate of $515 per hour. R&R at 180 n.147.

The Special Master at one point suggests that Thornton's use of a rate of $425 per hour for staff attorneys was so unreasonable as to warrant "adjustment" of Thornton's lodestar. Ultimately, perhaps in recognition of the empirical evidence and record evidence that $425 per hour was a reasonable rate, or perhaps having calculated the *de minimis* effect such adjustment would have—or perhaps both—the Special Master does not recommend any reduction to Thornton's lodestar on this basis. Indeed, the Special Master concludes that the hours and rates in Thornton's lodestar (excepting the rates for Michael Bradley and contract attorneys) are "reasonable and accurate." Exec. Summ. at 21-22; R&R at 365-67.

II. Garrett Bradley Did Not Intentionally File A False Declaration

The Special Master's erroneous conclusion that Garrett Bradley intentionally lied to the Court relies on a blatant mischaracterization of the factual record and a fundamental misunderstanding of the fee allocation among counsel.

A. There Was No Motivation To Deceive Co-Counsel

The Special Master's primary "support" for the proposition that Garrett Bradley intentionally lied to the Court is what he perceives as evidence of motivation. In particular, the Special Master finds:

> [T]he statements were false, and the false statements were not due to simple negligence, but rather Bradley intentionally and willfully identified the SAs in his Declaration as members of his firm and that their hourly rates were the same as the firm's regular rates charged for their services. Bradley's motivation for making the false statements is clear and well supported by the record. The record evidence shows that Bradley intentionally sought to "jack up" Thornton's individual firm lodestar vis-à-vis the other Customer Class firms, and representing the SAs as members of Thornton with billing rates of $425 an hour ($500 an hour, in the case of Michael Bradley) was the way to do it.
>
> R&R at 233.
>
> **

> [T]he Special Master concludes that Bradley deliberately and intentionally misrepresented the make-up of Thornton's professional staff and their hourly rates so that Thornton's lodestar petition would be grossly inflated.
>
> R&R at 234-35.
>
> **
>
> [T]he Special Master has found that Garrett Bradley's statements in his sworn declaration that accompanied the Thornton fee petition were knowingly false, and that they were motivated by a desire to greatly enhance the Thornton lodestar and thereby justify a larger fee award . . . .
>
> R&R at 364.

In short, the Special Master has concocted a story in which the Thornton Law Firm claimed staff attorneys as employees in order to deceive co-counsel into paying more of the aggregate fee to Thornton. This is wrong on many levels: (1) Lieff, Labaton, and Thornton jointly developed a plan to perform the necessary review of the millions of pages of State Street documents— neither Lieff nor Labaton ever stated they were deceived; (2) the boilerplate affidavit signed by Garrett Bradley was provided by Labaton; (3) the Special Master found that attorneys at all three firms understood that staff attorneys for which Thornton paid would be included on Thornton's lodestar; (4) the final fee agreement among the firms was executed *before* the fee declarations submitted to the Court even existed; (5) the fee agreement between the firms was not directly dependent upon each firm's lodestar; and (6) the fee agreement was a negotiation among sophisticated and experienced parties who had agreed to split the risk—and therefore the reward—of jointly funding the staff attorneys.

The idea that Garrett Bradley intentionally lied by signing an inaccurate boilerplate fee declaration (that he did not draft) in order to deceive co-counsel defies logic. The Special Master's conclusion is squarely contradicted by the fact that, in the course of a $3.8 million investigation, the Special Master did not uncover a shred of evidence that co-counsel was or felt

that it was deceived. There is no citation anywhere in the Report and Recommendations for this proposition because there is no such evidence; not a single Lieff or Labaton witness stated that the firms were in any way deceived by the Thornton Law Firm's fee declaration or lodestar.[20] The Special Master's motivation argument further hinges on the dubious claim that Garrett Bradley deceived co-counsel by signing (and not modifying) a boilerplate affidavit that co-counsel itself (Labaton) provided to the Thornton Law Firm. It simply does not make sense that Garrett Bradley would try to fool co-counsel by signing a declaration with language prepared by co-counsel.

The Special Master's conclusion that the Thornton Law Firm included staff attorneys on its lodestar in order to deceive co-counsel also **directly contradicts** the Special Master's finding that there was an understanding among attorneys at all three firms that Thornton would include staff attorneys on its lodestar. *See* R&R at 45 n.27 ("Some of the attorneys from Labaton, Lieff, and Thornton, however, independently made assumptions based on the circumstances that Thornton would claim those staff attorneys' time on its lodestar."); *id.* at 363 ("[C]ontemporary email traffic, the billing practices and deposition testimony all bear out that at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate . . . ."). *See also* Lieff's Resp. to Interrog. No. 34, 6/1/17 (SM Ex. 57) ("[I]t was the Firm's understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne

[20] Strangely, the Special Master insinuates that there was something nefarious about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. Yet Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage. In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%.

financial responsibility."); Lieff's Resp. to Interrog. No. 32, 7/10/17 (TLF Ex. 6) ("With respect to Staff Attorneys, the Firm's understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any attorney hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment.").

If attorneys at all three firms understood that Thornton would list the staff attorneys on its lodestar, it is unclear what possible motive there could have been to deceive, as all firms were operating under the same assumption. The Special Master also concluded that the double counting error was "largely inadvertent and the result of a combination of Labaton's internal compartmentalization . . . and a lack of any formal agreement." R&R at 363. It therefore makes no sense to suggest that Garrett Bradley could have *intentionally* caused an *inadvertent* error by signing a boilerplate affidavit.

In finding that Garrett Bradley was motivated to lie on the fee declaration to deceive co-counsel, the Special Master glosses over the incontrovertible chronology of the case. By the time the fee declaration was submitted to the Court, Customer Class Counsel had already decided upon a final division of fees. **There was no way in which the fee declaration submitted to the Court could have affected the proportion of the overall fee which Thornton would receive.** Here, some background is necessary. As the Special Master concedes, in 2011, "[a]t the inception of the case, Customer Class Counsel had agreed to a fee sharing arrangement pursuant to which Labaton, Lieff, and Thornton would each be entitled to 20% of any fee award, with the remaining 40% to be distributed at the end of the litigation . . . ." R&R at 51.

The Special Master does not explicitly say so but appears to believe that the remaining 40% was to be divided up among Labaton, Lieff, and Thornton based on the firms' lodestars

submitted to the Court on September 15, 2016. This was not the case. The final fee agreement among the firms was executed in August 2016, **prior to** the existence of the fee declarations or lodestars submitted to the Court in September 2016. *See* Chiplock Dep., 9/8/17, at 135:7-9 (SM Ex. 41) ("[T]he fee allocation agreement was reached in late August of 2016 . . . ."); Chiplock Dep., 6/16/17, at 131:5-9 (SM Ex. 10) ("So that was divvied up formally before we actually submitted the fee petition."); G. Bradley Dep., 6/19/17, at 46:24-47:2 (SM Ex. 43) ("[T]he fact of the matter is we had a fee agreement in place in August of '16 before we filed the fee application."); 8/30/16 Email, TLF-SST-032696 (TLF Ex. 7) ("Please see the attached fully executed fee agreement in the State Street matter."). Not surprisingly, this important piece of the chronology is absent from the Report.

The final fee agreement provided that of the total fee to be divided among Customer Class Counsel, Labaton would receive 47%, Thornton would receive 29%, and Lieff would receive 24%. *See* Final Fee Agreement, TLF-SST-056305, (TLF Ex. 8). As demonstrated by the below chart, the fee agreement did **not** track the final lodestar agreement. Although Thornton's lodestar was smaller than Lieff's, Thornton received a larger portion of the fee split than Lieff did:

	Agreed Fee Split of Customer Class Counsel (August 2016)	Percentage of Customer Class Counsel Total Lodestar (September 2016)
Labaton	47%	50%
Thornton	29%	22%
Lieff	24%	28%

This is illustrative of a broader point: which staff attorneys were on which lodestar did not at all control the allocation of the fee among counsel. All of the staff attorneys could have been listed on Lieff's or Labaton's lodestar, or all of the staff attorneys could have been listed on Thornton's lodestar—no matter who was on which lodestar, the fee allocation among counsel had already

been determined by negotiations among the three firms.[21] The purpose of the lodestars submitted to the Court on September 15, 2016 was not to set an allocation among counsel but simply to provide backup so that the Court could engage in a "cross-check" and determine whether the aggregate fee of 25% was reasonable. The Special Master refuses to acknowledge this important point.

In terms of rates, the Special Master ignores that some of Lieff's staff attorneys were actually billed at $515[22] and that **the weighted rate (i.e., total fees divided by total hours) for Thornton staff attorneys ($428) was actually lower than the weighted rate for Lieff staff attorneys ($438)**. If the weighted rate is limited to the "double counted hours," **the Lieff weighted rate is $50 per hour greater than the Thornton weighted rate.**[23] It's difficult to see

[21] The Special Master finds something troubling in the fact that there was "intertwining of the fee negotiations in the two cases [*BNY Mellon* and the State Street litigation]" as between Lieff and Thornton. *See* R&R at 52-53. The Special Master's "view [of Bradley intentionally making false statements in Thornton's fee declaration] is informed by the email exchanges between Bradley and Chiplock in which Bradley conveys his belief that Thornton did not receive a fair share of the *BONY Mellon* fee, in part because its lodestar was too low." R&R at 233 n.179. The fee agreement, which was finalized prior to the submission of the lodestars, was negotiated by sophisticated counsel who had entered into a cost-sharing agreement at the beginning of the litigation and who had finalized the fee division prior to submission of the lodestar. It would have been unremarkable (and certainly not cause for any kind of concern) if the fee allocation in the *BNY Mellon* case informed the negotiations among counsel in the State Street matter. The fee allocation among counsel would have **no effect** on the overall amount of attorneys' fees the class would pay to its attorneys.

[22] There are misrepresentations in the Special Master's report with respect to the staff attorney rates. At footnote 134 on page 169, the Special Master states that "Lieff Cabraser staff attorneys were billed at $415, except for two staff attorneys (Joshua Bloomfield and Marissa Oh) who were charged at $515." At page 169 in the text, he states "With the exception of two Lieff staff attorneys, those [staff attorney] rates landed mainly between $335 and $440." Both of these statements are false. Five Lieff staff attorneys were billed at $515, not two. *See* Lieff Decl., 9/14/16, Ex. A (SM Ex. 89). The Special Master himself acknowledges this in another part of his report on page 176: "Lieff's report listed twenty staff attorneys, five of whom were billed at $515 per hour . . . ." There is another misrepresentation on page 181. There, referring to the double counted staff attorneys, the Special Master states "The attorneys were billed by Labaton at Lieff at hourly rates ranging from $335 to $415." Again, this is false. As the Special Master acknowledges in footnote 147 on page 180, "Lieff billed two [double counted] staff attorneys – Ann Ten Eyck and Rachel Wintterle – at $515 per hour." In any case, there is no material difference between the Thornton billing rate for staff attorneys, $425, and the rate at which Lieff billed most of its staff attorneys, $415.

[23] Calculated according to the double-counted hours set forth in 11/9/16 Email, TLF-SST-032267 (SM Ex. 261). According to that email, no hours were double counted for McClelland and Weiss. To be conservative, double-counted hours for Wintterle and Ten Eyck are the lower of the hours on either the Lieff or the Thornton lodestar since "Rachel Wintterle and Ann Ten Eyck should not have been included in LCHB's lodestar at all,"

how Thornton could deceive Lieff when Lieff's effective staff attorney rate was higher than Thornton's. More broadly, the Special Master's laser focus on the $425 per hour rate[24] blinds him to the fact that by almost every metric, Thornton's rates were lower than one or both of co-counsel:

RATES	Average Partner	Weighted Partner	Average Staff Atty	Weighted Staff Atty
Labaton	$905.00	$861.13	$380.42	$376.59
Lieff	$765.50	$690.73	$440.00	$438.02
Thornton	$721.25	$694.36	$428.13	$427.87

Particularly noticeable is that both the average partner rate and weighted partner rate is more than $150 higher for Labaton than for Thornton. In none of the four categories listed above is Thornton the rate leader. This is hardly demonstrative of a law firm that is trying to inflate rates to deceive co-counsel (or the Court).[25]

Even if the fee agreement was based on the lodestar submitted to the Court (which it was not), the Thornton Law Firm's seeking credit for staff attorneys for which it paid could not possibly have deceived co-counsel—especially when the entire effort related to document review

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but Wintterle's hours were slightly lower on the Thornton lodestar and Ten Eyck's hours were slightly lower on the Lieff lodestar.

[24] As discussed *infra* at Section III(B)(iii), the $425 rate was used for Thornton staff attorneys because it was approved by the Court for Lieff staff attorneys in the most analogous case, *BNY Mellon*. Dan Chiplock had expressly suggested that the $425 rate be used in the State Street litigation. *See* note 34.

[25] One statement the Special Master makes with respect to rates is particularly misleading. He notes in the Executive Summary at page 16, "Indeed, the manner in which Thornton implemented this [cost sharing] agreement appears designed from the inception to exaggerate its lodestar. Thornton specifically reimbursed the other two firms for the staff attorneys and agency lawyers 'loaned' to them on a straight cost-only basis yet subsequently claimed them on its own lodestar report at rates much higher than Thornton had actually paid the two firms in cost reimbursement, and even higher hourly rates than Labaton and Lieff claimed for most of these same staff attorneys on their own reports." Here, the Special Master is concerned about the entirely unobjectionable proposition of billing attorneys above cost. Yet elsewhere in the R&R, the Special Master admits, "[T]here is nothing impermissible about marking up an attorney's billing rate above 'cost' so long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed," R&R at 177. And the Special Master later finds that the billable rate for the staff attorneys was reasonable. R&R at 172, 180.

and subsequent work was jointly planned and executed by the three customer class firms. The Special Master found that "Labaton, Lieff, and Thornton entered into a fee agreement to 'allocate' the costs of certain staff attorneys employed by and working at Labaton and Lieff's offices to Thornton. . . . The purpose of the cost-sharing agreement was to share the cost and risk burdens of the litigation among the three Customer Class firms." R&R at 43. Lieff and Labaton are sophisticated parties. They did not think that Thornton should have borne the risk of paying for staff attorneys during the pendency of the litigation if it was not going to be rewarded for taking on such risk if the litigation was successful. And Lieff and Labaton would not have themselves agreed to the cost-sharing agreement if it was not in their best interest to distribute some of the risk—and therefore some of the reward—to Thornton. *See, e.g.*, Chiplock Dep., 6/16/17, at 129:6-13 (SM Ex. 10); Belfi Dep., 6/14/17 at 51:8-13 (SM Ex. 17); Rogers Dep., 6/16/17, at 91:18-92:16 (SM Ex. 54).

This Court should understand the context of what the Special Master perceives as the "smoking gun"—an email in which Garrett Bradley receives an invoice *from Labaton* for staff attorneys and writes to Michael Thornton and Michael Lesser, "First month bill. . . . This is the best way to jack up the loadstar [sic] . . . ." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64).[26] This email was sent in **February 2015**—more than a year before the fee declaration or lodestar was filed with the Court. What Garrett Bradley is referring to is the fact that if Thornton bore more risk by investing in additional staff attorneys over the course of the litigation in relation to the other firms (and pursuant to the firms' agreement), Thornton would reap a greater reward **in the fee split among counsel** if the litigation was successful. **This would in no way increase the aggregate lodestar submitted to the Court or the amount of fees the class would pay its**

[26] This email is a long thread that continues into March, but the cited email was sent in February.

lawyers. In fact, Bradley is not referring to the aggregate lodestar, but is using shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* Although the Special Master or his counsel may think "jacking up" serves as a great soundbite, the concept is entirely proper and unobjectionable.

It is worth noting that the very same document demonstrates the Thornton Law Firm's attentiveness to avoiding any inaccuracies in the lodestar. Michael Lesser later writes, "Just following up on the doc review recordkeeping. The attached invoice is dated 2/6/2015 (and was sent by email on 2/6 as well) but includes billables through 2/28. Can you ask them to confirm whether these hours billed were for 2/6 – 2/28? **I don't want us to double-count anything**." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64) (emphasis added).

Perhaps what the Special Master really finds objectionable, as his so-called expert witness certainly does, is that plaintiffs' lawyers are interested in their fees. *See* Benjamin Weiser, *Tobacco's Trials*, WASHINGTON POST (Dec. 8, 1996) ("'The plaintiffs' bar is peopled by lawyers who are permanently hungry,' says Stephen Gillers, professor of legal ethics at New York University. 'They're like red ants at a picnic. There are an unlimited number of them, and if the food is good, they'll keep coming at you.'"); Stephanie Clifford and Benjamin Weiser, *In Shift, New York City Is Quickly Settling Big Civil Rights Lawsuits*, N.Y. TIMES (July 24, 2014) ("'It's like ants at a picnic,' said Stephen Gillers, an expert in ethics and the legal profession at New York University School of Law. 'All of a sudden the food's on the table and here they come.'").[27]

[27] The Thornton Law Firm objects to Prof. Gillers' participation in these proceeding as a "legal expert." *See* Supplemental Ethical Report for Special Master Gerald E. Rosen at 2 (SM Ex. 233) (stating "I understand that I am the equivalent of a court appointed expert" and noting "the District Court in Massachusetts has recognized legal ethics experts."). The Court should not permit Prof. Gillers to assume the imprimatur of the Court as an expert on the law. *See Reed v. Cleveland Bd. Of Ed.*, 607 F.2d 737, 747 (6th Cir. 1979) ("[W]e do not approve the practice of appointing legal advisors to a master or the court. To the extent that the master was not qualified to make recommendations to the court because of a lack of experience in constitutional law, he

B. There Was No Motivation To Deceive The Court

It is telling that the Special Master appears to find only that, in signing the boilerplate declaration, the Thornton Law Firm was motivated to deceive co-counsel, and not the Court. Again, in a percentage fee jurisdiction, additional lodestar simply does not provide additional funds to attorneys seeking a fee award—the lodestar is only used as a cross-check to ensure that the aggregate fee amount is reasonable. *See* Rubenstein Decl., 6/20/18, at ¶¶ 19-20; Rubenstein Decl., 7/31/17, at ¶¶ 14-18 (TLF Ex. 1). In this case, months before the lodestar was submitted to the Court, it was already understood by all parties that the attorneys would seek an aggregate fee of approximately 25%. *See*, *e.g.*, Chiplock Dep., 9/8/17, at 70:14-71:24 (SM Ex. 41). The 25% figure was represented to the Court in June 2016, three months before the lodestars were filed, *see* 6/23/16 Hr'g Tr. at 15:5-16:2 (Dkt. 85), and was published in the Notice of Pendency dated August 22, 2016. By the time the lodestars were submitted to the Court in mid-September 2016, the attorneys could not have asked for anything beyond 25%. It is not as if, for instance, the Thornton Law Firm could have showed its co-counsel a particularly large lodestar and convinced them to seek leave to request 27% or 30%. **The aggregate fee request was already set and, no matter how large their lodestar, there was zero possibility that Thornton could receive more than their agreed upon share (29% of Customer Class Counsel allocation) of the 25% fee request.**

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should have submitted such legal issues to the court."); *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code."); *In re: Initial Public Offering Securities Litigation,* 174 F. Supp. 2d 61, 69 n. 11 (S.D.N.Y. 2001) ("Each courtroom comes equipped with a 'legal expert,' called a judge.") (quoting *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997)). The Thornton Law Firm also objects to Prof. Gillers's report on the basis that the factual background section of the report (which, at 58 pages, is the more than half of the report) is replete with mischaracterizations and omissions of record evidence. This is not surprising, as Prof. Gillers acknowledges that the Special Master and his counsel drafted the factual background section of his report, Gillers Supp. Report, 5/8/18, at 2, and as those mischaracterizations and omissions are repeated in the R&R.

Perhaps the Special Master will next speculate that the Thornton Law Firm might have been motivated to increase its lodestar to provide further support for the Court's cross-check in support of the 25% award. In other words, the higher the lodestar, the lower the multiplier, and the more likely that the Court would find the fee award reasonable. But this is not a realistic motivation for at least two obvious reasons. First, the aggregate fee multiplier in this case was modest and well within the range of what courts find acceptable in awarding fees. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1); Rubenstein Decl., 6/20/18. There was therefore no need to decrease the multiplier to ensure the Court would approve the award. And second, it would be incredibly difficult for any one firm, especially Thornton, to "move the needle" on the multiplier. Thornton's lodestar represented just 18% of the overall lodestar submitted to the Court. Even if there were an additional $1 million on Thornton's lodestar which was removed, it would have only moved the overall multiplier from 1.804 to 1.849, which is negligible. Indeed, even if Thornton billed all of its staff attorneys at $300 per hour rather than $425 or $500 per hour and the difference was removed, the overall multiplier would have only moved to 1.865, which is also negligible.

It is important to recall the manner in which the Special Master believes the Court was supposedly intentionally deceived. The manner of deception was not falsely increasing hours worked, which would have been very difficult for the Court or anyone else to detect. In fact, the Special Master found that all of the Thornton Law Firm hours were reasonable. R&R at 216-17. The supposed manner of deception was instead signing a boilerplate affidavit (which the Thornton Law Firm did not even draft) and correctly listing on the Thornton's Law Firm's lodestar those staff attorneys which the Thornton Law Firm paid for pursuant to an agreement among co-counsel. The names of the staff attorneys were explicitly listed on the lodestars such

that **anyone** who placed the lodestars side by side would immediately realize that certain attorneys' time had been double counted. It is ludicrous to suggest such an obvious and basic mistake was intentional deception—indeed, it would be perhaps the lamest attempt at deception in the history of the federal courts. *Cf. Awkal v. Mitchell*, 613 F.3d 629, 655 (6th Cir. 2010) (Martin, J., dissenting) ("At some point, Ockham's Razor [sic] must apply—the simplest answer is usually the correct one."); *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004) ("Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made . . . .").

C. The Special Master's Assertion That Garrett Bradley Did, In Fact, Closely Review The Declaration Prior To Submission Is Based On A Blatant Misrepresentation Of The Evidence

With no true evidence of motivation, the Special Master next finds intentionality based on "evidence" that Garrett Bradley closely read the boilerplate declaration before singing it and therefore was aware of his misstatements. The Special Master states:

> Emails among Garrett Bradley, Mike Lesser and Evan Hoffman show that drafts of the declaration were circulated among these Thornton attorneys for their review. This is confirmed by the testimony of Evan Hoffman: "[w]e put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then **mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed**" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15.

R&R at 229 (emphasis in Special Master's R&R).[28]

Although the Special Master's description makes it seem that he has found another "smoking gun," the Court's attention should always be piqued when a litigant replaces the material words of a quotation with his own characterization, and this instance is no different. In fact, Mr. Hoffman **does not** say at lines 9 through 15 of page 94 that Messrs. Lesser, Bradley,

[28] The Special Master uses the same quote in his R&R at 59.

and Thornton reviewed the entire boilerplate declaration prior to Mr. Bradley signing it. Mr. Hoffman instead explained:

> [T]here was a section on fill in what your hours are, fill in what your expenses are, fill in what your lodestar is, fill in what your specific contributions were to the case, and the rest of the language was sort of, it was called a model fee declaration. And so that's what we did, he put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed **the sort of narrative about the firm's contribution, which I believe mostly Mike Lesser drafted**.

Hoffman Dep., 6/5/17, at 94:1-17 (SM Ex. 63) (emphasis added—the emphasized portion was omitted from the Special Master's quotation of this deposition).

This is perhaps the most egregious example of the Report's overreaching to identify non-existent misconduct. The Special Master or his counsel have lifted a partial quote, omitted the most material aspect of the quote, and substituted their own words to create an entirely different meaning. Mr. Hoffman **did not** testify that Mr. Bradley reviewed "the declaration" as a whole, but only that he reviewed the "narrative about the firm's contribution." *Id.* For the Special Master to find otherwise—and to use it as purported evidence to impose severe sanctions—is disingenuous and highly misleading. As the Court is aware, the boilerplate Labaton declaration was a "fill-in-the blank" document. *See* Hoffman Dep., 6/5/17, at 93:14-22 (SM Ex. 63). There were two primary portions of the template declaration that each firm needed to customize: the actual lodestar itself and paragraph 2, in which each firm described its unique contribution to the litigation. *See* Template Decl., TLF-SST-029797 (TLF Ex. 9) (noting, in paragraph 2: "Supplement to explain role in the Class Actions and give overview of work performed."). The rest of the declaration was Labaton's boilerplate and, as the Special Master concluded, the majority of the firms did not modify the boilerplate section at issue in these proceedings. *See* R&R at 57. Like the other firms, the Thornton Law Firm carefully drafted a narrative of its

particular contributions and submitted the narrative to the Court as paragraph 2 of its declaration. This is the "narrative" to which Mr. Hoffman is referring as being reviewed by Mike Lesser, Mike Thornton, and Garrett Bradley. It makes sense that the Thornton Law Firm partners carefully reviewed the customized section of the fee declaration, but in no way does this prove that Garrett Bradley must have also carefully reviewed the entire boilerplate portion of the fee declaration. The Special Master's (or his counsel's) decision to replace the content of sworn deposition testimony with their own words was obviously not done as a matter of summarization or for ease of reading: one can only conclude it was intended to change the meaning of the testimony in order to advance a false narrative.

D. The Special Master's Assertion That Garrett Bradley Had The "Opportunity" To Give The Declaration A "Close Read" Is Unobjectionable, But Does Not Prove Bradley Intentionally Filed A False Declaration

Without proper evidence of motivation or that Garrett Bradley in fact closely reviewed the boilerplate portions of the fee declaration, the Special Master also tries to prove that Garrett Bradley made intentional misrepresentations based on the fact that Bradley had the **opportunity** to scrutinize the boilerplate declaration. *See* R&R at 229 ("Though Bradley testified that he only looked at his declaration before it was filed . . . the record shows that Bradley had ample opportunity to give the declaration the 'close read' that was required."). This is, of course, a classic strawman argument. No party in these proceedings has ever contended that Garrett Bradley did not have the "opportunity" to closely read the declaration prior to signing it. Garrett Bradley himself has certainly never made this argument. *See* G. Bradley Dep., 6/19/17, 84:22-85:1 (SM Ex. 43) ("I saw the final. Evan brought it in. I gave it, obviously, not a close read and then I signed it. I'm sure I was on e-mail traffic for the draft form, as well."). Quite simply, the fact that Garrett Bradley had the opportunity to closely review the boilerplate sections of the declaration does not mean that he actually did so, and therefore that he knowingly and

intentionally made misrepresentations to the Court. Certainly Labaton, whose attorneys had the opportunity (and indeed, whose job it was as lead counsel) to review all fee declarations side by side and scrutinize them for inaccuracies, did not do so. The fact that Labaton had the opportunity to correct the inaccuracies but did not do so does not mean that they made intentional misrepresentations any more so than the fact that Garrett Bradley had the opportunity to review the affidavit means he made intentional misrepresentations.

E. The Special Master's Finding Of Intentional Misrepresentation Is Belied By His Inability To Decide Whether Or Not Garrett Bradley Actually Read The Declaration

It is emblematic of the Special Master's scattershot approach and ever-changing theories that, in one section of the Report (discussed above) he presents what he believes is hard evidence that Garrett Bradley carefully reviewed the declaration before it was filed and in the next section he alleges that "Garrett Bradley did not read the narrative section at all." In particular, the Special Master writes:

> Bradley admits that he did not take the time to "closely read" the Declaration before signing it. **The Special Master believes Bradley did not read the narrative section at all** or if he did, even in a cursory fashion, he turned a blind eye to the falsity of the statements, ignoring the ethical obligations imposed by Rule 11 and the potential impact of the false statements upon the attorney fees approval process.

R&R at 231 (emphasis added).

But the Special Master cannot have it both ways. The argument is ridiculous on its face—the Special Master cannot find both that Garrett Bradley read the declaration, knew it was false, and signed it anyway, and that he signed the declaration without reading it at all. When considering the imposition of sanctions, it is the factfinder's job to "marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402 (1990). Here, the Special Master's own factual

determinations flatly contradict themselves; he therefore could not have properly applied the "fact-dependent" legal standard required by Rule 11.

F. The Special Master's Assertion That Garrett Bradley Admitted He Intentionally Lied To The Court Grossly Mischaracterizes The Evidence

Lacking any support for the propositions that Garrett Bradley (1) had motivation to lie to the Court; (2) closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court; or (3) had the *opportunity* to closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court, the Special Master's final argument is that Garrett Bradley simply admitted that he lied to the Court: "At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway." This statement appears twice in the Special Master's Report. *See* R&R at 60, 229. The problem of course is that Bradley **did not** acknowledge during the hearing that "he knew his Declaration contained inaccurate information but he signed it anyway." The citations for this "fact" are: "3/7/17 Hearing Tr. P. 87:13-14; 88:2-9; 14-18 [sic]; 91:5-7; 92:3-8." Below is the transcript of the cited portions of the March 7, 2017 hearing:

87:13-14:

The Court:	Well, you signed the affidavit.
Mr. G. Bradley:	I did, your honor and within that . . . .

88:2-9:

The Court:	The Court was told that was their billing rate.
Mr. G. Bradley:	That is what the rate was that the Court approved in that case.
The Court:	Had you ever charged any of those individuals, paying client, at $425 an hour?
Mr. G. Bradley:	We don't have paying clients, your . . . .

88:14-18:

> Mr. G. Bradley: The staff attorneys that were listed on there that under – paragraph 4 in my affidavit where it says that we paid them is a mistake, your Honor. Those individuals were actually housed at Labaton Sucharow or Lieff Cabraser. We had not used those before. That paragraph, quite frankly, should . . . .

91:5-7:

> Mr. G. Bradley: [A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph.

92:3-8:

> Mr. G. Bradley: There was a discussion at the time as to what to use, and then our firm and, I believe, the Lieff firm used the same rates that were used within the *Mellon* case, but everybody understood that those were the rates that were going to be applied to the type of work being done by that group of people.

In no way do these cited statements show that Bradley "knew his Declaration contained inaccurate information but he signed it anyway." Mr. Bradley simply did not say so. What these excerpts instead show is that Garrett Bradley made a basic and very unfortunate mistake. The Special Master has mischaracterized the record here in the manner one would expect of an overly-aggressive litigant, not a supposed neutral court-appointed factfinder.

G. In Fact, Garrett Bradley Made A Mistake And Corrected The Mistake At the Appropriate Time

As demonstrated above, none of the Special Master's evidence even suggests that Garrett Bradley intentionally misled the Court. Although the Special Master may think he is obligated to justify his $3.8 million investigation by finding some form of intentional misconduct, in actuality, the root of the case is a basic and unfortunate inadvertent error—or in more simple terms, a mistake. The fact of the matter is that Labaton sent all firms a boilerplate, fill-in-the blank fee declaration with customizable sections for fees, expenses, and a narrative for each firm's unique contribution to the litigation. *See* Hoffman Dep., 6/5/17, at 93:14-94:8 (SM Ex.

63); Template Decl., TLF-SST-029797 (TLF Ex. 9). Thornton Law Firm attorneys drafted the fees, expenses, and firm contribution section and Messrs. Lesser, Bradley, Hoffman, and Thornton reviewed the firm contribution section. Hoffman Dep., 6/5/17, at 94:9-17 (SM Ex. 63). The Thornton Law Firm did not modify the boilerplate portion of the fee declaration at issue here but neither, as the Special Master found, did six of the nine firms who submitted fee declarations. *See* R&R at 57.

As Garrett Bradley testified in his deposition, when he signed the boilerplate declaration he "gave it, obviously, not a close read." G. Bradley Dep., 6/19/17, at 84:22-23 (SM Ex. 43). In other words, he did not scrutinize the boilerplate portion of the declaration to the extent necessary to have realized that some of its statements were incorrect, or at the very least, unclear. The errors in the affidavit, although unintentional and, as set forth below, immaterial, are "messy and . . . embarrassing." G. Bradley Dep., 6/19/17, at 82:20-21 (SM Ex. 43). Bradley admitted this mistake to the Court during the March 7, 2017 hearing, noting: "That paragraph, quite frankly, should have been clarified by me at that time. It was not," 3/7/17 Hr'g Tr. at 88:18-19 (SM Ex. 96), and "[A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph," *id*. at 91:5-7.

The double counting, which (as discussed above) was not the Thornton Law Firm's error, was immediately disclosed to the Court by Customer Class Counsel after a media inquiry alerted the law firms to the issue. As the Special Master found, on November 8, 2016, Garrett Bradley learned from counsel that the *Boston Globe* identified potential double counting on Customer Class Counsel's lodestar. *See* R&R at 126-27. The same day, Bradley contacted Lieff and Labaton, and all three firms worked diligently to determine the extent of the error and to prepare a revised and corrected lodestar figure. *Id*. A letter informing the Court was filed on November

10, 2016. The letter, which was signed by Labaton attorney David Goldsmith, noted that counsel "sincerely apologize[s] to the Court for the inadvertent errors in our written submissions and presentation during the hearing" and that counsel was "available to respond to any questions or concerns the Court may have." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178).

III. The Thornton Law Firm Did Not Violate Rule 11

A. Isolated Factual Errors Cannot Serve As The Basis For Rule 11 Sanctions

Sanctioning a lawyer or law firm pursuant to Federal Rule of Civil Procedure 11 is a severe penalty that should not be imposed broadly. "Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps." *McGee v. Town of Rockland*, No. 11-CV-10523-RGS, 2012 WL 6644781, at *1 n.2 (D. Mass. Dec. 20, 2012). As the First Circuit noted in reversing a district court's imposition of sanctions, "[c]ourts ought not to invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39-40 (1st Cir. 2005). This is especially so where sanctions are imposed *sua sponte* and counsel are not able to avail themselves of the Rule's safe-harbor provision when they realize they have erred and may withdraw a pleading without penalty. *Young*, 404 F.3d at 40 (noting that, when imposed *sua sponte*, Rule 11 sanctions are reserved for instances of "serious misconduct"); *Vollmer v. Selden*, 350 F.3d 656, 663 (7th Cir. 2003) ("Absent extraordinary circumstances not shown here, *sua sponte* sanctions are generally limited to several thousand dollars."); Fed. R. Civ. P. 11 advisory committee's note ("[S]how cause orders will ordinarily be issued only in situations that are akin to a contempt of court."). *See generally* Vairo Decl., 3/26/18 (TLF Ex. 10).

In this proceeding, it is vital to heed the First Circuit's warning that "Civil Rule 11 is not a strict liability provision." *Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 88 (1st Cir.

2017) (internal quotation marks omitted). Statements that are "literally inaccurate" may not be sanctionable because "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) (Breyer, J.).[29] *See also Young*, 404 F.3d at 41 (reversing sanctions imposed by district court where "memorandum may otherwise have been misleading or inaccurate in certain of its detail"); *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987) ("[Rule 11] does not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well grounded in fact.'").

The case at bar is on all fours with *Navarro-Ayala*. There, the First Circuit reversed the district court's finding of sanctions because "the motion, **read fairly and as a whole**, contain[ed] **no significant false statement** that **significantly harmed** the other side." *Navarro-Ayala*, 3 F.3d at 467 (emphasis added). In so holding, the First Circuit noted that "We emphasize the word 'significant' because the district court found one sentence literally false," and further explained that, "the district court, at most, could have found a few isolated instances of noncritical statements that further inquiry might have shown to be inaccurate or overstated. That further inquiry would not have shown the motion's requests to have been baseless." *Id.* at 467-68. *See also Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) (reversing Rule 11 sanctions where "the affidavit was not knowingly false as to any material fact, although one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization" and describing the affidavit as "an unsound piece of lawyer advocacy rather than a lie about a fact").

[29] Although this case construed the pre-1993 version of Rule 11, the 1993 amendments are immaterial to the First Circuit's analysis.

B. The Statements In The Affidavit Do Not Support Rule 11 Sanctions

The Special Master identifies what he believes are six discrete "false statements" in Garrett Bradley's affidavit. Upon closer examination, it is clear that none of the "false statements" can serve as a proper basis for imposing Rule 11 sanctions. *See* Vairo Dep., 4/10/18, at 47:23-48:8 (SM Ex. 202).

i. Staff Attorneys As Employees

The first two alleged "false statements" are variations on the same criticism—that the attorneys listed on Thornton's lodestar were not technically "employed" by the Thornton Law Firm. Specifically, the Special Master identifies as false: (1) the statement that the lodestar summarized "time spent by each attorney and professional support staff-member *of my firm* who was involved in the prosecution of the Class Actions"; and (2) the statement that "[f]or personnel who are no longer *employed* by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of *employment* by my firm." R&R at 227 (emphasis added). Of course, both statements are true with respect to the four partners, one associate, and one paralegal listed on the affidavit. These attorneys and the paralegal were bona fide employees of the Thornton Law Firm. With respect to the staff attorneys, the statement is literally incorrect in the sense that the staff attorneys were not technically, as a legal matter, employees of the Thornton Law Firm. It is not, however, as if the staff attorneys had no relationship with Thornton. In fact, it is undisputed that Thornton paid for all of the staff attorneys listed on its lodestar, whether directly through a staffing agency, or through co-counsel. And the Special Master has conceded that attorneys at all three law firms understood that the Thornton Law Firm would include the staff attorneys for which it was paying on the Thornton lodestar. *See supra* § II(A).

The error of including the word "employed" with respect to the staff attorneys was introduced only because Thornton used the boilerplate template of Labaton, a larger firm which predominantly and regularly brings class action cases and has the capacity to employ its own staff attorneys. Most crucially, by its nature, the error had absolutely no effect on the lodestar figure. The purpose of the lodestar is to show hours worked—not employment status. There is no question that the attorneys listed actually worked the hours included on the lodestar, as the Special Master concedes the hours were reasonable. R&R at 210.[30] Instead, the Special Master raises only the technical question of whether all attorneys were described properly as "employees."

If the Special Master believes that the reference to staff attorneys (housed at co-counsel but paid for by the Thornton Law Firm) as "employed" is false and sanctionable, it is curious that the Special Master does not recommend Rule 11 sanctions for Lieff and Labaton, both of whom used the **exact same boilerplate** the Special Master finds objectionable as to Thornton. The Lieff and Labaton affidavits, under the Special Master's hyper-technical reading, also appear to be false. The Lieff affidavit, for instance, lists as Lieff Cabraser "employees" attorneys who were actually "contract" or "agency" attorneys with whom Lieff Cabraser did not have an employer-employee relationship.[31] *Compare* Chiplock Decl., 9/14/16 (SM Ex. 89) (referring to

[30] The Special Master does not question any of the hours expended by any of the attorneys in this matter.

[31] In fact, it seems to be a fairly common practice to list contract attorneys as "employees" or attorneys "of the firm" on lodestars, even though such attorneys are technically not employees. *Compare* Friedman Decl., Dkt. 916-29, *In re Anthem, Inc. Data Breach Litigation*, No. 5:15-md-02617 (N.D. Cal. Dec. 1, 2017) (noting lodestar contains "detailed summaries of the amount of time spent by my firm's partners, attorneys, and professional support staff") (TLF Ex. 11), *with* Ex. 1, Dkt. 916-10, *Anthem* (listing 15 contract attorneys alongside partners, associates and staff in the firm's lodestar) (TLF Ex. 12); Shuman Decl., Dkt. 506-7, *In re: Oppenheimer Rochester Funds Group Securities Litigation*, No. 1:09-md-02063-JLK-KMT (D. Colo. June 6, 2014) (stating that the lodestar calculation is based on "my firm's current billing rates" or on billing rates "in his or her final year of employment by my firm" for "personnel who are no longer employed at my firm" and attaching a lodestar report that includes a "contract attorney") (TLF Ex. 13).

all attorneys in same manner as Bradley Declaration) *with* Lieff's Resp. to Interrog. No. 24, 7/10/17 (TLF Ex. 6) (noting some attorneys listed on lodestar were contract attorneys). The Labaton affidavit is similarly "flawed" because it lists as "employees" those attorneys who were paid by Thornton pursuant to the cost-sharing agreement. *Compare* Sucharow Decl., 9/15/16 (SM Ex. 88), *with* Labaton's Resp. to Interrog. No. 18, 6/1/17 (SM Ex. 249) (noting that the cost of certain staff attorneys was invoiced to Thornton). By listing staff attorneys as "employees," the Labaton affidavit implies that Labaton paid for all such attorneys when in fact it did not. This is certainly not to say that Lieff and Labaton should be sanctioned for these misstatements, but to emphasize that such misstatements are not sanctionable for any of the three firms. *See Obert*, 398 F.3d at 143 (attorneys should not be sanctioned for erroneously describing a chambers conference as a "hearing").

ii. Time Records

The Special Master next contends that the Thornton Law Firm should be sanctioned because the Bradley affidavit states that the lodestar "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court." Here it is worth noting that the Special Master finds this statement sanctionable because it is "untrue" on pages 227-28 of his R&R, but on page 59 of his R&R **declines to find that the exact same statement untrue**. R&R at 59 n.46 ("The Special Master, however is unable to conclude that this statement is untrue."). Putting aside the obvious irony of such a clear error in the context of this case, this demonstrates that the "time records" statement is not, as the Special Master contends on pages 227-28, actually false.

If the Court is inclined to accept the Special Master's finding on pages 227-28 rather than the exact opposite finding on page 59, it is important to note the Special Master finds this statement false and sanctionable (on pages 227-28, at least) for two reasons. The first reason is

that "Thornton did not prepare or maintain daily time records of the hours worked by the SAs listed on its lodestar." R&R at 227-28.

The Special Master's quibble is simply that co-counsel, rather than the Thornton Law Firm, and in some cases perhaps staffing agencies, *prepared and maintained* time records for certain staff attorneys listed on the lodestar.[32] Again, there is no allegation that the hours were not actually worked, only that the Thornton Law Firm did not state with adequate precision who *prepared* and *maintained* the records. But the Special Master ignored (at least in this section of the report) evidence that the Thornton Law Firm did, in many cases, *maintain* the time records of staff attorneys for whom it paid, including lawyers at Lieff and Labaton, and Michael Bradley. *See, e.g.*, R&R at 44 (describing how Thornton partner Evan Hoffman kept track of staff attorney time). Even if the Thornton Law Firm did not maintain or prepare any of the time records, it is certainly a stretch to say a technical error in who *prepared* and *maintained* the time records warrants Rule 11 sanctions.

The Special Master's second criticism is that the clause "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm" is false because "Thornton [did not] maintain *sufficiently reliable* contemporaneous time records for all of the attorneys working on the State Street case." R&R at 227-28 (emphasis added). But the Special Master specifically found that Thornton Law Firm partners Michael Lesser and Evan Hoffman *did* maintain sufficiently contemporaneous time records, R&R at 205, and does not appear to take any issue with the timekeeping of the staff attorneys. The Special Master has only criticized the timekeeping of Garrett Bradley and Michael Thornton. R&R at 208-09. In other

[32] Regardless, however, of the Special Master's criticism, for the partners, associate, and paralegal listed on Thornton's lodestar, all time records *were* prepared and maintained by the Thornton Law Firm.

words, the Special Master takes issue with the timekeeping of *two out of the thirty* timekeepers listed on the Thornton Law Firm's lodestar. Crucially, he does not conclude that the time records of these two attorneys were **not** contemporaneous, but that "**it is questionable** whether the handwritten notes and calendars of Garrett Bradley and Michael Thornton are sufficiently reliable to constitute contemporaneous records of their time." R&R at 228 n.178. Despite his questions as to whether the time records of two attorneys are sufficiently contemporaneous, he nonetheless concludes that "the total hours expended by each of the Thornton lawyers were **reasonable** and **sufficiently reliable**." R&R at 216 (emphasis added). The finding that a small number of time records *may not* have been contemporaneous (at least in one section of the R&R, which is flatly contradicted by another), but that nonetheless the time was reasonable, the records were reliable, and the hours were actually worked, clearly does not support a Rule 11 violation.

iii. Rates Accepted In Other Actions

The Special Master finds the statement that lodestar rates "have been accepted in other complex class actions" false because "[w]ith the exception of 4 staff attorneys, the $425 rate charged for the remaining staff attorneys listed on the lodestar, including Michael Bradley, had not been accepted in other complex class actions." R&R at 228. The Special Master appears to read the statement as an attestation that each *individual* staff attorney had previously been listed on an approved lodestar petition at the same rate. If the Special Master is correct in the meaning of this phrase, then he would have been obligated to inquire whether each of the 20 staff attorneys listed on the Lieff affidavit and each of the 35 staff attorneys on the Labaton affidavit (as well as, for that matter, all of the attorneys on Customer Class Counsel and the ERISA firms' declarations) had actually been listed on an approved lodestar petition at the relevant rate, or whether, for instance, some were recent law school graduates who had never previously

appeared on a lodestar.[33] That the Special Master does not appear to have undertaken this exercise undermines his interpretation of this phrase. Clearly the statement that certain "rates" have been accepted refers to rates for attorney **positions** (such as the staff attorney position), not rates for **individual** staff attorneys themselves. This reading is the only one that makes sense because staff attorneys are often temporary employees who move from firm to firm and document review to document review and whose rates are often not determined on an individual basis.

In any event, the rate of $425 per hour, which Thornton charged for its staff attorneys in this case, **was accepted** by the court in the *BNY Mellon* litigation for the staff attorneys listed on Lieff's lodestar. *Compare* Chiplock Decl., Ex. B, Dkt. 622-1, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Aug. 17, 2015) (SM Ex. 186) (listing $425 as the rate for nine contract attorneys on Lieff's lodestar) *with* Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, Dkt. 637, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Sept. 24, 2015) (SM Ex. 9) (allocating attorneys' fees "based on the multipliers applied to each firm's lodestar . . . which are adopted by the Court"). Although Michael Bradley's rate ($500) was not the rate for staff attorneys in the *BNY Mellon* litigation, the affidavit was not limited to that litigation, but rather cited "other complex class actions." G. Bradley Decl., 9/14/16, at ¶ 4 (SM Ex. 66). As Professor Rubenstein explained in his expert report, rates of up to **$550** per hour have been accepted in class action litigation for staff attorneys. *See* Rubenstein Decl.,

[33] For instance, is doubtful that Ann Ten Eyck and Rachel Wintterle, two contract attorneys, had ever been billed on an approved lodestar at $515 per hour. Lieff intended all staff attorneys to be billed at $415 per hour. The $515 rate was likely unintentional. Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the $515 rate was not reasonable or that it had not been approved for staff attorneys in other actions, only that it may not have been previously approved for Attorneys Ten Eyck and Wintterle as individuals.

7/31/17, at ¶ 36 (TLF Ex. 1). Even in this case (the instant State Street litigation), the Court approved Lieff's lodestar, which listed the rates of five staff attorneys as **$515** per hour, and the Special Master accepted these rates as well. *See* R&R at 180-81 (noting "the Special Master finds noting unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms . . . ."). In other matters, Labaton has set its staff attorney rates at $500 per hour. *See* Labaton's Resp. to Interrog. 48, 7/10/17 (TLF Ex. 14) (referencing *In re Barrick Gold Securities Litigation*, No. 13-cv-3851 (S.D.N.Y.)). The statement regarding rates "accepted in other complex class actions" is therefore true and cannot be the basis for Rule 11 sanctions.

Here, it is worth noting that the Special Master implies that it was somehow untoward for the Thornton Law Firm to use the $425 rate for staff attorneys because he has concluded that Lieff and Labaton suggested that $425 serve as a cap, not that Thornton actually charge $425 for its Staff Attorneys.[34] *See* R&R at 225. Regardless of the Special Master's insinuations, it is undisputed that the $425 rate was accepted in the *BNY Mellon* litigation. It is unclear why it would be inappropriate for the Thornton Law Firm to use the rate its co-counsel used (and the court approved) in the case most analogous to the one at bar. *See* Chiplock Dep., 6/16/17, at 184:20-25; 227:2-4 (SM Ex. 10) ("And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425," and "[t]hey [*BNY Mellon* rates] were generally 425, which is the guidance that Thornton used when they submitted their declarations."). Moreover, there is hardly any difference between the rate Lieff set for most of its staff attorneys in the State Street matter (generally $415,

[34] The Special Master's comment that $425 was a "cap" is also inconsistent with the record testimony, which was ignored by the Special Master. *See* Chiplock Dep., 9/8/17, at 52:2-5 (SM Ex. 41) (with respect to same email Special Master discusses, stating "It was my expectation that the three firms would be billing their document reviewers at comparable rates. And perhaps the same rate as I'm suggesting here.").

but going up to $515) and Thornton's rate. As set forth *supra* at section II(A), the average weighted rate for Lieff staff attorneys was actually higher than the average weighted rate for Thornton staff attorneys.

iv. Current And Regular Rates

The final two errors identified by the Special Master are that the lodestar was "based on my firm's current billing rates" and that the rates "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." It is understandable that the Court interpreted the phrases "current billing rates" and "charged for their services" to mean that each firm had paying clients who actually compensated the firms at the hourly rates listed in the lodestars. But the message perhaps intended by Labaton's boilerplate template—albeit unclear and with a poor choice of words—was that these are the regular rates of the firms which are charged against the common fund in class actions.[35] This is a plausible meaning if one understands that plaintiffs' firms, as evidenced by this case, usually do not have clients who actually pay by the hour. A simple modifying clause such as "in contingent fee matters" would have made the matter much more clear for the Court. Although the misunderstanding is regrettable, when considered with lack of both intent and materiality, the statement does not support Rule 11 sanctions.

It is of paramount importance that, although the Special Master has decided to single out the Thornton Law Firm with respect to the statements "based on my firm's current billing rates" and "the same as my firm's regular rates charged for their services," **identical phrases** appear in the Lieff and Labaton fee declarations. At the March 7, 2017 hearing, all three firms

[35] *See, e.g.*, Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174) ("The intent of the statement used by Labaton, as set forth above, was to convey to the Court that the rates in Exhibit A are the firm's regular standard rates, which are not applied for a specific case or depending on the nature of the work performed, **and that other Courts had found them reasonable when charged to a class in other litigation.**") (emphasis added).

acknowledged that, generally, they do not have clients who pay by the hour. *See, e.g.*, 3/7/17 Hr'g Tr. at 79:9-22; 88:8-9; 93:11-21 (SM Ex. 96). Further, the law firm of Richardson Patrick also submitted a fee declaration containing the **exact same** boilerplate language, SM Ex. 95 at ¶ 4, even though the Special Master found that Richardson Patrick is "a 100% contingent fee firm," R&R at 68. The McTigue Law Firm has "very few" clients who pay hourly rates, McTigue Dep., 7/7/17, at 83:19-84:3 (SM Ex. 11), yet also used nearly the same boilerplate language.[36]

There is no principled basis by which the Special Master can recommend that the Thornton Law Firm should be sanctioned for these misstatements when Lieff, Labaton, Richardson Patrick, and the McTigue Law Firm committed the same non-material error. This is not to say that all five firms should be sanctioned, but that the error itself is not the proper basis for sanctions. In fact, the types of phrases about which the Special Master is concerned, although admittedly confusing, appear to be quite common in fee declarations. For instance, in response to the Special Master's interrogatories, Labaton identified ten cases in which it submitted fee declarations with identical or similar language. *See* Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174). *See also* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174) (stating that such language "has appeared in Labaton Sucharow's fee petitions for several years."). The leading treatise in this area, *Newberg on Class Actions*, includes in its appendix a sample "Declaration of lead counsel in support of motion for attorney's fees from common fund"

[36] The McTigue Law Firm's declaration used slightly different language. As relevant here, the declaration stated, "The hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." McTigue Decl., 9/13/16, at ¶ 20 (SM Ex. 91). In his deposition, when asked whether the language "might lead a judge to believe that the references to amounts that were actually charged to a paying client," Mr. McTigue responded, "I think it could. And I'm learning." McTigue Dep., 7/7/17, at 87:9-12 (SM Ex. 11).

(Appendix XV-B) and "Declaration of lead counsel in support of motion for attorney's fees" (Appendix XVI-C). 9 NEWBERG ON CLASS ACTIONS (5th ed.). Those two sample declarations contain language, respectively, that the "lodestar is calculated based on the current hourly rates of the firm" and that "[b]ased upon hourly rates historically charged to my firm's clients, the total lodestar value of this billable time is . . . ."[37] This is not to say that the language should not be clarified in the future for all plaintiffs' firms, but to suggest that singling out one firm for Rule 11 sanctions is not the appropriate means of doing so.

With respect to the phrase "regular rates," in particular, to the extent plaintiffs' attorneys (who generally do not charge by the hour) have "regular rates," they can only be the rates that they have charged in past actions. The testimony of Keller Rohrback managing partner Lynn Sarko is particularly illuminating on this point. Mr. Sarko testified:

> I know in this litigation there's been some questioning about what does the term "regular rates" mean. And I guess, to me, that is a common term that's used in class actions by judges. And what it means is your standard listed rate. And if you're a firm that has all contingent fee work, that's your listed rate that you submit your time at, that isn't made up for this case, isn't made up, isn't higher, isn't raised or ballooned or anything, but that's the rate that you offer your services at . . . . [I]n the cases that I regularly appear in and judges that actually have you have fee orders at the beginning, regular rates, at least to me in the industry that I've seen, are the regular rate, posted rates, whether or not – doesn't mean and charged to individual clients because most firms – many of the firms don't have that.

Sarko Dep., 7/6/17, at 90:1-11, 98:23-99:5 (SM Ex. 28).

Here, Thornton's rates were similar or identical to the approved lodestar rates in the most analogous case the Thornton Law Firm handled, the *BNY Mellon* litigation. The rates for Michael Thornton and Garrett Bradley were identical to the rates approved in the *BNY Mellon*

[37] The Thornton Law Firm does not know whether the law firms who drafted these declarations work solely on a contingency basis. The mere fact, however, that these are the sample declarations in the treatise regularly consulted by contingent plaintiffs' attorneys suggests that this type of language is widely used by contingent firms.

litigation. The rates for both Evan Hoffman and Michael Lesser were $50 greater than in the *BNY Mellon* litigation to reflect that Hoffman had become a partner and that Lesser had gained valuable expertise in FX litigation from the *BNY Mellon* case. The rate for associate Jotham Kinder was $30 greater than in the *BNY Mellon* litigation. The paralegal rate, $210, was identical to the *BNY Mellon* rate. As discussed above, Thornton is a small firm that had not previously listed staff attorneys on its lodestars, so Thornton used the exact same "regular rate" that Thornton's co-counsel, Lieff, had used (and the court approved) for the staff attorney position in the *BNY Mellon* litigation.

But regardless of whether they were "regular" or not, the Special Master found the rates of the Thornton attorneys reasonable. "[G]iven that the rates at which Thornton partners and associates were billed were comparable to (and indeed generally less than) Labaton's and Lieff's billing rates, and given the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness. The Special Master is particularly persuaded that Thornton's billing rates here . . . are reasonable because rates in this range were previously approved for Thornton by the Court in the *BONY Mellon* case." R&R at 175.

If one ignores the fact that Michael Bradley was working on a purely contingent basis, perhaps it could be argued that his rate should have been listed as $425 per hour to reflect that he was a staff attorney and to match the "regular rate" that Thornton's co-counsel had listed for the staff attorney position in the *BNY Mellon* litigation.[38] $500 was still well within the range of

[38] There may have been exceptions on the Lieff declaration as well. For instance, the $515 rate at which certain staff attorneys were billed was likely an error since Lieff had made a decision to generally charge staff attorneys at $415. *See* Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the rates were not reasonable, only that they may not have been regular, and that Thornton should not be sanctioned for a single $500 rate any more than Lieff should be sanctioned for the $515 rates.

rates which have been accepted for the staff attorney position in other class actions, *see* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1), but it may well have been an error to describe it as a "regular rate" for the staff attorney position in this matter. As a mitigating consideration, it is important to note that if Thornton had listed the staff attorney "regular rate" of $425 rather than $500 for Michael Bradley, Thornton's lodestar would have decreased by only $30,480, which represents less than one half of one percent of the Thornton lodestar, and .0007 of the overall lodestar.[39] Moreover, as discussed above, even when Michael Bradley's rate is included, the weighted average rate for the Thornton Law Firm staff attorneys ($428) was actually lower than the weighted average rate for the Lieff staff attorneys ($438).[40]

C. Double Counting

Although the Special Master does not identify the double counting error as a basis for Rule 11 sanctions, it is clear that this error colors his view of the misstatements he identified in the affidavit. The Special Master, however, has found that the double counting "was simply a mistake that grew out of combination of different circumstances," R&R at 221, and that it was "inadvertent," R&R at 363. Moreover, as demonstrated above, Thornton cannot be held responsible for the double counting errors, as it is clear that the staff attorneys were double counted on Lieff's and Labaton's lodestars, not on Thornton's. *See supra* § I(C). If there is any sanction based upon the double counting issue (which the Special Master does not recommend

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[39] Calculated from the overall lodestar figure as submitted to the Court in September 2016. As noted elsewhere, Michael Bradley's rate was higher than the other staff attorneys, in part, because he was compensated on a contingent basis. That is, if the class action against State Street did not succeed, Michael Bradley would have been paid absolutely nothing for the over 400 hours of document review he performed.

[40] It is worth noting that an inadvertent error in Labaton's fee declaration resulted in an overstatement of over $80,000 but that the Special Master did not find this sanctionable or even worthy of mentioning in his Report and Recommendations. Lawrence Sucharow executed the Fee Declaration in this matter stating that the "[t]ime expended in preparing this application for fees and payment of expenses has not been included in this [fee] request." Later, it came to light that over 100 hours of time totaling $80,330 related to fee applications was mistakenly included in Labaton's lodestar submitted to the Court. *See* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174).

and which would, in any case, be unwarranted), there would be no principled legal basis to simply levy the sanction on Thornton.

D. Materiality And Intent

Given the nature of the statements that the Special Master identifies as "false," it is highly relevant that: (1) the "false" statements were immaterial to the overall motion; and (2) Garrett Bradley did not have any intent to deceive the Court. In terms of materiality, none of the statements in the affidavit affected the overall lodestar amount, which was the purpose of the motion. *See Navarro-Ayala*, 3 F.3d at 467 (reversing district court's finding of sanctions because "the motion, read fairly and as a whole, contain[ed] no significant false statement that significantly harmed the other side."). In terms of intent, section II, *supra*, explains why the Thornton Law Firm's fee declaration was not intentionally deceptive but rather the result of inattention. This fact is crucial. *See Young*, 404 F.3d at 41 ("We are not suggesting that a deliberate lie would be immune to sanction merely because corrective language can be found buried somewhere else in the document. But here the trial judge did not find, and in these circumstances could not have found, that plaintiff's counsel had intended to deceive."). *See also* Vairo Dep., 4/10/18, at 35:17-22, 36:6-7 (SM Ex. 202).

Seen in context, Bradley's affidavit was an isolated instance of inattentiveness due to reliance on a boilerplate affidavit that Bradley knew was prepared by experienced counsel. *See* Vairo Dep., 4/10/18, at 61:7-12; 78:2-3 (SM Ex. 202) ("Garrett Bradley made a mistake by not taking a closer look at the template before he submitted it to the Court. But that does not mean he violated Rule 11," and "[t]his is not the type of misstatement that should give rise to Rule 11 sanctions."). With respect to the double counting, Bradley immediately contacted co-counsel once alerted to the issue and ensured that within two days the Court was informed of the errors. R&R at 126-28. With respect to the additional statements in the affidavit, Bradley took

responsibility for the errors when he acknowledged, during the March 2017 hearing, that certain aspects of his affidavit were factually incorrect. 3/7/17 Hr'g Tr. at 88:8-21 (SM Ex. 96). Clearly sanctions are not warranted in these circumstances. *Cf. United States v. Jones*, 686 F. Supp. 2d 147, 156 (D. Mass. 2010) (Wolf, J.) (in criminal context, imposing no sanctions against prosecutor who, due to "inexcusable and inexplicable" errors, inadvertently neglected to disclose important exculpatory material to defendant). *See also Garbowski v. Tokai Pharm., Inc.*, No. 16-CV-11963, 2018 WL 1370522, at *8 n.5, *11 n.7 (D. Mass. Mar. 16, 2018) (Wolf, J.) (no discussion of sanctions for attorneys who "filed . . . documents in a manner that misrepresented the contents of the Certification" and filed an inaccurate declaration).[41]

IV. The Recommended Sanctions Are Incompatible With Rule 11

If the Court were to find that the Thornton Law Firm did violate Rule 11, a conclusion with which the Thornton Law Firm strenuously objects, the Court should not accept the Special Master's proposed sanction of $400,000 to $1 million for three reasons: (1) Rule 11 requires that

[41] Immaterial (or even material) errors, when not committed with ill intent, should not generate Rule 11 sanctions. In this very case, for example, the Special Master has made misstatements to the Court. In a letter to the Court dated April 23, 2018, the Special Master requested a delay in the submission of his Report and Recommendations. He stated that "[w]e were prepared to file under seal with the Court by today a hard copy of the Report and Recommendations, together with all exhibits" but noted that certain technical delays in creating a searchable disk with hyperlinks to exhibits necessitated a request for an extension. (Dkt. 217-1). It is clear, however, that the Report and Recommendations was not finalized by April 23, 2018, as the Special Master erroneously represented to the Court. Included as an exhibit to the Report and Recommendations is a "Supplemental Ethical Report for Special Master Gerald E. Rosen" dated **May 8, 2018** (totaling, with exhibits, over 700 pages) (SM Ex. 233), which the Special Master cites throughout the Report and Recommendations.

Also worth noting is that on June 7, 2018, the Special Master filed "Special Master's Responses (Under Seal) to Various Motions of Plaintiffs' Counsel On Redaction and Related Issues" but did not serve the filing on all counsel. On June 9, this Court issued an order citing the Special Master's submission. Once alerted to the existence of the Special Master's submission, counsel inquired of the Special Master's counsel why the Special Master filed an *ex parte* motion with the Court. In response, the Special Master's counsel acknowledged the error and provided all parties with the filing. The copy of the filing provided did not include a certificate of service, which means either that the filing did not conform to Federal Rule of Civil Procedure 5 or that there was a certification on the copy submitted to the Court but that such certification was false because the parties were not actually served. This is not to say that the error was anything other than inadvertent or that the inadvertent error should subject any firm to sanctions, but to highlight the absurdity of the Special Master's hyper-technical reading of the Rules.

sanctions must be "limited to deter repetition of the conduct or comparable conduct of others similarly situated"; (2) the dollar amount of the sanction sought is wildly out of proportion with other sanctions imposed in the First Circuit; and (3) monetary sanctions may not be imposed *sua sponte* if there has been a settlement of the underlying litigation.

A. The Recommended Sanction Exceeds What Is Necessary For Deterrence

As an initial matter, it is axiomatic that the central purpose of Rule 11 sanctions is deterrence. *See Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 247 (1st Cir. 2010) ("Rule 11 . . . finds its justification exclusively in deterrence."); *Carrieri v. Liberty Life Ins. Co.,* No. 09-12071-RWZ, 2012 WL 664746, at *5 (D. Mass. Feb. 28, 2012) ("It is well established that the purpose of Rule 11 sanctions is to deter rather than to compensate.") (internal quotation marks omitted); *Ultra-Temp Corp. v. Advanced Vacuum Sys., Inc.*, 194 F.R.D. 378, 384 (D. Mass. 2000) ("[U]nder the amended version [of Rule 11], sanctions should be imposed for the purpose of deterrence rather than to compensate the opposing party."). The Rule explicitly states that any sanction imposed "**must be limited** to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4) (emphasis added).[42]

Here, there is no plausible argument that a sanction of between $400,000 and $1 million is needed to deter an inadvertent error in a boilerplate affidavit prepared by another law firm.[43]

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[42] Rule 11 was amended in 1993. The Rule may well have had compensatory purposes prior to the amendment, but it is clear that the current version of Rule 11 finds its purpose in deterrence. *See Silva v. Witschen*, 19 F.3d 725, 729 n.5 (1st Cir. 1994) ("Under amended Rule 11, however, 'the purpose . . . of sanctions is to deter *rather* than to compensate.'") (quoting Fed. R. Civ. P. 11 advisory committee's notes) (emphasis added by *Silva*); 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.) ("[T]he 1993 revision makes it clear that the main purpose of Rule 11 is to deter improper behavior, not to compensate the victims of it or punish the offender."). Unfortunately, some courts erroneously cite pre-amendment cases for the proposition that today's Rule 11 serves a compensatory purpose.

[43] The Special Master has set sanctions at 10% to 25% of the double counting error. As explained above, the disgorgement of the double counting error is unjustified because the lodestar figure served only as a cross-check and not a dollar-for-dollar fee request. **If the correct disgorgement is $0, Rule 11 sanctions, to the extent any should be imposed, should also be $0.**

Both the monetary and reputational impact of this case on the Thornton Law Firm have already been severe. In monetary terms, the Thornton Law Firm (and its co-counsel Lieff and Labaton) have **already** funded the Special Master's $3.8 million investigation. As the exclusive purpose of Rule 11 is deterrence, it is of no moment where the $3.8 million went— the point is that the Thornton Law Firm has already been sufficiently deterred by paying its ratable share of the investigation, as well as paying for counsel to represent it during the investigation, and by the attendant reputational consequences. It goes without saying that in a typical Rule 11 case, counsel would not have been charged millions of dollars for the investigation of its own conduct. The Court therefore must consider the deterrent effect of the funds the law firms have spent on the investigation in the context of any additional deterrent purposes served by Rule 11 sanctions.

In terms of general deterrence, the $3.8 million investigation as well as the Special Master's recommendation that the three law firms be disgorged of an additional $6 million has sufficiently deterred other lawyers who may otherwise sign boilerplate documents without a sufficiently careful review. This proceeding and the Special Master's investigation have been widely covered in the legal press, ensuring that lawyers in this jurisdiction and others are aware that they introduce errors into fee declarations at their own peril. It is not a stretch to imagine that, in light of the extensive coverage of this case, class action attorneys will significantly revise their boilerplate fee declarations to ensure that all possible ambiguity is removed from their representations to the court.

It appears that the Special Master's recommendation of a Rule 11 sanction of $400,000 to $1 million is tainted by his opinion that the sanction should serve a compensatory purpose rather than a deterrent purpose. Rule 11 states that sanctions are limited to "nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion . . . an order directing payment to the

movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11. The Advisory Committee Notes further note that "a monetary sanction imposed after a court-initiated show cause order [is] limited to a penalty payable to the court." The Special Master has ignored the Rule, instead crafting his own remedy "that the monetary sanctions should be awarded to the class." R&R at 365. This is clear legal error. *See Lamboy-Ortiz,* 630 F.3d at 244 n.27 ("[A]ny monetary sanction imposed by the court *sua sponte* must be payable to the court alone."); *Medina v. Gridley Union High Sch. Dist*., 172 F.3d 57 (9th Cir. 1999) (table decision) (vacating order to pay *sua sponte* Rule 11 sanctions to party rather than to the court); *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, No. 06-CV-00258-JAW, 2008 WL 2679630, at *2 (D.N.H. June 26, 2008) (on reconsideration, vacating award of Rule 11 sanctions to party, and noting, "[t]he only monetary sanction a court may order on its own initiative is a penalty to the court itself."); *Balerna v. Gilberti*, 281 F.R.D. 63, 71 (D. Mass. 2012). The Special Master's proposed remedy suggests that he views Rule 11 as compensatory and has disregarded the deterrent effect of the Thornton Law Firm's funding of his $3.8 million investigation.

B. The Recommended Sanction Is Extraordinary When Compared With First Circuit Precedent

The First Circuit has warned that "the power to impose sanctions is a potent weapon and should, therefore, be used in a balanced manner." *Navarro-Ayala*, 968 F.2d at 1426-27. Courts "take pains [not] to use an elephant gun to slay a mouse." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990). The sanction recommended by the Special Master here is truly extraordinary. Undersigned counsel has searched for Rule 11 opinions in all courts in the First Circuit in the last twenty years. The sanction proposed by the Special Master is wildly inconsistent with the sanctions generally imposed in the First Circuit. Undersigned counsel has

identified only **three** cases in the last twenty years where courts in the First Circuit have imposed sanctions of over $100,000.[44] These cases are particularly instructive because they show the type of conduct that does—and does not—qualify for severe Rule 11 sanctions. Notably, in one of the cases, the First Circuit reduced a sanction of $250,000 to only $5,000.

i. *In re Nosek*

In 2008, the bankruptcy court issued a $250,000 *sua sponte* sanction against a mortgage company because the company represented to the court on multiple occasions that it held a certain mortgage when, in fact, it did not hold the mortgage.[45] *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2008). As later explained by the district court:

> Despite the fact that it had not held the loan since 1997 or serviced it since early 2005, Ameriquest and its attorneys made contrary representations. It filed a proof of claim and an amended proof of claim in 2002 and 2003 . . . listing itself as creditor without any reference to the assignment of the loan and without attaching a copy of the power of attorney. It filed pleadings signed by [its] attorneys in 2003 stating that it 'is the holder of the first mortgage . . . .' It filed an Answer signed by [its] attorneys in 2005 admitting the allegation that it is the holder of the first mortgage. It conducted an eight-day adversary proceeding in 2006, with representation by [its attorney], without ever notifying the Bankruptcy Court that it was neither the holder nor the servicer of the note and mortgage.

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[44] There are occasionally matters where the district court or the bankruptcy court orders sanctions in the amount of costs or fees and the amount of costs or fees does not appear in the opinion. *See, e.g.*, *Rivera v. Lohnes*, No. 10-2114, 2012 U.S. Dist. LEXIS 29441 (D.P.R. March 5, 2012). Although it is quite difficult to verify, even in these cases undersigned counsel is not aware of any case in which the amount of costs or fees is or exceeds $100,000. *See, e.g.*, Judgment, Dkt. 62, *Ruiz-Rivera v. Lohnes*, No. 12-1520 (1st Cir. Jan 8, 2014) (noting that "the district court never set the amount of attorneys' fees that appellant would be required to pay" and that "even if the sanction order were before this court, we could not affirm it.") (TLF Ex. 15). In a recent opinion, Judge Young discussed Rule 11 and ordered a party to submit a claim for attorneys' fees and costs. *Shire LLC v. Abhai LLC*, No. 15-13909, 2018 U.S. Dist. LEXIS 46946 (D. Mass. Mar. 22, 2018). The party's revised motion for fees seeks over $2 million but makes clear that the fees sought are pursuant to Fed. R. Civ. P. 37, the court's inherent power, and 35 U.S.C. § 285 (not, in other words, pursuant to Rule 11). *See* Plaintiff's Application for Reasonable Attorneys Fees and Expenses, Dkt. 342, *Shire LLC v. Abhai LLC*, No. 1:15-cv-13909 (D. Mass. Apr. 19, 2018) (TLF Ex. 16).

[45] Sanctions were imposed under the bankruptcy analogue to Rule 11. In addition to Ameriquest, additional sanctions were imposed on two law firms, an attorney, and another financial services company. The individual attorney's sanction was vacated on reconsideration by the bankruptcy court. The other sanctions were vacated by the district court, with the exception of a $25,000 sanction on one of the law firms. *See In re Nosek*, 406 B.R. 434, 436 (D. Mass. 2009).

In re Nosek, 406 B.R. 434, 437 (D. Mass. 2009).

On appeal, the mortgage company admitted that it had misrepresented the status of the mortgage, but argued that the sanction imposed was unreasonable. In reducing sanctions from $250,000 to $5,000, the First Circuit held that, "accuracy of representations is an objective matter, as is the reasonableness of any inquiry actually made. But subjective intent can bear on whether to impose a sanction and what amount to fix. Even a dog, said Holmes, distinguishes between being kicked and being stumbled over." *In re Nosek*, 609 F.3d 6, 9-10 (1st Cir. 2010) (citing O.W. HOLMES, JR., THE COMMON LAW 3 (1881)) (additional citations omitted).

ii. *In re 1095 Commonwealth Corp.*

The bankruptcy court imposed an approximately $143,000 sanction on Citizens Bank under the bankruptcy analogue to Rule 11 for substantial misrepresentations regarding the amount of attorneys' fees sought. *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997).[46] Specifically, in support of a motion for attorneys' fees, Citizens Bank filed an affidavit in which it stated that it had "incurred" legal fees in the amount of $262,419.40 and had paid such fees to its law firm. In fact, the law firm had an arrangement whereby it charged Citizens a special negotiated rate for fees actually paid by Citizens, but "in the event that [the bankrupt party] should ultimately be responsible to Citizens for fees, Brown Rudnick would charge Citizens the standard, generally higher hourly attorney rates. In effect, the higher fees would only be charged if Citizens was not going to pay the fees." *In re 1095 Commonwealth Corp.*, 236 B.R. 530, 533 (D. Mass. 1999). After the dual-fee arrangement was uncovered, one of the lawyers for Citizens "continued his attempt to conceal from the Court and the Debtors the nature of the agreement." *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. at 299. In affirming

[46] The sanction was imposed over twenty years ago, in 1997, but undersigned counsel includes this case because the affirmance by the district court occurred in 1999.

the imposition of $143,000 in sanctions, the district court noted that the bankruptcy court "found that the intentional nondisclosure of the fee agreement was the equivalent of fraud." *In re 1095 Commonwealth Corp.*, 236 B.R. at 533. The amount of the sanction (imposed on motion, not *sua sponte*) was equivalent to the attorneys' fees and expenses the bankrupt party incurred in opposing Citizen's fee petition.[47]

iii. *Sanchez v. Esso Standard Oil de Puerto Rico*

The District of Puerto Rico sanctioned plaintiffs approximately $513,000, which represented certain costs incurred by defendant defending environmental litigation which was "frivolous, unreasonable, and lacking a factual foundation" and in which plaintiffs "wrongfully procured injunctive relief based upon false testimony." *Sanchez v. Esso Standard Oil de Puerto Rico, Inc*., No. CIV 08-2151, 2010 WL 3809990, at *10, *14 (D.P.R. Sept. 29, 2010). The court noted that the plaintiffs' attorneys "acted in bad faith by . . . attempting to deceive this court . . . and dragging out the expensive litigation for over a year without factual support and without any reasonable hope of prevailing on the merits." *Id.* at *18 (internal quotations omitted). The court also ordered that plaintiffs and their attorney pay the defendants' attorney's fees for part of the litigation. Although undersigned counsel is including this case among the three First Circuit cases in the last twenty years where Rule 11 sanctions exceeded $100,000, it should be noted that the sanction was imposed in the first instance under 28 USC § 1927 and in the alternative under Rule 11, the court's inherent sanction power, or the fee-shifting section of the statute pursuant to which the underlying action was brought. The sanction was unusual in that the court appears to

[47] For sanctions imposed on motion, "under unusual circumstances . . . deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party." Fed. R. Civ. P. 11 advisory committee's note.

have approved a settlement between the parties in which plaintiffs paid defendant $315,000 to settle all claims, including any costs and fees pursuant to the court-ordered sanction.[48] *See* Agreed Final Judgement, Dkt. 513, *Sanchez v. Esso Std. Oil Co.*, No 3:08-cv-02151 (D.P.R. Apr. 13, 2011) (TLF Ex. 17).

C. The Special Master Has Ignored Rule 11's Prohibition On Imposition Of Monetary Sanctions Post-Settlement

In recommending a significant monetary sanction, the Special Master has wholly ignored section 5 of Rule 11, titled "Limitations on Monetary Sanctions," and thereby committed another serious legal error. That section states that "The court must not impose a monetary sanction . . . on its own, unless it used the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned." Here, the Court entered its Order and Final Judgment approving the settlement between State Street and the Class (i.e., the "settlement of the claims made by or against the party") on November 2, 2016. *See* Order and Final Judgment, 11/2/16 (SM Ex 113). The Court has not issued a show-cause order contemplated by Rule 11(c)(3). Even if one were to interpret the Court's February 6, 2017 Order as a Rule 11(c)(3) show-cause order, it was still issued after the settlement. The Special Master's failure to even consider this strict requirement is another example of his and his counsel's inattention to the law and to the facts. *See, e.g.*, *Wohllaib v. U.S. Dist. Court for the W. Dist. of Washington, Seattle*, 401 F. App'x 173 (9th Cir. 2010) (reversing *sua sponte* monetary sanction and noting "Rule 11 clearly prohibits a district court from *sua sponte* issuing an order to show cause why the court should not impose a monetary sanction if the parties have already settled a case."); *Steeger v. JMS Cleaning Servs.*, No.

[48] The court also agreed that plaintiffs' attorney could pay defendant $10,000 in lieu of court-ordered sanctions.

17CV8013, 2018 WL 1363497 (S.D.N.Y. Mar. 15, 2018) (on reconsideration, vacating monetary sanctions imposed *sua sponte*). *See also* 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.); MOORE'S FEDERAL PRACTICE, § 11.22(2)(b) (3d ed.).

V. Garrett Bradley Should Not Be Referred To The Board of Bar Overseers

A. The Conduct At Issue Affects All Firms Yet The Special Master Unfairly Recommends Only Garrett Bradley For Discipline

As an initial matter, the Special Master's recommendation that Garrett Bradley be referred to the Board of Bar Overseers for inadvertent misstatements in a boilerplate affidavit contradicts "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp*., 546 U.S. 132, 139 (2005). As demonstrated above, nearly identical misstatements were made by lawyers from the other law firms involved in this litigation—the majority of whom used the same boilerplate affidavit— yet the Special Master recommends discipline only for Garrett Bradley. Further, with respect to the Chargois arrangement (supposedly "the most disturbing aspect of what was learned during the entire investigation," R&R at 330), the Special Master found violations of multiple ethical rules, *see* R&R at 250, 255, 286, 322, 326, yet recommends "no professional disciplinary action be taken," *id.* at 371. This is not to say all firms should be referred for professional discipline, but to note that Garrett Bradley's conduct does not warrant professional discipline for him or his firm, particularly with respect to the technical and immaterial misstatements in the fee declaration. *Cf*. Lieberman Dep., 4/4/18, at 91:21-92:6 (SM Ex. 228).

B. The Special Master's Reliance On *Matter of Schiff* Is Clearly Wrong

As further evidence of the serious flaws in the Special Master's Report and Recommendations, the Court need look no further than the Special Master's primary authority for the proposition that Garrett Bradley should be referred to the BBO—*Matter of Schiff*. The

Special Master writes of this case, "The Rhode Island Court's handling of *Schiff* informs the Special Master with regard to Bradley's false Declaration in this matter." R&R at 241. But the *Schiff* case has absolutely no bearing on any potential discipline for Garrett Bradley or the other lawyers who signed boilerplate fee declarations. The Special Master's extensive discussion of this case—which takes up nearly three pages of his Report and Recommendations— suggests that the Special Master or his counsel are either: (1) disingenuous because they know the *Schiff* case has no relevance here but rely on it anyway; or (2) simply unable to understand the difference between two readily distinguishable cases. Both possibilities are cause for concern.

The procedural history underlying the *Schiff* case is "bizarre, not to say byzantine." *Pontarelli v. Stone*, 978 F.2d 773, 774 (1st Cir. 1992). Attorney Schiff represented a police fraternal organization and five police officers in an eight-count civil rights lawsuit against Rhode Island and four Rhode Island officials filed in June 1986. *Pontarelli v. Stone*, 930 F.2d 104, 107 (1st Cir. 1991). At the conclusion of the district court proceedings, all defendants prevailed against all plaintiffs except for three judgments on a single count of sex discrimination obtained by one plaintiff against Rhode Island ($2.00), and two officials ($10,002 and $5,002.). *See id; Pontarelli v. Stone*, 781 F. Supp. 114, 118 (D.R.I. 1992). Despite the relatively modest judgment, plaintiff moved for attorneys' fees of $511,951.00 and costs of $203,268.28 (in other words, over forty times greater than the recovery) pursuant to 42 U.S.C. § 1988. *Pontarelli*, 781 F. Supp. at 118. In connection with the fee petition, Attorney Schiff signed an affidavit stating that "the summaries of time and charges for my services attached hereto present an accurate statement of services performed in connection with this litigation and was prepared from contemporaneous time records, and with respect to sums for costs and expenses, from accounting records." *Matter of Schiff*, 684 A.2d 1126, 1140 (R.I. 1996). The district court found the

affidavit to be false and referred Schiff to the Rhode Island Supreme Court, which ultimately imposed an 18-month suspension. *Id.* at 1127, 1138; *Matter of Schiff*, 677 A.2d 422, 425 (R.I. 1996).

There are two similarities between *Schiff* and the case at bar: both are about attorneys' fees and both concern boilerplate statements in an affidavit. The similarities end there. The nature of the falsity in the *Schiff*—where the court found "**the fee claimed has been grossly inflated**" and the fee declaration was "**riddled with misrepresentations**"—is worlds apart from the nature of the alleged falsity in this case.[49] *Schiff*, 684 A.2d at 1134, 1136 (emphasis added). In *Schiff*, the "**[t]he billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] sought payment for time not worked.**" *Schiff*, 677 A.2d at 423 (emphasis added). The records demonstrated a "lack of good faith effort to eliminate time expended on separate unsuccessful claims or on behalf of unsuccessful litigants or to exclude hours which [were] 'excessive, redundant, or otherwise unnecessary.'"[50] *Pontarelli*, 781 F. Supp. at 121. The Rhode Island Supreme Court found that the "misrepresentations to the court bear a close resemblance to an attempt to obtain money under false pretenses." *Schiff*, 677 A.2d at 425. The nature of the "grossly inflated" billing is astounding:

> For example, according to the records submitted, Ms. Schiff worked on this case for 25.7 hours on October 9, 1988, and 26.6 hours on October 10, 1988. While it may be possible to work around the clock for two consecutive days without respite, it clearly is impossible to do so for more than 24 hours in any one day. The summary also indicates that on April 14, 1988, Ms. Schiff spent 8.9 hours travelling

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[49] As explained above, the lodestar was submitted in this case so that the Court could determine whether the 25% fee was reasonable (*i.e.*, the "cross-check"). Additional hours or fees on the lodestar would not have increased the fees paid to the plaintiffs' attorneys, but simply reduced the multiplier, making it more likely that the court would find the 25% fee reasonable. This is wholly different from the fee petition Attorney Schiff filed pursuant to 42 U.S.C. § 1988, where the hours and fees listed on the declaration represented the actual funds sought from the defendants.

[50] In addition to this malfeasance, the Court found Plaintiff engaged in "an effort to accomplish a goal completely unrelated to the stated purpose of litigation by making unsupportable claims against third persons." *Pontarelli*, 781 F. Supp. at 127.

> to New York for a meeting. That was only two days after she wrote to the Court advising that she was unable to meet a filing deadline because of a totally incapacitating illness that would prevent her from engaging in normal activities for 7–10 days. Her incapacity was confirmed by another letter she sent to the Court on April 20 indicating that she had been hospitalized until April 19.
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> [C]ompensation is sought for more than 4,000 billable hours which represent more than two full years of a lawyer's billable time. However, despite the sweeping allegations contained in the complaint, the "plaintiffs'" claims were based on a relatively simple sequence of events occurring over a limited period of time. It is inconceivable that even the most vigorous advocacy of those claims required anywhere near the number of hours for which the "plaintiffs" seek recovery.

Schiff, 684 A.2d at 1133-35.

There were also serious allegations that Schiff inflated costs:

> [T]hey assert that they have paid $22,510.17 for the services of three private investigators and approximately $40,000.00 in expert witness fees and expenses. However, they are unable to produce any bills or other documentation showing what services were performed, when they were rendered, how much time was involved, what rates were charged or what expenses are included in those sums.
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> A total of nearly $15,000.00 is claimed for "lodging" expenses. Of that amount, $4,800.00 is identified as "apartment rental" for the two out-of-state attorneys who participated in the trial. That sum, itself, seems excessive inasmuch as the trial lasted for only 17 days. The remaining $10,200.00 consists of hotel bills for unidentified "expert witnesses" who never testified and other individuals who were identified but whose roles in the case, if any, are unknown.
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> Superimposed on this complete absence of documentation is the same kind of misrepresentation that permeates the "plaintiffs'" requests for attorneys' fees. Thus, the plaintiffs seek reimbursement for very precise amounts allegedly expended for items such as office supplies ($479.50 and $877.75), postage ($548.40), and photocopying ($10,320.00, $550.00, $3,689.23). Those figures clearly convey, and presumably were intended to convey, the impression that they were derived from detailed records or exact measurement of the quantities of each item involved. However, on cross-examination, Ms. Schiff admitted that they were only "estimates" and that there is no documentation to support them.

Id. at 1135-36.

Contrast the findings in *Schiff* with the case at bar. **Here, there is no evidence whatsoever of false, inflated, or unreasonable billings.** Instead, the Special Master himself found that: (1) the total fees awarded to class counsel were justified and reasonable, *see* R&R at 6 ("By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved."); (2) the rates listed for Thornton partners and associates were justified and reasonable, s*ee* R&R at 175 ("[G]iven the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness."); (3) with the exception of Michael Bradley and the contract attorneys, the rates listed for the staff attorneys were reasonable and justified, *see* R&R at 172, 180 ("[W]e find that the higher rates billed were justified in this instance" and "[t]he Special Master concludes that the staff attorney billing rates in the lodestar fee petition are generally reasonable . . . ."); and most importantly, (4) the Thornton attorneys actually worked the hours listed on the lodestar, and the number of hours worked was reasonable, *see* R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); *id.* at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable.").

In short, the nature of the falsity in the *Schiff* case goes to the very essence of the fee request—the number of hours actually worked and the reasonableness of those hours—whereas the nature of the falsity alleged here relates to erroneous (or at the very least, ambiguous) and immaterial statements that did not affect the overall lodestar. In *Schiff,* the declaration was false because—boilerplate or not— the attached statement of fees was not true and correct. Here, the

declaration *language* itself contained errors regarding, for instance, the nature of the employee-employer relationship between the Thornton Law Firm and the staff attorneys for whom it paid; the Special Master found the accompanying hours and time to be reasonable and reliable. There simply is no comparison between the two and it is bizarre that the Special Master concludes that "[t]he facts in *Matter of Schiff* are **eerily similar** to those here."[51] *See* R&R at 244 (emphasis added). Justice Holmes' axiom, cited above by the First Circuit, again seems particularly apt: "Even a dog knows the difference between being kicked and being stumbled over." O.W. HOLMES, JR., THE COMMON LAW 3 (1881).

C. Garrett Bradley Did Not Violate MRPC 3.3 or 8.4

If the Court were to consider referring Garrett Bradley to the BBO—a step which should be reserved for only serious misconduct—it would have no basis for doing so.[52] In signing a boilerplate affidavit that contained inadvertent and immaterial errors, Bradley violated neither Massachusetts Rule of Professional Conduct 3.3(a)(1) nor 8.4 because he did not have actual knowledge of any false statement.

Rule 3.3(a)(1) states in relevant part that "[a] lawyer shall not **knowingly** make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law

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[51] *Compare* R&R at 244 ("Just like Schiff's affidavit, Garrett Bradley's Declaration here was a sworn statement designed to convince Judge Wolf that Thornton's fee petition was fair, reasonable, and accurate") *with* R&R at 6 ("[T]he attorneys' fee award was fair, reasonable, and deserved.").

[52] The Court's Local Rules regarding disciplinary procedures and referrals were amended effective January 1, 2015. Pursuant to the new rules, there is now a question of whether the judicial officer presiding over the case should be the judicial officer who determines whether or not to refer attorneys to the Board of Bar Overseers. *Compare* L.R. 83.6.5 (effective Jan. 1, 2015) *with* L.R. 83.6.5(A) (version which appears to have been in effect prior to Jan. 1, 2015) ("When misconduct or allegations of misconduct that, if substantiated, would warrant discipline as to an attorney admitted to practice before this court, is brought to the attention of a judicial officer, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the judicial officer may refer the matter to counsel for investigation, the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate."). *See Gonsalves v. City of New Bedford*, 168 F.R.D. 102, 107 n.100 (D. Mass. 1996) (Wolf, J.); *Blake v. NSTAR Elec. Corp.*, No. 09-10955, 2013 WL 5348561, at *1 n.1 (D. Mass. Sept. 20, 2013).

previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1) (emphasis added). The Rules define "knowingly" as "**actual knowledge** of the fact in question." Mass. R. Prof. C. 1.0(g) (emphasis added). This intent standard does not reach negligent or inadvertent misrepresentations. The drafters of the Rule knew how to employ a negligence standard but affirmatively did not do so in the candor to the tribunal provision. *See* Mass. R. Prof. C. 4.3 (using the "[w]hen the lawyer knows or reasonably should know" standard for communications with unrepresented parties); Mass. R. Prof. C. 8.2 (using the "knows to be false or with reckless disregard as to its truth or falsity" standard for statements regarding integrity of judges).[53]

Indeed, as the Special Master's own so-called expert acknowledged, the test for whether an attorney violated Rule 3.3(a)(1) is **subjective**. Gillers Dep., 3/20/18, at 272:4-21 (SM Ex. 253). That is, in determining whether there has been a violation, the tribunal must ask not what the reasonable attorney *would have known*, but what the attorney *actually knew* when he presented facts to the Court. *See* W. Bradley Wendel*, Monroe Freedman: The Ethicist of the Non-Ideal,* 44 HOFSTRA L. REV. 671, 680 n.8 (2016) ("Knowledge is defined in the *Model Rules* as actual (that is, subjective) knowledge.") (citations omitted); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act As Gatekeepers*, 56 RUTGERS L. REV. 9, 51 (2003) ("[T]he Model Rules eschew an objective standard . . . opting instead to judge the propriety of the lawyer's conduct under a subjective, actual knowledge standard.").

As with violations of Rule 3.3, Rule 8.4(c) does not apply to mistakes. *See In re Murray*, 455 Mass. 872, 881 (2010) (upholding hearing committee's finding that attorney did not violate

[53] In *In re Hilson,* 448 Mass. 603 (2007), the Supreme Judicial Court suggested, but did not hold, that Rule 3.3 could be violated by "reckless disregard for . . . truth or falsity."

Rule 8.4(c) where "no intent to mislead"); *Matter of McCabe*, 13 Mass. Att'y Disc. R. 501 (Appeal Panel Report, September 1997) ("[T]he conduct must be intentional, not merely negligent."); *Matter of Thurston*, 13 Mass. Att'y Disc. R. 776 (Board Memorandum, May 12, 1997) (striking hearing committee's finding that attorney violated DR 1-102(A)(4) [predecessor to 8.4(c)] and noting, "As Bar Counsel concedes, a negligent misrepresentation does not violate DR 1-102(A)(4) because the rule prohibits only intentional conduct."). Professor Gillers agrees and stated in his deposition that the mental state required for a Rule 8.4 violation should not be lower than the mental state required for a Rule 3.3 violation. Gillers Dep., 3/20/18, at 275:9-21 (SM Ex. 253).[54]

The Supreme Judicial Court's *In re Diviacchi* opinion, which the Special Master cites, is not to the contrary. There, the attorney committed multiple ethical violations, including charging excessive fees, and sued his client in both federal and state courts. In one of the lawsuits, the attorney alleged the client had a "standard habit" where she "hires an attorney, works him or her until she stops paying the bills, fires that attorney and disputes the bill and files a [BBO] complaint, and then gets another attorney and starts the process again." *In re Diviacchi*, 475 Mass. 1013, 1017 (2016). In fact, there was no evidence of such a pattern, and in particular, there was no evidence of any BBO complaints. In upholding the sanction, the Court cited a comment to Rule 3.3 and rejected the attorney's argument that his statements "should be

[54] The BBO has not always spoken with one voice. In a few instances, particular fact summaries compiled by the BBO have suggested that a negligent misrepresentation may be sufficient for a violation of Rule 8.4. For instance, in *In re Ged* (Public Reprimand 2004-17), the attorney received a public reprimand for erroneously including hours that he did not actually work on a fee petition. The matter, however, was resolved by a stipulation which waived a hearing. Similarly, in *In re Tiberii* (Public Reprimand 1996-4), the BBO imposed a public reprimand for negligent misrepresentations under both the predecessor to 8.4 and the predecessor to 3.3. *See also In re Paul J. Pezza* (No. BD-2013-116) (although the paucity of facts prevents the reader from understanding which intent standard was actually used). The precedents cited above, and that of the Supreme Judicial Court, however, suggest that intentionality is required. *See In re Discipline of an Attorney*, 448 Mass. 819, 831 n.17 (2007); *Matter of Zak*, 476 Mass. 1034, 1038 (2017).

evaluated under a subjective, good faith basis standard" even though he could not provide any factual basis for them. *Id.* at 1020. *Diviacchi* did not alter the "actual knowledge" standard in Rule 3.3; the *Diviacchi* attorney was not merely inattentive in reviewing an affidavit, but intentionally concocted, and swore to the truth of, defamatory allegations about his client.

Nor could the "actual knowledge" standard be changed by a comment to a Rule.[55] As the First Circuit has noted regarding the Rhode Island Rules of Professional Conduct, "[a] Comment cannot substantively change the text of [a] Rule." *Whitehouse v. U.S. Dist. Court for the Dist. of Rhode Island*, 53 F.3d 1349, 1358 n.12 (1st Cir. 1995). And the Rules themselves state, "Comments do not add obligations to the Rules. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[56] Mass. R. Prof. C. Scope §§ 1,9. *See also Clark v. Beverly Health and Rehab. Servs., Inc.*, 440 Mass. 270, 275 n.8 (2003) ("[A Comment] is an illustrative tool, not a bootstrap. While it provides guidance to the practitioner in certain circumstances, it cannot enlarge, diminish, or in any way affect the scope of the . . . rule itself."); *Matter of Larsen*, 379 P.3d 1209, 1214 (Utah 2016) ("[Ou]r rules require proof of *actual knowledge*. That concept is distinct from constructive knowledge or recklessness. . . . [Rule 3.3], as written, does not lend itself to the interpretation that a false statement made

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[55] The Special Master believes Comment 3 to Rule 3.3 is applicable, which states "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." *See* R&R at 240; Mass. R. Prof. C. 3.3.

[56] In any event, a federal court is not bound by a state's interpretation of disciplinary rules. *See Grievance Comm. For S. Dist. of New York v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) ("[W]ell-established principles of federalism require that federal courts not be bound by either the interpretations of state courts or opinions of various bar association committees."); *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445, 1450 (D.P.R. 1985) ("The manner in which the Supreme Court of Puerto Rico applied its disciplinary code was, of course, useful precedent in our own interpretation of that code's application to a particular situation before us, but it is essential to understand that the primary responsibility for supervising the conduct of the attorneys who practice before this court lies precisely with this forum.").

without a 'reasonably diligent inquiry' is a *knowing* misstatement in violation of the rule. . . . We accordingly repudiate Comment 3 in the Advisory Committee Notes to rule 3.3.").

Here, as set forth above, there is no evidence that Garrett Bradley had "actual knowledge" that the affidavit submitted in September 2016 contained "false" information.[57] Bradley's admission of an inadvertent mistake does not lead to the conclusion that Bradley knowingly made false statements to the court. As even Professor Gillers acknowledged in his deposition, a careless mistake is not equivalent to a knowing misrepresentation. Gillers Dep., 3/20/18, at 269:5-7 (SM Ex. 253). And here, there is a question about the ambiguity, materiality, and import of the statements in the affidavit. *See Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 8 (1st Cir. 2005) ("Anyway, it seems to us that a finding of ethical misconduct, so fraught with consequences for a lawyer's professional reputation, should not rest on such fine distinctions. If the court has trouble coming to an unqualified conclusion about the parties' settlement status, then [respondent] can hardly be charged with telling a knowing falsehood—the standard set forth by the Rules of Professional Conduct—under such circumstances.").

There is also no evidence to support the proposition that Garrett Bradley violated Rule 3.3(a) by failing to correct a false statement of material fact.[58] The Special Master is only able to conclude Bradley violated 3.3(a) in this manner because he assumes that, when Bradley submitted the Declaration in September 2016, Bradley had actual knowledge that his Declaration was false. *See* R&R at 233. If that assumption were correct, it may well follow that Rule 3.3(a) was violated from the moment Bradley submitted the Declaration until the moment the errors were disclosed to the Court in the March 2017 hearing. But, as noted, the "evidence" cited for

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[57] The nature of this "false" information is discussed *supra* § III(B).

[58] The Thornton Law Firm objects to the characterization of the errors in the fee declaration as material. This is an additional reason why Garrett Bradley did not violate this provision of Rule 3.3.

the predicate proposition that Bradley had actual knowledge he submitted false evidence in September 2016 is spurious, and there is no other support offered for the violation. *See supra* § II. Nor could there be. All of the evidence, including Bradley's contrition and acceptance of responsibility for the mistakes, as well as the lack of any motive whatsoever to falsify any passages of his Declaration, suggest that Bradley first realized the inaccuracies when Judge Wolf issued the February 2017 order and further inquired during the March 2017 hearing.[59]

The case at bar is similar to those in which courts and other tribunals have found an attorney's mistakenly incorrect statement is not a violation of Rule 3.3 or analogous provisions. For instance, in *Obert v. Republic W. Ins. Co*, 398 F.3d 138, 143 (1st Cir. 2005), the First Circuit found there was no knowing violation of Rule 3.3(a)(1) even where "one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization." Even in the much more egregious case of *In re Auerhahn*, No. 09-10206, 2011 WL 4352350, at *16 (D. Mass. Sept. 15, 2011),[60] a three judge panel of the District of Massachusetts found that an attorney who failed to turn over potentially exculpatory documents in a habeas proceeding did not "knowingly disobey an obligation under the rules of the tribunal" (a rule analogous to Rule 3.3 and requiring the same mental state). In that case, the court found

[59] Contrary to the Special Master's insinuations, *see* R&R at 235-36, there is no evidence that Bradley became aware of the errors in the boilerplate affidavit prior to the Court's February 2017 order. The media inquiries which prompted the November 2016 letter to the Court focused on the double counting error, and counsel's efforts were directed at disclosing the error and submitting a revised and corrected lodestar as soon as possible. The February 2017 order, which raised the issue of "regular hourly billing rates" listed in the affidavit, set a date for a hearing on the matter. Memo. and Order, 2/6/17, at 6, 13 (SM Ex. 180). At that hearing Bradley addressed the inaccuracies in the declaration. The Special Master seems to suggest Bradley should have somehow addressed the inaccuracies after the February order but before the hearing. This would be contrary to common practice—when the Court sets a hearing date, attorneys address the issues raised by the Court at the hearing. Moreover, none of the other law firms notified the Court of any inaccuracies prior to the March 2017 hearing—even though, as discussed above, the fee declarations of all three law firms were inaccurate in certain respects.

[60] Since the *Auerhahn* case, the District of Massachusetts has amended its Local Rules regarding the standard of proof in attorney discipline proceedings. *See* L.R. 83.6.5(i)(6).

the attorney was "lackadaisical at best" and conceded negligence. *Id.* But as the *Auerhahn* court noted, "[n]egligence, however, is not enough here." *Id.* Surely if a prosecutor's "lackadaisical" and negligent failure to turn over potentially exculpatory evidence did not violate the Rules of Professional Conduct because it was not done "knowingly," Garrett Bradley cannot be sanctioned for mistakenly submitting a boilerplate fee application containing inaccuracies.

VI. The Customer Class Law Firms Properly Listed Contract Attorneys On The Lodestars

In pages 181-89 of his Report, the Special Master expresses a strong personal policy preference for listing contract attorneys' time as expenses rather than legal fees. But his personal preference is merely that: a personal preference. The Special Master has **failed to identify a single case which holds contract attorneys must be listed as expenses**.[61] In fact, the Special Master's Report cites a number of cases that actually support counsel's decision to include contract attorneys in the lodestar. *See Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009), *aff'd*, 355 F. App'x 523 (2d Cir. 2009) (finding that contract attorneys were properly included in the lodestar where contract attorneys' work was supervised by plaintiffs' counsel); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) ("[C]ourts have . . . regularly applied a lodestar multiplier to contract attorneys' hours.");[62] *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) ("[I]t is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm[.]"); *In re Enron Corp. Sec., Derivative &*

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61 The Special Master asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue[.]" R&R at 187. However, case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar.

62 The Special Master cites *Citigroup* in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically drew this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his market rate." 965 F. Supp. 2d at 395.

ERISA Litig., 586 F. Supp. 2d 732, 784-85 (S.D. Tex. 2008) (allowing counsel to recover fees for contract attorney services at market rates rather than their cost to the firm); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 272 (D.N.H. 2007) ("It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); s*ee also In re AOL Time Warner S'holder Derivative Litig.*, No. 02 CIV. 6302 (CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) ("The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary.").

The only cited authorities that even come close to supporting the Special Master's preference that contract attorneys should be listed as expenses are cases in which counsel, on their own initiative, included contract attorneys as expenses and the court did not consider whether including them in the lodestar would have been appropriate. *See Dial Corp. v. News Corp.*, 317 F.R.D. 426, 438 (S.D.N.Y. 2016) (noting counsel's decision to include contract attorneys as an expense despite the fact that it is permissible to "mark[]-up contract attorney fees"); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2016) (approving request for expenses including expenses for document review by contract attorneys).

Further, the ABA Standing Committee on Ethics and Responsibility has advised that "a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000). Surprisingly, the Special Master cited ABA Formal Opinion 00-420, yet instead of acknowledging that it affirmatively answers the exact question he is posing, stated that it "leave[s] attorneys a wide degree of latitude to decide"

whether to bill contract attorney services as fees for legal services or as costs incurred by the firm.[63] *See* R&R at 186.

The Special Master contends that decisions allowing contract attorneys to be included in lodestars at market rates are "not acceptable for purposes of this Report" because they are based on the "faulty premise" that "contract attorneys [are] indistinguishable from off-track associates[.]" R&R at 184. This assertion is based on a clear mischaracterization of the cases. In *Tyco*, the only decision from a court within the First Circuit cited by the Special Master, the court explicitly found that "[a]n attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney." 535 F. Supp. 2d at 272. The other decisions referenced by the Special Master also demonstrate a clear understanding that a contract attorney's work is temporary and often project-specific. *See, e.g.*, *Carlson*, 596 F. Supp. 2d at 409 ("A contract attorney is one hired 'to work on a single matter or a number of different matters, depending upon the firm's staffing needs and whether the temporary attorney has special expertise not otherwise available to the firm.'") (quoting *Enron*, 586 F. Supp. 2d at 782).[64] At no point do the decisions cited by the Special Master conflate a "contract attorney" with an "off-track associate" permanently employed by a firm. The Special Master also claims that those courts including contract attorneys in lodestars "accepted, without discussion, the billing of contract attorney expenditures as legal fees rather than as a cost or expense." R&R at 186. This is simply

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63 It is curious that the Special Master cites ABA Formal Opinion 00-420, which is directly on point, but did not include the full opinion as one of the 266 exhibits attached to his Report.

64 The Special Master cites *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400 (D. Conn. 2009) after acknowledging that "[s]everal courts, *including two within this Circuit*, have applied market rates without regard to the actual wages paid to a contract attorney." R&R at 184 (emphasis added). While *Carlson* does support the fact that firms may bill for contract attorneys at market rates, it is worth noting that *Carlson* is a decision out of the District of Connecticut, a court within the Second—not the First—Circuit.

incorrect. *See Citigroup*, 965 F. Supp. 2d at 394 ("[C]ourts routinely reject claims that contract attorney labor should be treated as a reimbursable litigation expense.").

The Special Master's policy-based arguments fare no better. He claims that "the decision to bill a contract attorney as an expense or as a legal service fee" is a matter of "professional judgment" that should be "informed by the role of the contract attorney vis-à-vis the other attorneys in the case." R&R at 186. According to the Special Master, the contract attorney's role is determined not by the work performed, but by the financial obligations incurred by the law firm. He attempts to compare the cost of hiring contract attorneys with that of hiring a stenographer, or with paying for transportation, meals, and lodging, since the firm does not face "long-term financial obligations" with contract attorneys.[65] Yet, the Special Master does not explain, nor provide any authority for, the proposition that a firm's financial obligations should have any bearing on whether to treat contract attorneys' work as legal fees. Courts considering the issue focus instead on the type of work performed by the contract attorneys. *See AOL Time Warner*, 2010 WL 363113, at *25 (allowing a multiplier on contract attorney fees where those attorneys "were not mere clerks" but "exercised judgments typically reserved for lawyers, under the supervision of the firms' regular attorneys"). The Special Master has offered no explanation as to why the contract attorneys here—who were making legal judgments under the supervision of the firms' regular attorneys—were more akin to stenographers than associates. As the Special Master recognized, "contract attorneys . . . perform work readily assigned to a first- or second-

[65] The Special Master claims that the cost of contract attorneys is "most akin to a disbursement of funds passed along to the client at face value." R&R at 187 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (SM Ex. 193)). According to ABA Formal Opinion 00-420, Formal Opinion 93-379 was "made in the context of goods or services of non-lawyers," and "does not speak directly to the subject of . . . contract lawyers, in the context of disbursements or expenses." The principles laid out in Opinion 93-379 are "applicable to surcharges for legal services provided by contract lawyers *when billed to the client as a cost or expense*." ABA Formal Opinion 00-420 (emphasis added).

year associate in a traditional law firm model." R&R at 183-84. The contract attorneys in this case provided valuable legal services. They were doing the same work as the "staff attorneys" who, as the Special Master himself admits, were appropriately included in the lodestar.[66] *See* R&R at 176-181. And as the Special Master acknowledges, "similar work justifies similar rates." *Id.* at 182.

Even if the Court were to adopt the Special Master's personal policy preference for listing contract attorneys as reimbursable expenses, it would be inappropriate to apply that preference retroactively. *See In re Beacon Assocs. Litig.*, No. 09 CIV 3907 (CM), 2013 WL 2450960, at *18-19 (S.D.N.Y. May 9, 2013) (the court expressed that if it had thought ahead it "would have included in [its] order appointing Lead Counsel specific directives about how much [it] was prepared to authorize in terms of an hourly rate for document reviewers," but having failed to do so it was "unfair to impose such a rule *ex post facto*"). The attorneys agreed to take this case on a contingency basis, believing that they would be paid appropriately. Their belief that they would be compensated at market rates for contract attorneys' time was not only reasonable, but in line with common practice and supported by legal authority. It would be unfair to impose a retroactive rule reducing counsel's recovery for no reason other than to satisfy the Special Master's personal preference, which has no basis in prevailing case law.

In any event, the Special Master's proposed remedy is improper. Even if the firms were required to list contract attorneys as expenses rather than legal fees—and according to every

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[66] *See* Heimann Dep., 7/17/17, at 51:18-52:15 (SM Ex. 19) ("There is no distinction that I am aware of between the work that's assigned to attorneys who are employed by the firm directly and those that are employed through an agency. There is no difference between the expectations for the work to be performed by those lawyers. There is no distinction with respect to the quality of the work that is expected to be performed by those lawyers. There is no distinction between how those lawyers are trained to to [sic] their work. There is no distinction between how they are supervised in connection with the work that they do. They are one and the same.").

court to have considered the issue, they were not—the proper remedy would not be to disgorge that amount from the lodestar to the class, but to remove that value from the lodestar and then determine whether or not the multiplier was still reasonable. *See* Rubenstein Decl., 6/20/18. When the total contract attorney value is removed, the total lodestar comes to $35,940,307.75.[67] Comparing this against the total fee award, $74,541,250, results in a multiplier of 2.07. This is well within the reasonable range approved by courts in complex class-action litigation. *See, e.g.*, *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (finding that a 28% fee award yielding a multiplier of 3.32 was "well within the range").

VII. The Special Master's Proposed 50% Reduction In Rate For Michael Bradley's Work Is Unjustified

The Special Master finds that Michael Bradley performed document review work on this case, on a contingency basis, between 2013 and 2015, R&R at 189-90, and that his work was supported by contemporaneous time records, R&R at 366. The Thornton Law Firm agrees with these findings. However, the Special Master's concern is not with the hours in the Thornton fee declaration attributed to Michael Bradley—indeed, he finds those hours to be supported by time records produced by Thornton, R&R at 217 n.171, 366—but, rather, he takes issue with the hourly rate applied to Mr. Bradley's work for purposes of the lodestar cross-check. The Special Master recommends that Michael Bradley's rate be reduced by 50%, and that the difference between the amount listed in the Thornton lodestar, multiplied by 1.8, and the amount calculated at the new rate, multiplied by 1.8, be "returned to the class." R&R at 366.

[67] This number is calculated by reducing the original lodestar ($41,323,895.75) by the amount of double counted time ($4,058,000) and the Special Master's "original petition" "lodestar value" of "contract attorneys time" ($1,325,588.00).

In assessing the value of the work performed by Michael Bradley in this case, the Special Master finds that Mr. Bradley's work "most closely resembles that of a junior level associate."[68] R&R at 196. For this and for other reasons, he recommends a reduction in the $500 hourly rate associated with Mr. Bradley's work.[69] Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in his report ($325 to $725 per hour). R&R at 164. Moreover, it is less than the $415 per hour rate used for at least one other staff attorney who performed exactly the same work (*i.e.,* document review, no drafting), and who also worked remotely. *See* p. 86, *infra*.

The Special Master finds that Michael Bradley "had no experience relevant to the case and the work he performed was simple, straightforward, and unmonitored document review."

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[68] The Special Master makes this recommendation despite finding elsewhere in his report that Mr. Bradley had more than eight years of legal experience when he signed on to assist with the State Street matter—years that included serving as an Assistant District Attorney in Norfolk County, as the Executive Director of a Commonwealth Task Force dedicated to detecting fraud in the underground economy, and as a solo practitioner. R&R at 190-91.

Regarding the work performed, the Special Master claims that Michael Bradley had no contact with the Thornton firm regarding this case beyond sending in his hours and raising "technical concerns about the software." R&R at 193. This finding clearly ignores record evidence that Michael Bradley contemporaneously raised substantive questions to Evan Hoffman regarding documents he was reviewing in the Catalyst database. The Special Master selectively quotes deposition testimony from Evan Hoffman but curiously ignores testimony from the same deposition in which Mr. Hoffman recalled conversations with Mr. Bradley about substantive case questions. *See* Hoffman Dep., 6/5/17, at 109:17-110:7 (SM Ex. 63) (recalling, *e.g.,* discussion about trade tickets).

[69] One of these reasons, apparently, is that Michael Bradley performed work "fully on his free time and when it was convenient for him to do so." R&R at 366. The Thornton Law Firm is aware of no authority stating that the time at which worked is performed has a bearing on the rate at which that work can be charged. Setting aside the fact that "free time" and "convenient" are surely subjective concepts, Mr. Bradley did not testify that he did work in his "free time" (or at "odd hours," as the Special Master asserts elsewhere (R&R at 196)). To the contrary, Mr. Bradley testified that his practice was to work on the matter in the afternoons or evenings, when he had available time after attending to other client matters in the mornings, and that he tried to review for a consistent amount of time each week. M. Bradley Dep., 6/19/17, at 51:14-52:8 (SM Ex. 67). The fact that Mr. Bradley was performing this work in addition to other case matters, over a two-year period, makes him no different from any other associate or partner working on this case who also worked on matters for other clients during the years this case was pending.

R&R at 366. These distinctions apply equally to some of the staff attorneys performing document review for both Lieff and Labaton. Yet, despite this similarity, only Michael Bradley's rate is singled out for a 50% reduction. The Special Master's asserted distinctions based on "experience," the "simple and straightforward" nature of the work, and the "unmonitored" nature of the work are unjustified and, more importantly, cannot be the basis for the radically disparate treatment of cutting Michael Bradley's rate in half.

The nature of contract or temporary case-by-case document review is such that lawyers performing document review will seldom see the same fact patterns or underlying issues in their work as they move from one case to the next. While some staff attorneys in this case had previously worked on a similar case involving another bank, BNY Mellon, not all did. Indeed, *none* of the 35 Labaton staff attorneys worked on the *BNY Mellon* case, as Labaton was not counsel in that case. This is not to suggest that they were unqualified to do the work. But there is no basis, in the record or anywhere else, to suggest that such staff attorneys' rates should change from case to case based on their "relevant experience."[70]

If the Special Master's recommendations on this point were followed, every lodestar review would necessarily devolve into a detailed analysis of each staff attorney's professional biography and educational background. Michael Bradley is a gainfully employed attorney with eight years of professional experience, including extensive litigation and trial work, who was appointed to head a state fraud-detection task force. His experience justified his lodestar rate in this case. Surely, the other staff attorneys' experience was not, collectively, so much more

[70] Indeed, if a particularly knowledgeable staff attorney had a wealth of relevant experience, it might make better sense, if the firm so chose, for such an individual to be hired full-time to take on a more senior role in the case.

"relevant" that it would justify listing them at lodestar rates that are nearly *double* what the Special Master would assign to Michael Bradley's work.

Further, to characterize Michael Bradley's document review work as "simple and straightforward" is to necessarily characterize ***all*** staff attorneys' document review work in this case as simple and straightforward. There is nothing in the record to support the notion that any document review was substantively or materially different from any other. Thus, the "simple and straightforward" nature of the work, even if true, cannot be a basis for cutting only Michael Bradley's lodestar rate.

The Special Master takes particular issue with Michael Bradley's "failure to produce any substantive memoranda or other work product," calling this the "perhaps most telling" basis for distinguishing him from other staff attorneys. R&R at 192. But the Special Master cites no evidence that every other staff attorney wrote memoranda. Indeed, the evidence shows that not all staff attorneys wrote memoranda. For example, Lieff staff attorney Kelly Gralewski testified in her deposition that she did not write any. Gralewski Dep., 6/6/17, at 19:23-20:2 (SM Ex. 104) ("Q. Were you tasked with drafting any memoranda related to any specific topics in the case? A: No."). The Special Master, who does not mention Ms. Gralewski's testimony in the Report, proposes no reduction to Ms. Gralewski's rate of $415 per hour, while urging that Michael Bradley's rate be reduced to $250 per hour for the same work. Moreover, Ms. Gralewski—like Michael Bradley—performed all of her work remotely. Gralewski Dep., 6/6/17, at 13:13-15 (SM Ex. 104); Lieff's Resp. to Interrog. 24, 7/10/17 (TLF Ex. 6). Distinguishing Michael Bradley from other staff attorneys on the basis that he did not write memoranda—the "most telling" basis, according to the Special Master— is entirely unjustified.

Also of note, the staff attorneys who did draft memoranda did so toward the end of their work on the case, having spent the bulk of their time conducting "straightforward" document review. *See* 7/14/15 Email, TLF-SST-008524 (TLF Ex. 18) (email from Mike Rogers of Labaton noting fact of settlement and that all issue memorandum drafting was completed before July 4, 2015); 6/23/15 Email, TLF-SST-034482 (TLF Ex. 19) (email from Michael Lesser of Thornton noting that reviewers have been working on issue memoranda "for the last two months"). The firms did not apply different rates for different tasks; the staff attorneys who both performed document review and drafted memoranda maintained the same lodestar hourly rates for both tasks. Appropriately, the Special Master does not propose different rates for the different tasks performed.

In asserting that Michael Bradley's work was "distinctly limited" as compared to that of other staff attorneys, the Special Master cites Michael Bradley's testimony that he recalls recording comments on a "handful" of documents in the Catalyst system. R&R at 192. Of course, the content of the review folders assigned to Michael Bradley, and how many documents they contained that were worthy of comment, is entirely arbitrary and is no basis for judging the quality of his work. On that point, the Special Master notes that there is "no clear evidence" that Michael Bradley made comments on any documents, despite Michael Bradley's testimony that he did. *Id.* The negative inference here is obvious, but patently unfair. The Catalyst system was taken off-line after the document review ended, and, as a result, there is no ability to verify *anyone's* work in Catalyst. *See* Chiplock Dep., 6/16/17, at 212:6-213:8 (SM Ex. 10) (stating that "[T]he Catalyst platform had been shut down for a year and a half at that point, and we had all of the documents and the coding on a hard drive, but there was no way to audit any individual user's work in retrospect by looking at that information," and noting that it is not possible "to do

an audit of any individual user's work from years prior, because I just don't think the system was built to capture that.").

In addition, while some staff attorneys certainly worked at a firm's brick-and-mortar location while under in-person supervision, not all did. More than a third of Lieff's staff attorneys worked remotely. *See* Lieff's Resp. to Interrog. No. 24, 7/10/17 (TLF Ex. 6) (identifying Joshua Bloomfield, Elizabeth Brehm, Kelly Gralewski, Chris Jordan, Leah Nutting, Virginia Weiss, and Jonathan Zaul as working remotely); Jordan Dep., 6/6/17, at 16:11-22 (SM Ex. 101); Zaul Dep., 6/6/17, at 15:4-10 (SM Ex. 59). While Michael Bradley did not work at the Thornton office, he did, when necessary, seek guidance from Thornton attorneys. *See* Hoffman Dep., 6/5/17, at 109:17-111:11 (SM Ex. 63). There is simply no basis for cutting only Michael Bradley's lodestar rate for working "unmonitored," when he was far from the only lawyer working remotely. Even if he were—and as the Special Master presumably recognized in not recommending any reduction to Lieff staff attorney rates based on remote work—document review technology allows for this work to be done from any computer, wherever located.

Finally, the sheer magnitude of the reduction proposed by the Special Master highlights its unfairness. The Special Master arbitrarily decides that Michael Bradley's rate should be reduced so that his rate is "more at the level of a paralegal, supplemented by the fact of his law degree and experience as a lawyer." R&R at 366. This proposed reduced rate of $250 per hour, while slightly higher than the rate for Thornton's sole paralegal in this case (Andrea Caruth, $210 per hour), is lower than the rate charged for paralegals by Labaton and Lieff in their fee declarations (Labaton listed its paralegals at rates ranging from $275 per hour to $340 per hour, with an average rate of $316 per hour; Lieff listed its paralegal at $270 per hour). Labaton Fee Decl., Ex. A, 9/15/16 (SM Ex. 88); Lieff Fee Decl., Ex. A, 9/14/16 (SM Ex. 89). Moreover, the

lowest rate for any associate in any fee petition submitted by a law firm in this case (both Customer Class Counsel and ERISA Counsel) is $325 per hour.

In light of Mr. Bradley's experience as an attorney, the rates he has recently charged other clients, and his willingness to perform the work in this case on a contingency basis, the Special Master's proposed reduction to his rate is totally unwarranted.

A. Any Reduction In Michael Bradley's Rate Is Immaterial To The Fee Award

Most importantly, even if one accepts the Special Master's recommendation that Michael Bradley's rate should be reduced by any amount, the result is entirely immaterial to the overall attorneys' fee award, regardless of the amount of reduction. At maximum, and even after the removal of all double-counted staff attorney time, Michael Bradley's work accounts for less than 0.55% of the overall lodestar.[71] Even if one were to remove all value associated with Michael Bradley's work ($203,200)—which would be wildly unfair as even the Special Master acknowledges that he performed work and that his time records support that work—it would have no material effect on Thornton's lodestar or on the overall lodestar. Indeed, the multiplier applied to the overall lodestar without *any* of Michael Bradley's time would still be 2.01, well within the range of reasonableness for a case of this size and complexity. *See supra* § I (citing and quoting portions of July 31, 2017 and June 20, 2018 Expert Declarations of Professor William B. Rubenstein, and 4/9/18 Deposition Testimony of Professor Rubenstein, stating that multiplier is "fully reasonable, indeed modest," and that "it would have been justified to see a three or four [multiplier].").

[71] The revised lodestar as stated in the November 2016 letter is $37,265,241.25. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)

As explained in the previous section regarding double counting, any discussion of lodestar must recognize its limited purpose in this case. In recommending that the difference between Michael Bradley's work at the $500 per hour rate (times 1.8 multiplier) and his work at the proposed reduced $250 per hour rate (times 1.8 multiplier) must be "returned to the class," R&R at 366, the Special Master appears to confuse the lodestar cross-check with the use of lodestar information to determine a *lodestar-based* award. On the one hand, the Special Master accurately concludes that the Court "reviewed the hours as part of a lodestar cross-check, rather than reimbursing . . . attorneys on a one-to-one basis." R&R at 206 n.106 (discussing Thornton hours specifically, but making a general point applicable to all hours).

But when it comes to Michael Bradley, the Special Master flatly contradicts himself, asserting that Thornton "sought reimbursement of fees" for Michael Bradley's work. R&R at 73, 189. This is plainly false and leads to an illogical result. The inclusion of the hours worked by Michael Bradley in the lodestar served the same purpose as the inclusion of all of the other hours in the lodestar—to demonstrate to the Court, *for purposes of the lodestar cross-check only*, the work put into the case, and the reasonableness of the percentage fee sought by counsel. Thornton neither sought nor was awarded "reimbursement" for any professional's hours (as the Special Master himself correctly states elsewhere in in the report, R&R at 206 n.106).

The Special Master compounds his error in asserting that "because of the 1.8 multiplier effect, Thornton received almost an additional $500 per hour on Michael Bradley's time, resulting in an additional almost $200,000 to the Thornton law firm. . . . Thornton's award must be reduced by the amount earned by applying this inflated hourly rate at an almost two-times multiplier." R&R at 197. The Special Master asserts that these ostensible 'earnings' should be returned to the class. R&R at 366. But Thornton clearly did not receive "an additional almost

$200,000" because of Michael Bradley's time. It did not "earn[]" any amount as a result of Michael Bradley's rate.[72] The lodestar containing Michael Bradley's hours was submitted only to help the Court verify that the percentage of the settlement fund it was awarding to counsel was reasonably supported by the work done on the case.[73] And as demonstrated above, the value of Michael Bradley's hours—regardless of hourly rate—had a *de minimis* effect on Thornton's lodestar, an infinitesimal effect on the overall lodestar, and no effect whatsoever on the multiplier applied to the lodestar to verify the 25% percentage of fund award. *See, e.g.*, *In re: Cathode Ray Tube (CRT) Antitrust Litig.,* No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("A lodestar reduction is unnecessary when the effect on the multiplier is not material.").

The Special Master wrongly asserts (without acknowledging the other part of his report in which he concludes the opposite) that the rate charged for Michael Bradley's services has a one-to-one correspondence to the attorneys' fee awarded to Thornton, and that Thornton received an "additional benefit" based on Michael Bradley's rate. R&R at 366. The Special Master then uses this flawed logic as the basis to demand that Thornton disgorge this supposed "additional benefit" it received to the class. *Id.* Neither reason, nor math, nor precedent support such a demand. As Professor Rubenstein states in his June 20, 2018 declaration:

> In a case where a court employs the percentage method to determine class counsel's fee, and uses the lodestar only for cross-check purposes, **the reduction of an hour**

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[72] Harvard Professor Rubenstein explains this concept in his June 20, 2018 Declaration (submitted by Lieff), in the context of contract attorney work: "The Court in this case awarded class counsel 25% of the common fund; counsel's lodestar was submitted solely for cross-check, or verification purposes, and showed that the 25% award was about twice counsel's lodestar. This enabled the Court to ascertain whether a 1.8 multiplier was appropriate given the risks counsel took and the rewards it obtained for the class. The Court's conclusion that the 1.8 multiplier was justified did not mean that class counsel received $800/hour for contract attorneys. It meant that the 25% fee was justified." Rubenstein Decl., 6/20/18, at ¶ 15 (fifth bullet).

[73] *See* Rubenstein Decl., 6/20/18, at ¶¶ 18-20 (explaining that the purpose in a lodestar cross-check is to enable courts to ensure that the percentage awarded was reasonable when compared to the time counsel have worked on the case).

> **of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the "repayment" of that hour of time since counsel was never "paid" for that hour of time; counsel were paid a percentage of the recovery**. Numerous legal decisions have understood this distinction and, after adjusting a lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable.[78]

Rubenstein Decl., 6/20/18, at ¶ 20 n.80 (emphasis added) (citations omitted).

The Special Master's untenable (and internally inconsistent) position and related recommendation with respect to Michael Bradley's work, like his position and recommendation on the issue of the double counting mistake, contravene the purpose and function of the lodestar cross-check in this case.

VIII. The Recommended Payment Of $3.4 Million To ERISA Counsel Is Unjustified And Based On Erroneous Findings

Yet another blunder is the Special Master's conclusion that ERISA Counsel did not receive a fair amount of attorneys' fees in the case. The Special Master calls for a "reallocation remedy" to ERISA Counsel in the amount of $3.4 million. R&R at 369. This recommended remedy is based on three findings made by the Special Master:

1. That, in December 2013, ERISA Counsel agreed to a 9%[74] fee based on the ERISA trading volume of 5-9% that was known at the time, but that "it was later learned" that the trading volume attributable to ERISA plans "was actually about 12-15% of the total trading volume." R&R at 46;
2. That, per the Plan of Allocation and the Stipulated Settlement Agreement, ERISA Counsel were entitled to up to $10.9 million in fees, but received only $7.5 million pursuant to the fee agreement—thereby creating a delta of $3.4 million that was earmarked for ERISA Counsel, but that ERISA Counsel did not receive, Exec. Summ. at 51; R&R at 368-69;[75] and
3. That, owing to "internal tension" between Customer Class Counsel and ERISA Counsel, Customer Class Counsel restricted ERISA Counsel's access to documents,

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[74] As the Special Master found, this amount was later increased to 10% at the suggestion of Customer Class Counsel, and ERISA Counsel received 10% of the overall fees. R&R at 48, 85.

[75] These findings are repeated verbatim in the Supplemental Ethical Report submitted to the Special Master by Professor Stephen Gillers. Gillers Supp. Report, 5/8/18, at 31, 100 n.91 (SM Ex. 233).

> to wit, "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class," and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34.

All three of these findings are wrong. None is a factually or legally supportable basis for the "reallocation" of fees to ERISA Counsel that the Special Master recommends.

A. The Special Master's Conclusion That The ERISA Trading Volume Was "Actually 12-15%" Is Wrong

The Special Master finds, accurately, that the fee agreement between ERISA Counsel and Customer Class Counsel, signed in 2013, was based on the known ERISA **trading volume** percentage at that time. R&R at 46 ("Th[e] agreement—to allocate 9% of the total fee awarded (if successful) to ERISA Counsel—was based largely on the premise that the total ERISA case volume **comprised five to nine percent of the total FX trading volume**.") (emphasis added). This "five to nine percent" trading volume figure came from State Street, which supplied the trading data, and which conferred directly with ERISA Counsel about it.[76]

The ERISA trading volume percentage—meaning, the volume of affected ERISA FX transactions, expressed as a percentage of the total affected FX transactions—is fundamentally different from the ERISA *settlement* percentage, which is the amount of the settlement allocated

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[76] *See* Sarko Dep., 7/6/17, at 58:18-59:22 (SM Ex. 28) (emphasis added):

> "And then in 2013, over the course of time I had had some discussions with Bob Lieff that, you know, it might make sense for us to try to see if we can come up with some tentative agreement on how to divide the fee between the ERISA case and the customer class case. And I guess it was more—in my view it was important not to have the lawyers fight with each other, or at least be a greater chance of getting them to cooperate if they didn't think if affected what fees they received.
>
> Q. **Did trading volume play any role in that second discussion**?
>
> A. [redacted] And, therefore, he was constantly harping back to me that it was a small piece. And we tried to quantify that. **And my recollection was that he thought it was 9 percent—between 5 and 9 percent, something like that. And the discussions with the customer counsel was that we would receive 9 percent, which, at least my understanding, is what the ERISA portion of the case was**."

to ERISA funds, expressed as a percentage of the total settlement amount. The ERISA settlement percentage was never the basis of any agreement among counsel.

As support for the conclusion that the ERISA trading volume was "actually about 12-15% of the total trading volume," the Special Master cites **only** to the deposition testimony of ERISA lawyers, who, naturally, stand to gain from the Special Master's faulty recommendation to reallocate funds to them. R&R at 46 (citing testimony of ERISA attorneys Lynn Sarko and Carl Kravitz). Notably, and as discussed further below, the Special Master does *not* mention other deposition testimony, given by the lawyer actually assisting with the claims administration process, that the volume is, in fact, approximately 9%. Nor does he credit (or even mention in the body of his Report) counsel's statements that verifiable data from the claims administrator shows the volume to be approximately 9%, pending final resolution of the administration process. But even the deposition testimony on which the Special Master does rely—though, of note, not the lines cited in the Report—illustrates that there is no certainty about the "12-15%" number the Special Master adopts:

> The settlement, if you look at it, has a process for determining exactly what that percentage is because, at the end of the day, you need to know whether the group trust assets that are ERISA are going to take from the ERISA pile or the non-ERISA pile. **And if you ask me do I know what that process has revealed in terms of what the actual percentage is, the answer is I don't know.** So I wish I could answer that question. But definitely at the end of the day, if you even **assumed** that it was half ERISA and—half ERISA, you'd be up at 12 percent. **Could have been a little higher, could have been a little lower**.

Kravitz Dep., 7/6/17, at 54:12-25 (SM Ex. 21) (emphasis added).

When, in the course of the investigation, it became clear that the Special Master had adopted the belief that the ERISA portion of the overall trading volume was "actually about 12-15%," lawyers for Customer Class Counsel attempted to set this straight, both during the deposition of Nicole Zeiss (the Labaton partner with responsibility for the claims administration

process) and during oral argument before the Special Master on April 13, 2018. *See* Zeiss Dep., 9/14/17, at 163:20-165:1 (SM Ex. 115); *see also* 4/13/18 Hr'g Tr. at 104:22-105:7 (SM Ex. 162) ([MS. LUKEY, Counsel for Labaton]: "Right now, as we have in the record, it appears it's going to come out at 9 to 9.5 percent. A.B. Data is trying to finish, but it needs to be able to get the last data from the group trust which are a mixture of customer class and ERISA investors. And it's been unable to collect some of that. But there is nothing to indicate, at least at this point, that it's going to exceed the estimated 10 percent. Looks like it'll come in a little under that.")

In the Report, the Special Master acknowledges counsel's statements at oral argument in a single-sentence footnote, but makes no mention of Nicole Zeiss's testimony there, or anywhere else in the Report. R&R at 46 n.28 ("During oral argument, counsel for Labaton indicated that the trading volume for the ERISA funds was in a range of 9% to 10%. However, the record evidence on this point is incomplete."). The omission of Ms. Zeiss's testimony is particularly troubling, given that the Special Master questioned her himself about her knowledge of the ERISA trading volume, eliciting testimony that she understood the percentage to be "around 9 percent." Zeiss Dep., 9/14/17, at 164:16-165:1 (SM Ex. 115).

Presumably, the Special Master makes no mention of this testimony because it contradicts his conclusion that ERISA Counsel got a raw deal in this case. The Special Master's selective reliance on deposition testimony is unjustifiable and, to use a phrase employed by the Special Master elsewhere in the Report, "perhaps telling." Setting aside the issue of selectively quoting deposition testimony, relying on testimony as the sole support for a conclusion about volume is unnecessary and inappropriate. Determining the portion of the total trading volume attributable to ERISA plans is an objective process that results in a definite number, and therefore data, not personal recollection, is the best and most reliable evidence.

But the Special Master did not seek documents regarding the ERISA trading volume. Although the Special Master's first requests for documents, served in May 2017, may have been read to call for such documents, the Special Master's counsel revised the requests six days after serving them, in the process striking numerous requests pertinent to this issue.[77] Even after counsel specifically mentioned the claims administration process resulting in the actual ERISA trading volume at oral argument on April 13, 2018, the Special Master did not pursue it. Nor did he seek further information after Nicole Zeiss testified that she knew the trading volume to be around 9 percent. Zeiss Dep., 9/14/17, at 164:16-165:1 (SM Ex. 115).

State Street—not Customer Class Counsel—supplied the FX trading volume data used in this case. *See* Omnibus Decl., 9/15/16, at ¶ 131 (SM Ex. 3) ("A.B. Data will calculate each Settlement Class Member's Recognized Claim using information ***supplied by State Street***") (emphasis added), ¶ 132 ("The Plan is based on transaction data ***maintained by State Street***") (emphasis added), ¶ 133 ("The parties have relied on Indirect FX Trading Volume information ***provided by State Street*** to develop this Plan of Allocation") (emphasis added); *see also* Zeiss

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[77] The document requests stricken by the Special Master's counsel included, *inter alia,* the following requests:

> "2. …any other documents or information identified during the SST litigation bearing on the material issues in the Litigation, including but not limited to liability and damages.
>
> 23. All documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms, and/or ERISA counsel regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award.
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> 29. All communications between the Law Firm and counsel for State Street relating to the SST Litigation, including but not limited to document productions, mediations, and settlement.
>
> 39. All communications between and among the Law Firm, the Plaintiffs' Law Firms, and the ERISA firms, relating to preparation of the Motion for Attorneys' Fees and/or the Fee Petitions filed in the SST Litigation."

The Special Master's catch-all request ("53. All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far") did not require the production of these materials, including because it pertained to documents supporting "your Fee Petition," meaning Thornton's individual fee petition. Thornton could not have reasonably anticipated at the time that the Special Master would seek to invalidate the agreement between Customer Class Counsel and ERISA Counsel, or would question the trading volume numbers.

Dep., 9/14/17, at 164:10-12 (SM Ex. 115) ("WilmerHale [State Street's counsel] produced the volume to us in connection with developing the plan of allocation"). Over the course of the mediation process, State Street provided updated versions of their FX trading data to all parties. As State Street refined its process, the data reflected incremental changes.

During the spring of 2015, while the parties were engaged in mediation and closing in on settlement, State Street informed Customer Class Counsel and ERISA Counsel that the estimated ERISA volume was approximately $79.8 billion—or approximately **9.11** % of the total trading volume of $875.7 billion. Specifically, in email correspondence in March 2015, counsel for State Street informed Michael Lesser (Customer Class Counsel) and Lynn Sarko (ERISA Counsel) that the total ERISA volume was $79,898,954,988. *See* 6/11/15 Email (TLF Ex. 20).[78] On June 11, 2015, just weeks before the parties reached an agreement in principle on June 30, State Street's counsel confirmed this number in a chart it sent to customer class attorney Michael Lesser, who in turn shared it with ERISA attorneys Lynn Sarko, Brian McTigue, Regina Markey. *Id.*[79] Accordingly, when the parties reached an agreement in principle to settle this case at the end of June 2015, ERISA Counsel knew that the ERISA trading volume was estimated to be approximately **9.11**%. With the data supplied by State Street in hand, ERISA Counsel made an informed decision to enter into a settlement in principle.

At that time, the ERISA trading volume was still an estimate—albeit an estimate based on hard data analyzed and supplied by State Street—because, as Labaton stated in the Omnibus

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[78] The email thread extends to June but the cited email was sent in March. The term "SSH" used in this email stands for "Securities Settlement and Handling," and refers to Indirect FX transactions relating to purchases and sales of foreign securities. "AIR" stands for "Automated Income Repatriation," and refers to Indirect FX Transactions to repatriate dividend and income payments. Omnibus Decl., 9/15/16, at ¶ 20 (SM Ex. 3).

[79] As noted above, the Special Master did not request documents concerning the ERISA trading volume during the investigation. Thornton attaches exhibits here to clarify misinformation in the record. Thornton provides these documents pursuant to all protective orders and confidentiality agreements applicable to the Special Master's investigation and to the underlying litigation.

Declaration filed with the fee petition, the Group Trusts' transaction volume attributable to ERISA funds had yet to be determined. *See* Omnibus Decl., 9/15/16, at ¶ 135 (SM Ex. 3) ("ERISA Plans and eligible Group Trusts represent approximately 9%-15% of the total Indirect FX Trading Volume, **depending on what portion of the Group Trusts' volume actually falls under ERISA**.") (emphasis added).[80] The Omnibus Declaration explained the process by which Labaton and third-party settlement administrator A.B. Data would seek this information about the Group Trusts and make the final calculations. *Id.* at ¶¶ 137-50. This process included: (1) requiring the Group Trusts to submit certifications detailing their ERISA fund percentages; and (2) working with the Department of Labor, which has independent knowledge of certain Group Trusts with ERISA volume, to ensure that Group Trusts that failed to provide certifications would be included. *Id.* at ¶¶147-49.

As of June 2018, this two-step process of determining the absolute final ERISA trading volume is nearly complete. The first step (obtaining certifications) was completed last year. A.B. Data's spreadsheet capturing this information—which Labaton's counsel referenced during the oral argument before the Special Master—shows that the ERISA volume increased only a *de minimis* amount as a result of the certification process.[81]

The remaining work (obtaining confirmatory volume information from the Department of Labor for Group Trusts that failed to submit mandatory certifications) is still ongoing. While this cleanup effort with the Department of Labor could cause an adjustment to the ERISA trading volume, it is unlikely to have a significant effect, and certainly nowhere in the range of 3% to

[80] *See also* Kravitz Dep., 7/6/17, at 54:12-25 (SM Ex. 21) (explaining that the percentage depended on the outcome of the Group Trusts process).

[81] The A.B. Data spreadsheet containing this information is subject to a non-disclosure agreement between A.B. Data and State Street, which the Court may order State Street to disclose.

5%—the increase that would be necessary to bring the trading volume within the "actually 12-15%" figure on which the Special Master relies. Contrary to the Special Master's assertion that the ERISA trading volume is between 12-15% of the overall trading volume, the volume is "actually" between 9% and 10%, which, if one compares percentage of volume to percentage of fees,[82] is ***less than,*** or at least very closely commensurate with, the percentage of attorneys' fees that ERISA Counsel received. Accordingly, a "reallocation remedy" is not needed to bridge any gap between ERISA Counsel's fees and the ERISA trading volume, and such reallocation would be unjustified.

Finally, it is worth noting that the suggestion that ERISA Counsel would have agreed to (and agreed not to revisit) a 9% fee agreement when they believed the ERISA trading volume to be approximately 12-15% is difficult to square with their obligations to their clients. ERISA Counsel's fees were derivative, directly or indirectly, of the result they helped achieve for their clients. The $60 million share of the settlement recovery for ERISA plaintiffs was based on the ERISA trading volume. The fact that the Department of Labor insisted on a premium that caused ERISA's share of the *settlement* to be 20% would not excuse ERISA Counsel's acceptance of a $60 million share if they truly thought the ERISA volume was higher. If ERISA Counsel believed that the ERISA trading volume had increased over time by 33 to 60 percent (*i.e.,* from approximately 9% to 12-15%), surely they would have been obligated to demand additional settlement funds for the ERISA plaintiffs, even setting aside the issue of their own fees.

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[82] This is in and of itself a problematic comparison, as it presumes that ERISA Counsel was solely responsible for the ERISA funds' recovery, and therefore entitled to attorneys' fees on a one-to-one basis. To the contrary, the Customer Class Counsel's work on the case—including, of particular note, its development of the damages theory—contributed significantly to the result for the ERISA plans. This also wrongly presumes that the Customer Class's claims did not cover ERISA funds, a question never resolved because the court never ruled on State Street's motions to dismiss the ERISA complaints.

B. The Special Master's Finding That The $10.9 Million "Fee Cap" Applied To ERISA Counsel's Fees Only Is Wrong

In quantifying the "reallocation remedy" he asserts ERISA Counsel deserves, the Special Master references the $10.9 million "fee cap" imposed by the Department of Labor. R&R at 85. In recommending that ERISA Counsel receive reallocated attorneys' fees, the Special Master concludes that those fees should be in the amount of $3.4 million because that number "reflects the difference between the $10.9 million that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received." Exec. Summ. at 51; R&R at 368-69. This is a faulty conclusion based on the Special Master's incorrect and unsupportable finding that "$10.9 million [] was allocated as a cap for ERISA attorneys in the Settlement Agreement." *Id.*

Contrary to the Special Master's assertion, the purpose of the cap was to limit the amount that could be deducted from the ERISA portion of the settlement for attorneys' fees of any kind, not only ERISA Counsel's fees (the Department of Labor's intention being to limit deductions from the ERISA class's share of the recovery).[83] As with the trading volume issue, discussed

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[83] The Special Master's and his counsel's confusion on this point is well illustrated by this exchange with ERISA attorney Carl Kravitz:

> "Q [MR. SINNOTT]. So is it fair to say that that 10.9 million is a cap of sorts? **That's the outer limit that the Department of Labor has set for ERISA fees?**
>
> A. I—I—ERISA fees. I would—**I always thought of it a tiny bit differently. I always thought of it as the cap of the amount of the fee award that could be deducted from the ERISA share**.
>
> Q. Okay.
>
> THE SPECIAL MASTER: **The cap on the amount -- the cap on the amount of the fee award that could be deducted from the ERISA share?**
>
> THE WITNESS: **That is exactly what I was trying to say.**
>
> THE SPECIAL MASTER: Okay. So – and **was DOL's objective in wanting this cap to ensure that at the very least—to ensure a minimum recovery for the—what we'll refer to as the ERISA class**?
>
> THE WITNESS: Right. Yes, that was my understanding of at least part or—or the major part of their motivation. **They were trying to protect what the ERISA part would get on a net basis as in addition to on a gross basis**."

above, attorneys for the Customer Class Counsel attempted to clear up the Special Master's misunderstanding when it became clear during the investigation that the Special Master thought ERISA Counsel received $7.5 million pursuant to the parties' agreement, but was entitled to up to $10.9 million. The Special Master's findings in the Report show that this misunderstanding persists, and it now underpins the Special Master's conclusion that ERISA Counsel is entitled to an additional $3.4 million in fees.

Documents filed with the Court both pre-and post-settlement confirm that the $10.9 million cap applied to *all plaintiffs' counsel's* fees, not just ERISA Counsel's fees. The issue was how much in attorneys' fees could be paid out of the **ERISA portion of the settlement**—not how much money was going to Customer Class Counsel versus ERISA Counsel.[84] Of note:

- The Stipulation and Agreement of Settlement filed with the Court on July 26, 2016 ("Settlement Stipulation"), which the Special Master includes as exhibit 75 to his Report makes this even more clear. The Settlement Stipulation states: "Except with respect to the amount of **Plaintiffs' counsel's attorneys' fees chargeable to the ERISA Plans**,…." Settlement Stipulation, 7/26/16, at ¶ 24 (SM Ex. 75) (emphasis added).

- The Plan of Allocation, which is set forth in full in the Notice to the Class dated August 10, 2016, states that "[N]o more than $10,900,000 in fees can be paid out from the ERISA Settlement Allocation[.]" Notice to Class, 8/10/16, at 11 (SM Ex. 81). In the Report, the Special Master characterizes this portion of the Notice as follows: "**Recipients were also told that attorneys' fees for ERISA counsel would not exceed $10.9 million**, and they were told how fees for the other counsel would be computed 'if the Court awards the total amount of fees that Lead Counsel intends to request.'" R&R at 277 (emphasis added). This is plainly untrue; nowhere does the Notice inform recipients that attorneys' fees for ERISA Counsel would not exceed $10.9 million.

- The Omnibus Declaration filed by Labaton in support of the attorneys' fees motion on September 15, 2016 states that ERISA Plan and eligible Group Trusts class members will be allocated $60 million "minus," *inter alia,* "attorney's fees, if awarded by the Court, in

Kravitz Dep., 9/11/17, at 39:15-40:13 (SM Ex. 117) (emphasis added).

[84] On that point, emails produced to the Special Master show that ERISA Counsel did not disclose the details of its fee agreement to the DOL. *See* 8/28/15 Email, TLF-SST-052975 (SM Ex. 35); 8/9/15 Email, TLF-SST-043022 (TLF Ex. 21).

> an amount not to exceed $10,900,000." *See* Omnibus Decl., 9/15/16, at ¶ 134 (SM Ex. 3).

If the above documents leave any room for confusion about which "attorneys' fees" the cap pertains to, the Term Sheet, executed by all counsel in September 2015, makes clear that the function of the cap is to limit the amount of fees incurred by any plaintiffs' counsel that can be deducted from the ERISA portion of the settlement:

> "**Plaintiffs' Counsel** may apply for their fees and expenses and any service awards for Plaintiffs against the entire Class Settlement Amount, but in no event shall more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in fees be paid out of the $60 million portion of the Class Settlement Amount allocated to ERISA Plans, as referenced in paragraph 8(n) above."

Term Sheet, 9/11/15, TLF-SST-050929-050944, at ¶ 12 (TLF Ex. 22) (emphasis added). "Plaintiffs" is defined in the Term Sheet as including both ATRS and the individual ERISA class representatives. *Id.* at ¶ 1. Therefore, "Plaintiffs' Counsel" logically means both Customer Class Counsel and ERISA Counsel and, indeed, is used in that context elsewhere in the Term Sheet. *See id.* at ¶ 8(n) (definition of Plan of Allocation).

During his deposition, David Goldsmith, the Labaton attorney who presented the settlement plan and request for attorneys' award to the Court, stated that the cap applied to "all counsel's fees":

> Q [MR. HEIMANN]: The Department of Labor also negotiated a cap of some 10.9 million dollars on the fees to be charged against the 60-million-dollar amount that they had negotiated for the ERISA class members, correct?
>
> A [MR. GOLDSMITH]: Correct.
>
> Q. And did that negotiated fee apply only to the settlement being allocated to the ERISA plan -- excuse me. Let me begin again. **Did that cap on the fee apply only to the ERISA counsel's fees?**
>
> A. **No.**
>
> Q. **Did it apply to all counsel's fees?**

A. **Yes.**

Goldsmith Dep., 9/20/17, at 254:13-255:2 (SM Ex. 42) (emphasis added).

ERISA attorney Carl Kravitz also tried to clear up the Special Master's and his counsel's misunderstanding on this point:

> "Q [MR. SINNOTT]. So is it fair to say that that 10.9 million is a cap of sorts? That's the outer limit that the Department of Labor has set for ERISA fees?
>
> A. I—I—ERISA fees. I would—I always thought of it a tiny bit differently. I always thought of it as the cap of the amount of the fee award that could be deducted from the ERISA share.
>
> Q. Okay.
>
> THE SPECIAL MASTER: The cap on the amount—the cap on the amount of the fee award that could be deducted from the ERISA share?
>
> THE WITNESS: That is exactly what I was trying to say.

Kravitz Dep., 9/11/17, at 39:15-40:3 (SM Ex. 117).

There is no support for the Special Master's conclusion that the $10.9 million cap on "attorneys' fees" meant that ERISA Counsel had been "allocated" $10.9 million in fees, but was constrained by its agreement with Customer Class Counsel and had to accept a lesser amount ($7.5 million). Exec. Summ. at 51; R&R at 368. To the contrary, the key settlement and fee documents—including the Plan of Allocation, Term Sheet, Notice, and Omnibus Declaration—all confirm that the cap applied to fees sought by plaintiffs' counsel generally, not only ERISA Counsel. The Special Master's recommendation that a $3.4 million "reallocation remedy" be given to ERISA Counsel is based on his fundamental misunderstanding of the cap, and is wholly unjustified.

C. The Special Master Wrongly Concludes That Customer Class Counsel Sought To Prevent ERISA Counsel From Reviewing Documents And Omits

Testimony From ERISA Counsel That Directly Contradicts This Erroneous Finding

To buttress his ultimate conclusion that ERISA Counsel was treated unfairly, and to further justify his suggested award of an additional $3.4 million to ERISA Counsel, the Special Master erroneously concludes that Customer Class Counsel somehow prevented ERISA Counsel from accessing documents produced by State Street in the litigation. The Special Master's reason for drawing this conclusion is obvious—it is further "evidence" of his belief that Customer Class Counsel sought to put ERISA Counsel at a disadvantage. It is also summarily contradicted, however, by testimony taken by the Special Master that is conveniently ignored in the Report.

Specifically, the Special Master finds that "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class" and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34. The Special Master finds that this lack of access was a "manifest[ation]" of "internal tension" between the Customer Class Counsel and ERISA Counsel, for which proposition he cites the testimony of ERISA attorney Carl Kravitz. R&R at 34, 46 n.29. Notably, the discussion makes no reference to testimony from numerous other attorneys, including ERISA attorney Lynn Sarko, [redacted].[85] Ignoring contradictory

[85] *See, e.g.*, Sarko Dep., 7/6/17, at 43:17-44:1; 75:20-76:1 (SM Ex. 28) (emphasis added):

> Q: Describe, Lynn, if you would the coordination between ERISA Counsel and customer class, or the big three. Was there any tension involved in the relationship? A: Well, **I don't think there was any tension**, at least from my viewpoint, with any of the ERISA [sic] on the customer class side. I thought they were all perfectly professional. There was a difference, and I think this has to back up to the way State Street viewed it.
>
> …
>
> [redacted]

testimony about the relationships of Customer Class Counsel and ERISA Counsel that does not fit his desired narrative, the Special Master concludes that ERISA Counsel did not have access to documents produced by State Street because Customer Class Counsel did not want ERISA Counsel to have access.

As with numerous other conclusions the Special Master makes in the Report, this is flatly contradicted by other deposition testimony taken by the Special Master during the investigation. The testimony of ERISA attorney Lynn Sarko dispels the Special Master's conclusion that Customer Class Counsel prohibited ERISA Counsel from accessing documents. First, as to the Special Master's finding that "[n]or were ERISA Counsel allowed access to the Customer Class's database"—the obvious inference being that Customer Class Counsel *denied* ERISA Counsel access to its database—Mr. Sarko testified that sharing a document database would have been "totally unrealistic" for confidentiality, workflow, and other reasons. Sarko Dep., 7/6/17, at 65:10-19 (SM Ex 28). He further testified that it is common in large cases consisting of groups with differing interests, where one group might settle while another does not, for those groups to have separate databases so they can preserve their ability to access documents regardless of another group's actions. *Id.* at 65:5-66:7. On that point, Mr. Sarko explained that, in this case, ERISA Counsel's having a separate database, and thus having the ability to pursue the case even if the Customer Class settled, was an important consideration weighed by the Department of Labor during settlement negotiations. *Id.* at 66:8-18 ("[T]hat was a selling point to them for them to settle the case, thinking that we were not just, you know, trailing along."). Thus, the Special Master's strange finding that ERISA Counsel was not "allowed" access to the database maintained by Customer Class Counsel is squarely contradicted by Mr. Sarko's testimony, which the Report does not cite.

Lynn Sarko's deposition testimony also squarely negates any finding, conclusion, or inference that Customer Counsel inhibited ERISA Counsel's access to documents produced by State Street. *See* R&R at 34. Mr. Sarko explained in his deposition that, to the extent ERISA Counsel did not have access to the same universe of documents as Customer Class Counsel, it was because ***State Street***—not Customer Class Counsel—did not allow ERISA Counsel to have such access. Sarko Dep., 7/6/17, at 44:2-5, 64:13-65:4 (SM Ex. 28). [redacted] Contemporaneous correspondence between ERISA Counsel and State Street's counsel confirms that ERISA Counsel was communicating directly with State Street's counsel regarding documents, and receiving documents from State Street as a result. For example, a February 1, 2013 letter accompanying a production of documents by State Street's counsel to ERISA Counsel shows that (1) ERISA Counsel received the voluminous California production; and (2) ERISA Counsel issued discovery requests to State Street, negotiated with State Street regarding those requests, and received documents in return. *See* 2/1/13 Email (TLF Ex. 23).[86] ERISA Counsel also received other documents and information from State Street's counsel, including trading volume data and analysis.

[86] Nor did the Special Master request documents from Thornton concerning ERISA Counsel's discovery negotiations with State Street.

As Mr. Sarko further explained in his deposition, [redacted] Sarko Dep., 7/16/17, at 44:24-25; 46:4-6.

The Report entirely ignores the following testimony by Mr. Sarko:

> When we agreed to go into the mediation, the understanding was that they [State Street's counsel] would provide certain documents to customer class, and we would not have access to those. **And we were provided certain documents on the ERISA side that I don't know whether the class received.** The reason being that we, of course, think about it, had not survived a motion to dismiss. We're in the process of amending our complaint. And, therefore, we got—**we negotiated with State Street to get the documents we got that we needed for—you know, for settlement purposes.**
>
> On the other hand, the customer class received all kinds of documents; for example, class certification was an issue for them. **And in our discussions with State Street, they said,** [redacted] **So we had separate confidentiality agreements at the beginning. We did not have access to those documents.** [redacted] So we started by taking the documents that we received from State Street. And we had our own separate database.
>
> **
>
> And I think that was the history of why there was no—you know, we didn't receive write-ups of documents for any work they had done because we couldn't see those documents at State Street. **And even though they produced to us the—some of the same stuff, I mean, we did receive the documents from California. We received, for example, all the documents produced to the Department of Labor. I don't know if Arkansas got those documents or not. But it was State Street kept those two silos separate so that they could settle with one and not the other**.

Sarko Dep., 7/6/17, at 44:2-45:7; 45:19-46:6 (SM Ex. 28) (emphasis added).

In addition to ERISA Counsel's own dealings with State Street and their own analysis of State Street's documents, Customer Class Counsel also shared work product with ERISA Counsel and participated in joint collaborative discussions. *See, e.g.*, Sarko Dep., 7/6/17, at 114:15-25 (SM Ex. 28) (recalling "all counsel" meeting at which counsel came together to share

views of the case, and at which Michael Lesser of Thornton presented a PowerPoint presentation); Kravitz Dep., 9/11/17, at 11:7-8 (SM Ex. 117) ("As the case wore on, we did work closely with the customer class"); Kravitz Dep., 7/6/17, at 78:4-23, 95:13-96:20 (SM Ex. 21) (recalling presentation and substantive discussions among counsel).

The Special Master's findings regarding ERISA Counsel's access to documents, and the accompanying inference against Customer Class Counsel, are plainly contradicted by record evidence. There is no factual basis for the Special Master to conclude that Customer Class Counsel was trying to inhibit ERISA Counsel's ability to obtain or review documents. This is an important correction not only because the Special Master saw fit to make this finding in his Report, but also because it underpins his broader conclusion that ERISA Counsel got a raw deal at the hands of Customer Class Counsel, and therefore should receive $3.4 million in "reallocat[ed]" fees—a figure that, for the reasons explained above, is based on a fundamental misunderstanding of the fee cap imposed by the Department of Labor.

IX. The Recommendation That A Monitor Be Appointed Is Baseless

As a final salvo, the Special Master recommends that an ethical monitor be imposed on the Thornton Law Firm "to consult with them on professional conduct norms and to ensure that they comply with those norms." R&R at 373. This recommendation is absurd. What could a consultant do to ensure "consistent ethical compliance" when there have been only unintentional mistakes? The answer is: nothing.

The recommendation that Thornton engage a monitor—no doubt at its own cost— is primarily premised upon the Special Master's conclusion that "[a]s to its **business development**, Thornton lawyers appear to be largely unsupervised and unconstrained by the professional conduct norms" and that such conduct is "**endemic** to the way [the Thornton Law Firm does] business with their hyper-focus on business development and fee generation." *See* R&R at 372-

73 (emphasis added). There is no significant discussion of the Thornton Law Firm's "business development practices" anywhere in the Report. This is simply another instance where the Special Master or his counsel, for whatever reason, impugn the reputation of an entire law firm with no apparent reason.[87]

Ultimately, the only conduct that the Special Master has "uncovered" with respect to the Thornton Law Firm is: (1) immaterial misstatements in a boilerplate affidavit used as a cross-check for an aggregate fee award; and (2) a potential lack of contemporaneous time records of two attorneys where the Special Master found that the time recorded was nonetheless "reasonable and sufficiently reliable." R&R at 216.[88] This sixteen-month, $3.8 million investigation (with its attendant reputational effect and the additional significant cost to the firm of defending itself) has no doubt reminded all attorneys of their responsibility to scrupulously avoid inadvertent errors in submissions to the Court. While the Special Master's recommendations that the Thornton Law Firm establish more consistent procedures for recording

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[87] Of course, this is not the only place where the Report and Recommendations unfairly impugns the reputation of the Thornton Law Firm and its attorneys. As an additional example, page 54 of the Report quotes a lengthy email from co-counsel which the Special Master characterizes as "warning Bradley not to include unwarranted hours in Thornton's fee petition." The underlying email states, "I heard third-hand that Mike [Thornton] recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million . . . . I am hopeful that Mike T simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf." In the response, which does not appear in the Report, Michael Thornton replies, "I did say something like that on the call, but preceded it by saying **it was a guess** and that I would have to ask Mike Lesser for the actual figure at that point which of course is not complete as with the other firms." 8/30/15 Email, TLF-SST-031166 (SM Ex. 87) (emphasis added). Nor does the Special Master include a subsequent email, which clarified that the mistake was the result of a simple transposing of concepts, in which Michael Lesser writes, "**I think that 14 would have been our share of the fee, making some assumptions, and not the actual size of our lodestar.**" 8/30/15 Email, TLF-SST-038587 (TLF Ex. 24) (emphasis added). This later email was identified for the Special Master, *see* Thornton's Resp. to Request for Add'l. Submission, 4/12/18, at 11-12 (TLF Ex. 3), as was deposition testimony from co-counsel that "I think Mike Thornton may have simply been mistaken because that's not the number they ultimately reported." *Id.* (citing Chiplock Dep., 9/8/17, at 64:16-18 (SM Ex. 41)). The Special Master was either recklessly inattentive or chose to ignore this evidence, publishing innuendo with a complete disregard for injuring the reputation of a highly respected member of the bar.

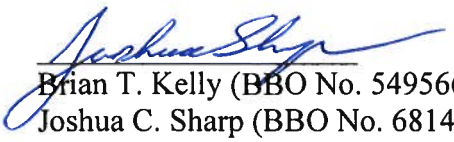
[88] As additional evidence of the Special Master or his counsel's inattention, in one section of the Report, the Special Master finds that he cannot say whether or not the time records were contemporaneous and in another section states that the time records were not contemporaneous. *See supra* § III(B)(ii).

time and setting billing rates are not in and of themselves unreasonable, they certainly do not justify "on-going ethics supervision," R&R at 373, and in fact do not even concern legal ethics. Imposing an ethics monitor on the Thornton Law Firm is a draconian recommendation that should be rejected because it is unfair, unjustified, and needlessly punitive.

CONCLUSION

For the foregoing reasons, the Thornton Law Firm objects to the Special Master's factual and legal findings identified above.

Respectfully submitted,



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Dated: June 28, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document and its exhibits will be filed conventionally on June 29, 2018 when the Clerk's office opens, as the Clerk's office will be closed by the time we are able to file the foregoing document and its exhibits tonight. The foregoing document and its exhibits will be served on all counsel by electronic means on June 28, 2018. A redacted version will be filed on ECF on June 28, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

Joshua C. Sharp

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third*, the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier.*** (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

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[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
>
> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
>
> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.

- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.

- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc.*, No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc.*, No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

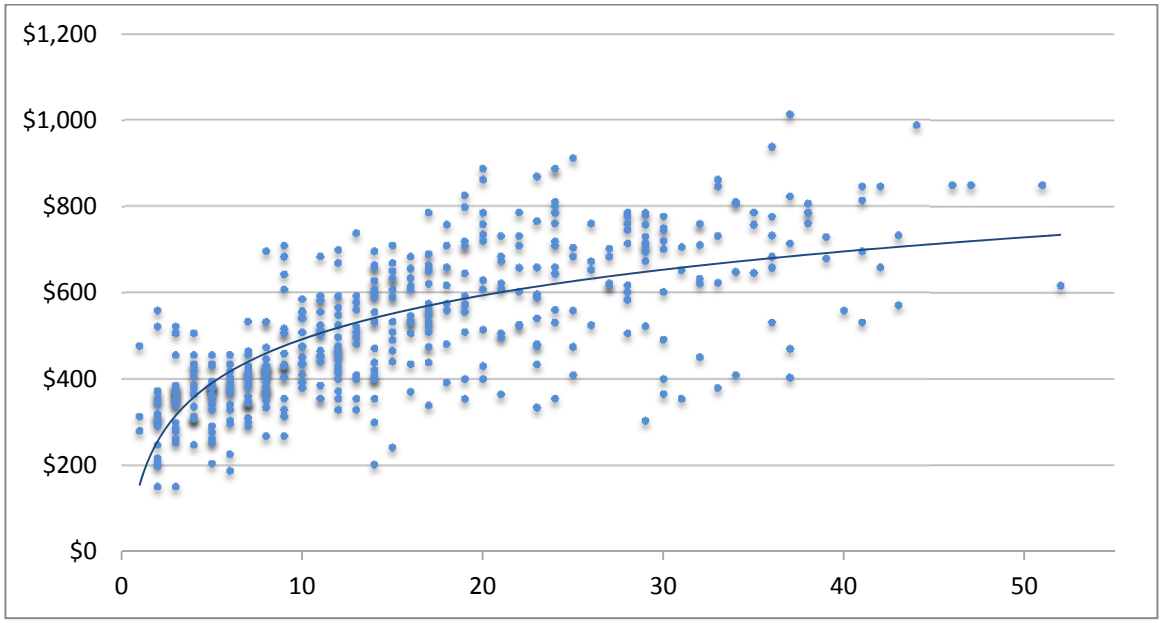
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



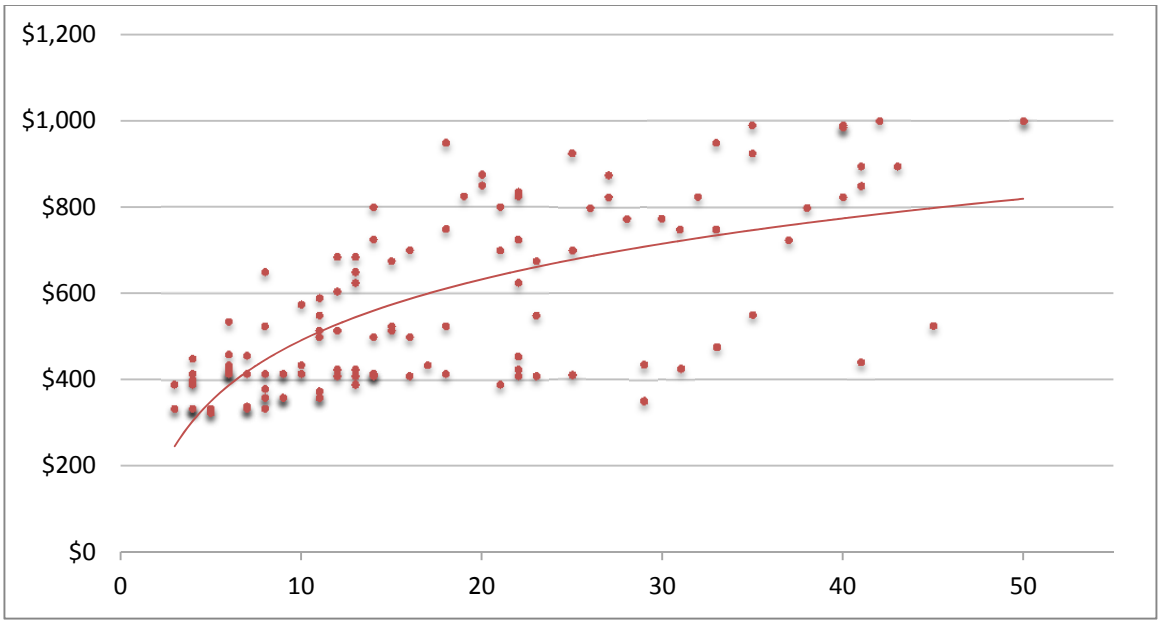
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

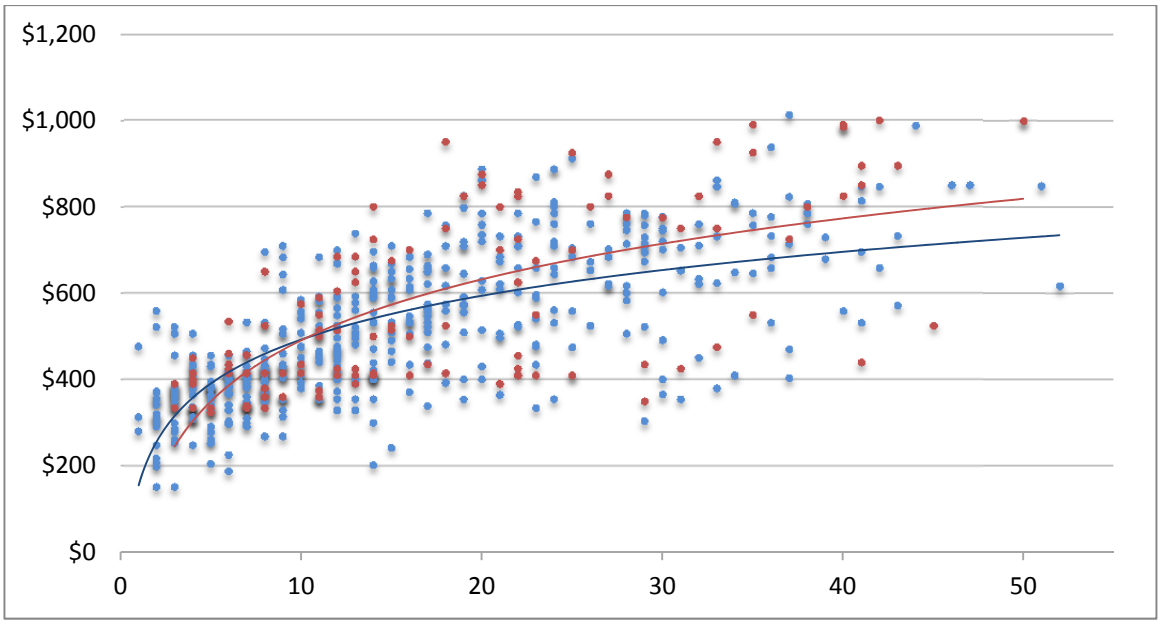
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

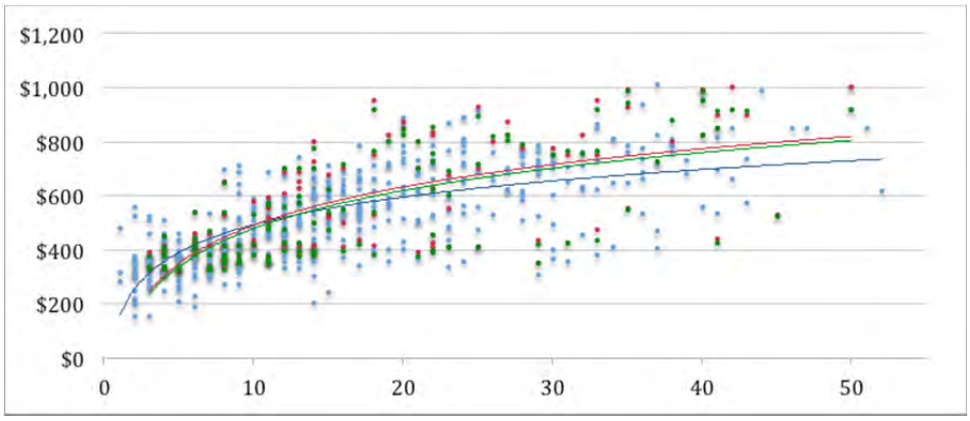
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

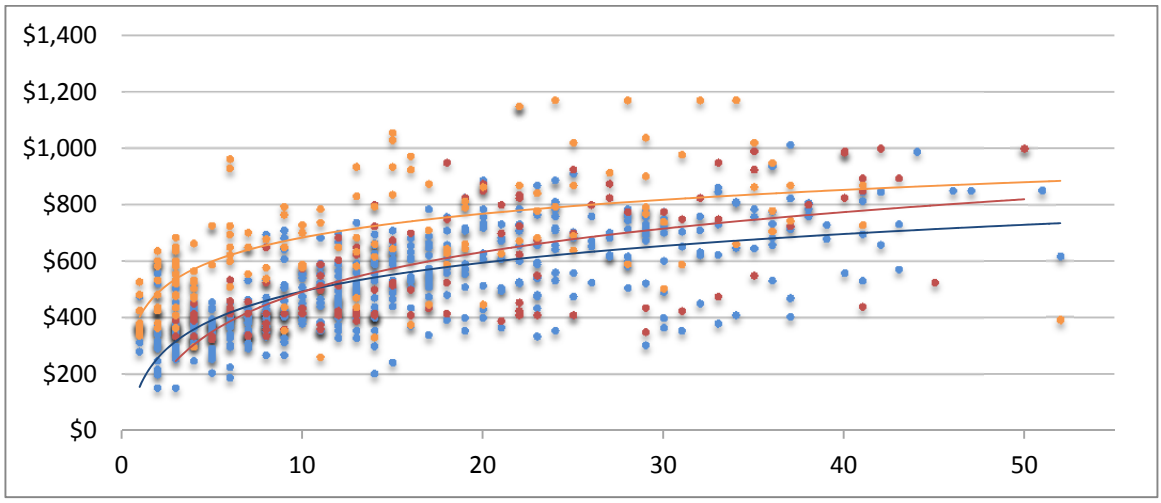
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

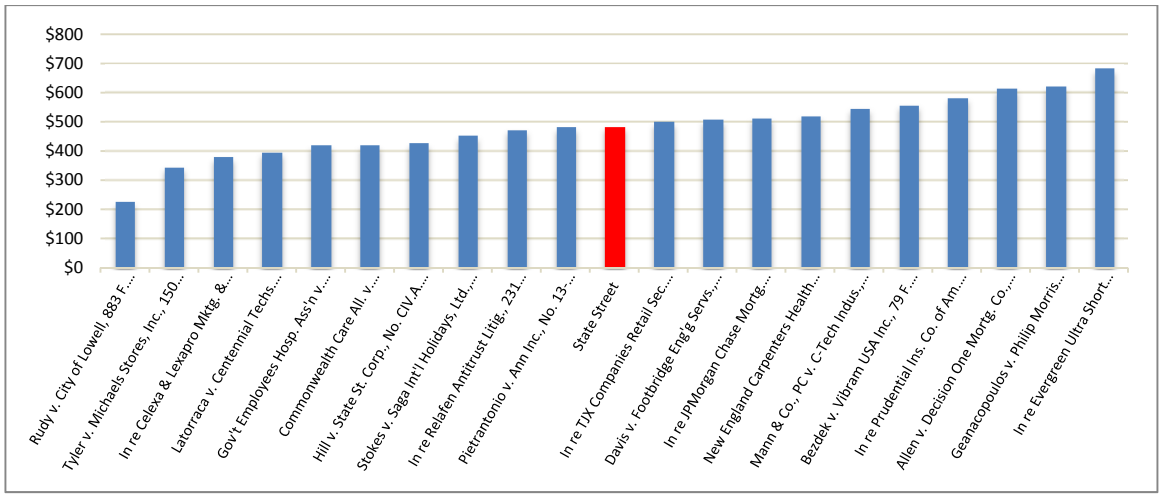
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

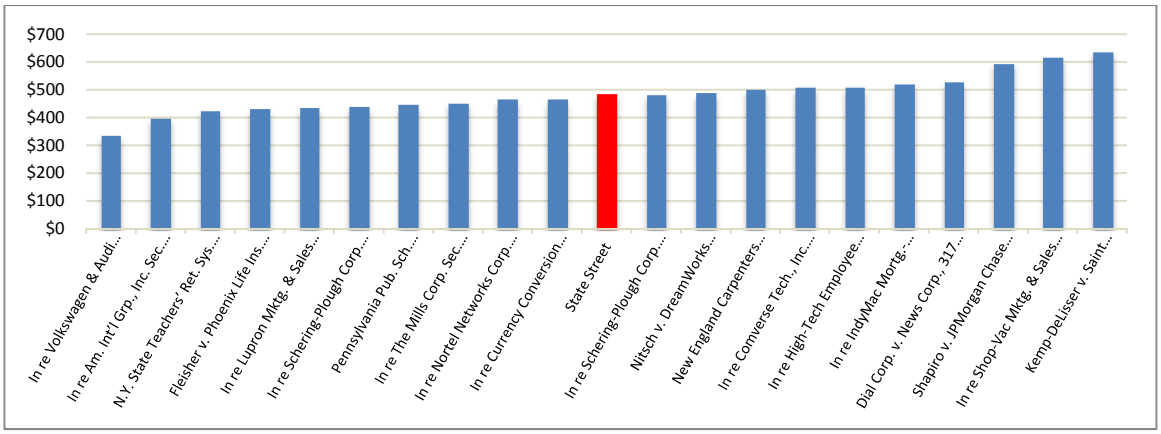
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

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[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

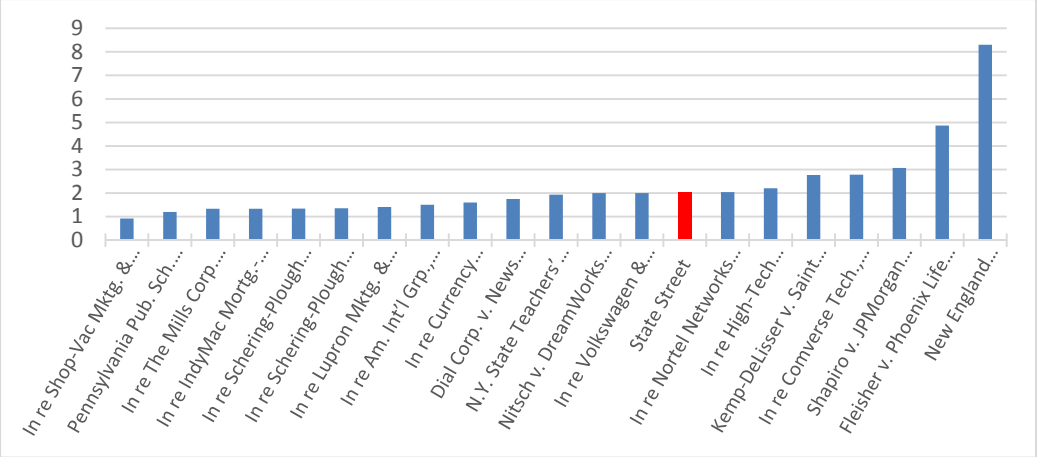
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

EXHIBIT A

PROFESSOR WILLIAM B. RUBENSTEIN

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ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-present
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

♢ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

♢ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016))

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

♢ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

♢ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

♢ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

♢ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1368741 (N.D. Ill., April 10, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

♢ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

♢ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

♢ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

♢ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

♢ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

♢ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

♢ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

♢ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

♢ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

♢ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

♢ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

♢ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

♢ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

♢ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

♢ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

♢ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

♢ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

♢ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

♢ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

♢ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

♢ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

♢ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

♢ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

♢ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

- ♢ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

- ♢ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

- ♢ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

- ♢ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

- ♢ Retained by a Fortune 100 Company as an expert consultant on class certification issues

- ♢ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

- ♢ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

- ♢ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

- ♢ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

- ♢ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

- ♢ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

- ♢ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

- ♢ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

- ♢ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

♢ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

♢ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

♢ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

♢ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

♢ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

♢ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

♢ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

♢ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

♢ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

♢ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

♢ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

♢ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

♢ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

♢ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

♢ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

♢ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

♢ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

♢ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

♢ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

♢ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

♢ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

♢ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

♢ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

♢ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

♢ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

♢ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

♢ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

♢ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

♢ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

♢ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

♢ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

♢ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

♢ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

♢ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

♢ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

♢ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

♢ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (***Rosebrock v. Hoffman***, 135 S. Ct.1893 (2015))

♢ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (***AT&T Mobility v. Concepcion,*** No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (***Salazar v. Buono***, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (***Lawrence v. Texas***, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (***Illinois v. Perkins***, 496 U.S. 292 (1990))

Attorney's Fees

♢ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in *Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (***Dydyk v. Apple Inc.,*** 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (***In re Google Buzz Privacy Litigation,*** 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

♢ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

♢ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

♢ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

♢ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

♢ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
♢ *Play It Straight*, NEW YORK TIMES, October 16, 2004
♢ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
♢ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
♢ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
♢ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

♢ Massachusetts (2008)
♢ California (2004)
♢ District of Columbia (1987) (inactive)
♢ Pennsylvania (1986) (inactive)

♢ U.S. Supreme Court (1993)

♢ U.S. Court of Appeals for the First Circuit (2010)
♢ U.S. Court of Appeals for the Second Circuit (2015)
♢ U.S. Court of Appeals for the Fifth Circuit (1989)
♢ U.S. Court of Appeals for the Ninth Circuit (2004)
♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
♢ U.S. Court of Appeals for the D.C. Circuit (1993)

♢ U.S. District Courts for the Central District of California (2004)
♢ U.S. District Court for the District of the District of Columbia (1989)
♢ U.S. District Court for the District of Massachusetts (2010)
♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT B

Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

1. Class Action Complaint, ECF No. 1
2. Amended Class Action Complaint, ECF No. 10
3. Memorandum of Law in Support of Plaintiff's Assented-to Motion for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, ECF No. 8
4. Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 19
5. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 22
6. Reply Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 29
7. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, ECF No. 33
8. Stipulation and Joint Motion to Continue Stay, ECF No. 66
9. Stipulation and Joint Motion to Continue Stay, ECF No. 71
10. Stipulation and Joint Motion to Continue Stay, ECF No. 75
11. Stipulation and Agreement of Settlement, ECF No. 89
12. Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 91
13. Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 92
14. Exhibit A: Letter Dated March 18, 2011, ECF No. 92-1
15. Exhibit B: Labaton Sucharow Firm Resume, ECF No. 92-2
16. Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, ECF No. 97
17. Defendants' Memorandum in Support of Class Action Settlement, ECF No. 99
18. Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, ECF No. 100
19. Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses of Service Awards to Plaintiffs, ECF No. 102
20. [Proposed] Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 103-1
21. Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of

Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 104

22. Exhibit 1: Declaration of George Hopkins in Support of Final Approval of Class Settlement, Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Award to ARTRS, ECF No. 104-1
23. Exhibit 2: Letter Dates March 18, 2011, ECF No. 104-2
24. Exhibit 3: Motion to Dismiss, ECF No. 104-3
25. Exhibit 4: Lobby Conference Before Chief Judge Mark L. Wolf, ECF No. 104-4
26. Exhibit 5: Declaration of Jonathan B. Marks, ECF No. 104-5
27. Exhibit 15: Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15
28. Exhibit 16: Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-16
29. Exhibit 17: Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-17
30. Exhibit 18: Declaration of Lynn Sarko on Behalf of The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Strangeland in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-18
31. Exhibit 19: Declaration of J. Brian McTigue in Support of Motion for Attorneys' fees, Reimbursement of Expenses, and Incentive Awards to Certain Class Representatives, ECF No. 104-19
32. Exhibit 20: Declaration of Carl S. Kravitz in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-20
33. Exhibit 21: Declaration of Catherine M. Campbell on Behalf of Feinberg, Campbell & Zack, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-21
34. Exhibit 22: Declaration of Jonathan G. Axelrod on Behalf of Beins, Axelrod, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-22
35. Exhibit 23: Declaration of Kimberly Keevers Palmer on Behalf of Richardson, Patrick, Westbrook & Brickman, LLC in Support of Lead Counsel's Motion for an Award of Attorneys' fees and Payment of Expenses, ECF No. 104-23
36. Exhibit 24: Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, ECF No. 104-24
37. Exhibit 25: Rate Tables, ECF No. 104-25
38. Defendant's Statement of Reporting Status of Class Action Settlement, ECF No. 106
39. Reply Memorandum of Law in Further Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 108

40. Supplemental Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion, ECF No. 109
41. Order and Final Judgment, ECF No. 110
42. Order Awarding Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 111
43. Order Approving Plan of Allocation, ECF No. 112
44. Hearing Transcript, ECF No. 114
45. Letter Dated November 10, 2016, ECF No. 116
46. Memorandum and Order, ECF No. 117
47. The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master, ECF No. 127
48. Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master, ECF No. 128
49. Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master, ECF No. 129
50. Order Regarding Class Notice, ECF No. 172
51. Memorandum and Order Regarding Appointment of Judge Rosen as Special Master, ECF No. 173
52. The Competitive Enterprise Institute's Center for Class Action Fairness's *Amicus* Response to Court's Order of February 6 – Leave to File granted March 8, 2017 (Dkt. 172), ECF No. 174
53. Memorandum and Order Regarding Class Notice, ECF No. 187
54. Memorandum and Order Regarding Motion for Relief from Fee Order, ECF No. 192
55. Special Master's Order Regarding the Law Firms' Objection to Retention of John W. Toothman as Advisor to Counsel to the Special Master, ECF No. 193
56. Objection of Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceeding Before the Special Master, ECF No. 194
57. Objection Plaintiffs' Law Firms' Objection to Special Master's Order Regarding Retention of John W. Toothman, ECF No. 199
58. Memorandum and Order Regarding Emergency Motion, ECF No. 200
59. Exhibit A: Notice of Proceedings that Could Result in an Additional Award to Class Members Who Have Claims, ECF No. 200-1
60. Exhibit B: Notice of Proceedings that Could Result in an Additional award to Class Members Who Have Claims, ECF No. 200-2
61. Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel, ECF No. 202
62. Order Regarding Email Addresses, ECF No. 203
63. Memorandum and Order – Toothman Order, ECF No. 204
64. Labaton Sucharow's Response to the Court's April 26, 2017 Order, ECF No. 205
65. Exhibit A: Declaration of Nicole M. Zeiss in Response to the Court's April 26, 2017 Order, ECF No. 205-1

66. Exhibit B: Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Response to the Court's April 26, 2017 Order, ECF No. 205-2
67. Memorandum and Order Regarding Special Master Billing Rate, ECF No. 206
68. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 1 Response
69. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017
70. Thornton Law Firm, LLP's June 1, 2017 Responses to Special master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
71. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 9 Response
72. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 9, 2017
73. Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
74. Lieff Cabraser Heimann & Bernstein LLP's Corrected Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Interrogatories Nos. 43 and 44
75. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response
76. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017
77. Thronton Law Firm, LLP's July 10, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories

EXHIBIT C

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT C
Massachusetts Cases Affirming Class Action Fee Awards

1. *Allen v. Decision One Mortg. Co., LLC*, No. CIV.A. 07-11669-GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
2. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324 (D. Mass.), aff'd, 809 F.3d 78 (1st Cir. 2015)
3. *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
4. *Davis v. Footbridge Eng'g Servs., LLC*, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
5. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536 (Mass. Super. Feb. 24, 2016)
6. *Gov't Employees Hosp. Ass'n v. Serono Int'l, S.A.*, 246 F.R.D. 93 (D. Mass. 2007)
7. *Hill v. State St. Corp.*, No. CIV.A. 09-12146-GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015), appeal dismissed, 794 F.3d 227 (1st Cir. 2015)
8. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
9. *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
10. *In re JPMorgan Chase Mortg. Modification Litig.*, 18 F. Supp. 3d 62 (D. Mass. 2014)
11. *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
12. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005)
13. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass. 2008)
14. *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25 (D. Mass. 2011)
15. *Mann & Co., PC v. C-Tech Indus., Inc.*, No. CIV.A.08-11312-RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
16. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
17. *Pietrantonio v. Ann Inc.*, No. 13-CV-12721-RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
18. *Rudy v. City of Lowell*, 883 F. Supp. 2d 324 (D. Mass. 2012)
19. *Stokes v. Saga Int'l Holidays, Ltd.*, 376 F. Supp. 2d 86 (D. Mass. 2005)
20. *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015)

EXHIBIT D

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT D

Massachusetts Bankruptcy Cases Containing Corporate Firm Billing Rates

1. *In re Houghton Mifflin Harcourt Publishing Company*, 12-BK-15610 (Bankr. D. Mass. 2012), ECF. No. 168
2. *In re Lexington Jewelers Exch., Inc.*, No. 08-10042-WCH, 2013 WL 2338243 (Bankr. D. Mass. May 29, 2013), ECF No. 439-1
3. *In re McCabe Grp.*, 424 B.R. 1 (Bankr. D. Mass.), *aff'd in part, rev'd in part sub nom. McCabe v. Braunstein*, 439 B.R. 1 (D. Mass. 2010), ECF No. 404-8
4. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 485
5. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 487-6
6. *In re The Educ. Res. Inst., Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010), ECF No. 1196-1

EXHIBIT E

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT E
Class Actions Settlements with Funds of $100-$500 Million

1. *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016)
2. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), ECF No. 310
3. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013), ECF No. 634-23
4. *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
5. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009)
6. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)
7. *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015)
8. *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833 (D. Mass. Aug. 17, 2005)
9. *In re Nortel Networks Corp.*, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), ECF No. 194
10. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Schering" settlement]
11. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Merck" settlement]
12. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
13. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155 (D. Mass. 2015)
15. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016)
16. *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226 (E.D. Mich. 2016)
17. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009), ECF No. 769
18. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161 (N.D. Cal. June 5, 2017)
19. *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 23 (S.D.N.Y. 2016)
20. *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

EXHIBIT F

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT F
Reported Class Action Fee Decisions
Containing Billing Rates for Contract or Staff Attorneys

1. *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), ECF No. 218-8
2. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015), ECF No. 61-4
3. *In re Am. Apparel, Inc. S'holder Litig.*., No. CV1006352MMMJCGX, 2014 WL 10212865 (C.D. Cal. July 28, 2014), ECF No. 188-3
4. *In re Animation Workers Antitrust Litig.*, No. 14-CV-4062-LHK, 2016 WL 6663005 (N.D. Cal. Nov. 11, 2016), ECF Nos. 331-2, 331-3, 331-4
5. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), ECF No. 1083-20
6. *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016), ECF No. 1963-1
7. *Long v. HSBC USA INC.*, No. 14 CIV. 6233 (HBP), 2016 WL 4764939 (S.D.N.Y. Sept. 13, 2016)
8. *McGreevy v. Life Alert Emergency Response, Inc.*, No. 14 CIV. 7457 (LGS), 2017 WL 1534452 (S.D.N.Y. Apr. 28, 2017)
9. *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008 (S.D.N.Y. Sept. 30, 2015), ECF No. 52
10. *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289 (M.D.N.C. May 9, 2016), ECF No. 145-1
11. *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
12. *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086 YGR, 2014 WL 3945655 (N.D. Cal. Aug. 11, 2014)

EXHIBIT G

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT G
List of Exemplary Cases With Multipliers Over 3.5

1. In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000) (19.6 multiplier)

2. Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., NO. CIV.A. 03-457, 2005 WL 1213926, at *17-18 (E.D. Pa. May 19, 2005) (15.6 multiplier)

3. Kuhnlein v. Department of Revenue, 662 So.2d 309, 315 (Fla. 1995) (15 multiplier reduced to 5)

4. In re Doral Fin. Corp. Sec. Litig., No. 05-md-1706 (S. D. N.Y. July 17, 2007) (10.26 multiplier)

5. Weiss v. Mercedes-Benz, 899 F. Supp. 1297 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier)

6. Doty v. Costco Wholesale Corp., No. 05-3241 (C. D. Cal. May 14, 2007) (9 multiplier)

7. Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998) (8.9 multiplier)

8. Cosgrove v. Sullivan, 759 F. Supp. 1667, 167 n.1 (S. D. N.Y. 1991) (8.74 multiplier)

9. New England Carpenters Health Benefits Fund v. First Databank, Inc., Civil Action No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3 multiplier)

10. Newman v. Caribiner Int'l, Inc., No. 99 Civ. 2271 (S.D. N.Y. Oct. 19, 2001) (7.7 multiplier)

11. Hainey v. Parrott, No. 02-733 (S. D. Ohio Nov. 6, 2007) (7.47 effective multiplier)

12. In re Rite Aid Corp. Sec. Litigation, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier)

13. Steiner v. Amer. Broadcasting Co., Inc., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier)

14. In re UnitedHealth Group, Inc. PSLRA Litig., No. 06-1691 (D. Minn. Aug. 10, 2009) (6.49 multiplier)

15. The Music Force, LLC v. Viacom, Inc., No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier)

16. In re Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890 (1st Cir. 1985) (6 multiplier)

17. In re Cardinal Health Inc. Securities Litigations, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier)

18. In re Krispy Kreme Doughnuts, Inc. Sec. Litig., No. 04-416 (M.D. N.C. Feb. 15, 2007) (6 multiplier)

19. In re RJR Nabisco, Inc. Securities Litigation, No. 88 Civ. 7905(MBM), 1992 WL 210138, at *5-6 (S.D. N.Y. Aug. 14, 1992) (6 multiplier)

20. Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141 (D. S.C. Aug. 15, 2006) (6 multiplier)

21. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S. D. Ohio Dec. 31, 2007) (5.85 multiplier)

22. Dutton v. D&K Healthcare Res., Inc., No. 04-147 (E. D. Mo. June 5, 2007) (5.6 multiplier)

23. In re Charter Communications, Inc., Securities Litigation, No. MDL 1506, 2005 WL 4045741, at * 22 (E.D. Mo. June 30, 2005) (5.6 multiplier)

24. Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D. N.Y. 1997) (5.5 multiplier)

25. Warner v. Experian Info. Solutions, Inc., No. BC362599 (Cal. Super. Ct. Los Angeles Co. Feb. 26, 2009) (5.48 multiplier)

26. Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier)

27. Di Giacomo v. Plains All American Pipeline, No. Civ.A.H-99-4137, 2001 WL 34633373, * at 11-12 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier)

28. Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1123-25 (C.D. Cal. 2008) (5.2 multiplier)

29. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (5.2 multiplier)

30. In re Beverly Hills Fire Litig., 639 F. Supp. 915, 924 (E. D. Ky. 1986) (5 multiplier to attorney who performed the bulk of work on the case)

31. In re Fernald Litigation, No. C-1-85-149, 1989 WL 267038, at *4-5 (S.D. Ohio Sept. 29, 1989) (5 multiplier)

32. In re Cendant Corp. Securities Litigation, 404 F.3d 173, 183 (3d Cir. 2005) (multiplier in "mid-single digits")

33. In re United Rentals, Inc. Sec. Litig., No. 04-1615 (D. Conn. May 26, 2009) (4.79 multiplier)

34. Castillo v. General Motors Corp., No. 07-2142 (E. D. Cal. April 19, 2009) (4.77 multiplier)

35. Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 (E. D. Pa. Aug. 14, 2006) (4.77 multiplier)

36. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (4.7 multiplier)

37. Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier)

38. Teeter v. NCR Corp., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier)

39. Holleran v. Rita Medical Sys., Inc., No. RG06302394 (Cal. Super. Ct. Alameda Co. Aug. 1, 2007) (4.57 multiplier)

40. Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1991 WL 275757 (S.D. N.Y. Dec. 19, 1991) (4.4 multiplier)

41. Agofonova v. Nobu Corp., No. 07-6926 (S. D. N.Y. Feb. 6, 2009) (4.34 multiplier)

42. Buccellato v. AT & T Operations, Inc., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (4.3 multiplier)

43. In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier)

44. Shannon v. Hidalgo County Board of Comm'r, No. 08-369 (D. N.M. June 4, 2009) (4.2 multiplier)

45. Simmons v. Andarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct. Caddo Co. Dec. 23, 2008) (4.17 multiplier)

46. In re OSI Pharm., Inc. Sec. Litig., No. 04-5505 (E.D. N.Y. Aug. 22, 2008) (4.11 multiplier)

47. Blackmoss Inv., Inc. v. Gravity Co., No. 05-4804 (S. D. N.Y. Nov. 20, 2007) (4.0 multiplier)

48. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2003) (4.0 multiplier)

49. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (3.97 multiplier)

50. Karpus v. Borelli (In re Interpublic Secs. Litig.), No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D. N.Y. Oct. 26, 2004 (3.96 multiplier)

51. Vizcaino v. Microsoft Corp., 290 F.3d 1045, 1050-51 (9th Cir. 2002) (3.65 multiplier)

52. Donkerbrook v. Title Guar. Escrow Servs., Inc., No. 10-00616 LEK-RLP, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011) (3.6 multiplier)

53. Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869 (E.D. La. 2007) (3.5 multiplier)

54. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (3.5 multiplier)

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM, LLP'S RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) SEPTEMBER 7, 2017 REQUEST FOR ADDITIONAL SUBMISSION

In a letter dated September 7, 2017, Special Master Gerald E. Rosen (Ret)., through counsel, invited Labaton Sucharow ("Labaton"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and Thornton Law Firm, LLP ("Thornton") (collectively, the "Consumer Class Firms") to submit an additional supplemental submission addressing the payment to Attorney Damon Chargois, as well as any other topics raised in the Special Master's July 5, 2017 letter.

Preliminary Statement

On August 7, 2017, the Special Master sent supplemental interrogatories and supplemental requests for production of documents to the Consumer Class Firms. These discovery requests concerned the payment of a portion of the Consumer Class Firms' fee in this case to Attorney Damon Chargois, as well the Consumer Class Firms' relationship with Mr. Chargois generally. Thornton responded to the supplemental discovery requests in full and produced two witnesses for depositions in September 2017.

Thornton respectfully submits this response to the Special Master's September 7, 2017 letter to address certain facts that Thornton believes are relevant and helpful to the Special Master's assessment of issues raised in this matter. In addition to responding to the Special Master's request concerning Mr. Chargois, Thornton addresses below a topic revisited during this supplemental discovery phase, namely, Thornton's listing of the Staff Attorneys assigned to it in its individual fee declaration.

Damon Chargois

As concerns the primary topic of the Special Master's September 7, 2017 letter – the payment to Mr. Chargois in the State Street matter – Thornton respectfully submits that the

factual record developed by the Special Master demonstrates that Thornton believed that Mr. Chargois facilitated Labaton's introduction to the Arkansas Teacher Retirement System ("ARTRS") and that Mr. Chargois was acting as a liaison to ARTRS, including in the State Street litigation. Thornton further understood that Labaton had a financial obligation to Mr. Chargois in matters involving ARTRS. The factual record demonstrates that Thornton, along with Lieff Cabraser, agreed to share in Labaton's financial obligation to Mr. Chargois in the State Street case, and that Thornton partner Garrett Bradley helped negotiate down the percentage of the Consumer Class Firms' fee that would be paid to Mr. Chargois.

With respect to questions concerning ARTRS's awareness of Mr. Chargois's involvement, and what work Mr. Chargois performed or did not perform on the State Street litigation, the factual record developed in this investigation demonstrates that Thornton lacked full knowledge regarding these issues. Thornton therefore defers to Labaton on those questions.

Staff Attorney Sharing and Thornton's Fee Declaration

During this investigation, the Special Master has questioned the arrangement among the Consumer Class Firms to share the cost and risk associated with Staff Attorneys who performed document review work on the case. As set out in documents and deposition testimony, and as set forth in the Consumer Class Firms' submission to the Special Master dated August 1, 2017, Thornton, Labaton, and Lieff Cabraser entered into a cost- and risk-sharing agreement as part of which Thornton paid for the services of certain Staff Attorneys who performed document review work. Because Labaton and Lieff Cabraser already had Staff Attorneys with available time, as well as experience with employing Staff Attorneys on large document review matters, the firms deemed it most efficient to share the cost and risk of Staff Attorneys housed at (or working remotely for) those two firms. Accordingly, certain of the Staff Attorneys working at Labaton

and Lieff Cabraser were assigned to Thornton. In turn, Thornton paid their hourly rate of compensation, plus, as to Staff Attorneys assigned by Labaton, an additional amount for overhead expenses.[1] *See* TLF-SST-000400, TLF-SST-000395; TLF-SST-000154; *see also* Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission ("Consolidated Response") at 8-9. All three of the Consumer Class Firms attested to this arrangement in the Consolidated Response. *See* Consolidated Response at 19-20 (citing deposition testimony of Eric Belfi of Labaton ("Belfi Dep.") (June 14, 2017) at 50:19 – 51:16; Garrett Bradley of Thornton ("G. Bradley Dep.") (June 19, 2017) at 43:4-13; and Dan Chiplock of Lieff Cabraser ("Chiplock Dep.") (June 16, 2017) at 127:11 – 128:16).

In the latest round of depositions, the Special Master has revisited the issue of whether the Consumer Class Firms had an agreement that Thornton would list the hours associated with the Staff Attorneys assigned to it on its individual fee declaration. The Special Master specifically has questioned whether Thornton was "authorized" to list Staff Attorneys in its fee declaration. M. Thornton Dep. (Sept. 1, 2017) at 50:1-7 & 53:15-20; Chiplock Dep. (Sept. 8, 2017) at 48:2-7; deposition testimony of David Goldsmith ("Goldsmith Dep.") (Sept. 20, 2017) at 217:11-17. As the Consumer Class Firms have explained, there was no formal written

[1] As previously stated in the Consolidated Response, in the case of Staff Attorneys housed by Labaton, Labaton invoiced Thornton using a rate that consisted of both cost and overhead. *Compare* TLF-SST-000415 (Ray Politano of Labaton stating the $50 hourly rate Labaton was charging to Thornton) *and* TLF-SST-000403 to TLF-SST-000414 (Labaton invoices paid by Thornton showing $50 per hour rate) *with* deposition testimony of Ray Politano ("Politano Dep.") (June 14, 2017) at 18:3-9 (Politano stating that Staff Attorneys were paid between $32 and $40 per hour). *See also* G. Bradley Dep. (June 19, 2017) at 93:23 – 95:5, deposition testimony of Michael Thornton ("Thornton Dep.") (Sept. 1, 2017) at 52:9-17.

In the case of Staff Attorneys housed (or working remotely) at Lieff Cabraser, there was a brief period of review (approximately nine weeks) for which Thornton paid Lieff Cabraser for two Staff Attorneys' work. For the remainder of the project, Thornton paid two third-party staffing agencies directly. Chiplock Dep. (June 6, 2017) at 156:7-15; deposition testimony of Evan Hoffman ("Hoffman Dep.") (June 5, 2017) at 61:17 – 62:10.

agreement setting out the terms of the sharing arrangement. However, contemporaneous e-mail correspondence and/or deposition testimony taken in this matter establish that Thornton listed the hours of the Staff Attorneys assigned to it on its lodestar because it reasonably believed, as did others at Labaton and Lieff Cabraser, that doing so was part of the agreement. After all, Thornton also bore the risk with respect to these hours; if the case did not result in a settlement for the plaintiffs, or if the Court, for whatever reason, disallowed those hours, Thornton – not Labaton or Lieff Cabraser – would have been out the funds it paid for these attorneys' work. Indeed, as the record demonstrates, risk sharing was a key consideration for Labaton in entering into the document review work arrangement. *See* Belfi Dep. (June 14, 2017) at 51:8-16 ("…I was concerned about the status of where the case was, and the risk to our firm, so I wanted to make sure that this review was shared equally among the three firms and that we weren't going to just bear all the heavy lifting. So there was a process that was started to try to figure out a way for us to have these documents reviewed between our firm, the Lieff firm and the Thornton firm.").

The sharing of the costs and risk associated with the document review was consistent with the Consumer Class Firms' effort to share equally in the cost and risk of the litigation overall. In addition to splitting the Staff Attorneys' work, and dividing the substantive work among lawyers in the three firms, the three firms also each paid into a litigation fund and shared other costs associated with the litigation, including the costs associated with experts and with mediation. *See, e.g.*, Lesser Dep. (June 19, 2017) at 54:9-20. As Dan Chiplock of Lieff Cabraser testified, this was the firms' intent from the beginning: "From the get-go, the understanding always was that the firms would try to share equally in the risk, the three firms would try to share equally in the risk of the case. And by sharing in the risk, that means trying to

equally bear the costs, and equally investing time and resources in the success of the litigation." Chiplock Dep. (June 16, 2017) at 127:22 – 128:5; *see id.* at 129:6-13 (stating that the desire to bear cost and risk equally was "the overarching understanding that animated the case throughout"); *see also* Consolidated Response at 19 (noting that law firms in multi-firm class action cases make various arrangements, including but not limited to document review sharing, in the name of splitting the work, costs, and risk of the case equitably).

As previously discussed, none of the firms recall explicitly discussing how the hours of Thornton-assigned Staff Attorneys would be accounted for on eventual fee declarations. *See* Consolidated Response at 19. But even in the absence of an explicit agreement, there is ample evidence demonstrating that Thornton contemporaneously understood that it would include the Staff Attorneys in its fee declaration, as well as testimony confirming that both Labaton and Lieff Cabraser assumed that Thornton would list the Staff Attorneys. *See, e.g.*, deposition testimony of Michael Rogers ("Rogers Dep.") (June 16, 2017) at 91:18 – 92:16 and Chiplock Dep. (June 16, 2017) at, e.g., 143:13-23 and 145:13-25. Thornton's belief was a good-faith assumption that was reasonable from a cost- and risk-sharing perspective.

(A) Contemporaneous E-mails

The following e-mails previously produced to the Special Master, listed in chronological order, demonstrate Thornton's understanding. These e-mails make clear (i) that Thornton communicated to Labaton, both before and after the document review work was completed, that it was seeking detailed information regarding Staff Attorneys for purposes of tabulating its (Thornton's) lodestar; (ii) that Labaton assured Thornton that, with respect to the adjustments to overlapping Staff Attorney time set out in the November 10, 2016 letter to the Court, "the intent is not to suggest that Thornton time is less legitimate"; and (iii) that Thornton, in providing a

lodestar estimate to Lieff Cabraser, identified two types of reviewers – "internal" and "external (Thornton reviewers working Lieff + Labaton paid by Thornton)" – in its lodestar calculation.

- On **March 6, 2015** – three months before the Staff Attorneys completed their work in July 2015 – Evan Hoffman of Thornton e-mailed Mike Rogers, a partner at Labaton, and asked: "Mike, can you put me in touch with someone over there who can get me a total number of hours and number of documents reviewed to date by the Labaton reviewers hired by Thornton?" Mike Rogers responded the same day, including in his e-mail a list of "reviewers [] assigned to Thornton's payroll" and attaching "[t]heir total hours to date." The report attached by Mr. Rogers was titled "Timekeeper Worked Detail Report" and listed the hours worked by each Thornton-assigned Staff Attorney to date, by name. **TLF-SST-001943 to TLF-SST-001946.** Mr. Hoffman testified that when he received this information concerning reviewers who were assigned to Thornton but working at Labaton, he kept it in mind so that he could seek the information from Labaton "when it ultimately came time to prepare the hours." Hoffman Dep. (June 5, 2017) at 62:21 – 63:7.

- On **June 29, 2015**, Michael Lesser of Thornton sent an e-mail to Dan Chiplock of Lieff Cabraser in which he provided Mr. Chiplock with an estimate of Thornton's lodestar in the case, "to give [Mr. Chiplock] the flavor" of Thornton's lodestar number. **TLF-SST-011206.** For context, at this time, the parties were reaching an agreement in principle to settle the case, which was finalized on June 30, 2015. *See* Doc. 89, *Stipulation and Agreement of Settlement*, at p. 6, ¶ R ("On June 30, 2015, after additional extensive arm's-length negotiations, on multiple occasions, in person and by exchange of proposals, Plaintiffs and SSBT reached an agreement in principle to settle the Class Actions, which was memorialized in a Term Sheet dated September 11, 2015"). Thus, although it took more than a year for the parties to finalize the settlement and appear before the Court, the agreement in principle – and thus the conclusion of substantive work on the matter, including the document review – was reached long before that. *See* Belfi Dep. (June 14, 2017) at 61:5-10 ("[T]he case settled in the summer of 2015, and, you know, the final -- the papers were submitted, I believe, in September of 2016, so there's a 13-month period that we went through a lot of issues with State Street dealing with regulatory agencies.")

- In his **June 29, 2015** e-mail estimating Thornton's lodestar, Mr. Lesser broke the document review hours contributing to Thornton's lodestar into two categories: "Thornton doc review external (Thornton reviewers working Lieff + Labaton paid by Thornton)" and "Thornton doc review internal." With the caveat that Thornton was still reviewing its time records, Mr. Lesser commented to Mr. Chiplock that "this is mostly it for us [Thornton]." Mr. Lesser's e-mail clearly informed Mr. Chiplock that Thornton was including the Thornton-assigned reviewers working at Lieff and at Labaton in its lodestar calculation. **TLF-SST-011206**.

- On **August 24, 2015** – approximately two months after the Staff Attorneys had completed their work – Evan Hoffman of Thornton again e-mailed Mike Rogers of Labaton, this time copying Todd Kussin of Labaton, regarding Staff Attorney hours. Referencing the March 2015 e-mails they exchanged and seeking "a more detailed (i.e. daily) breakdown of those reviewers' hours from when they first started being on Thornton's payroll until we let everyone go early this summer," Mr. Hoffman informed Mr. Rogers and Mr. Kussin that he was seeking this information because he was "trying to compile in to one nice detailed document all of the document review hours for us [Thornton] in STT." **TLF-SST-031155 to TLF-SST-031157.** Mr. Kussin and Mr. Rogers responded to Mr. Hoffman's request, seeking clarification about what Mr. Hoffman needed. Mr. Hoffman responded that he needed "[W]hatever you have so I can gather all the hours info on a daily basis of Thornton-payroll reviewers, from when we hired them until they were terminated." **TLF-SST-031155**. Mr. Kussin responded to Mr. Hoffman and noted that Labaton's accountants would be pulling the information, and that he would be able to provide it to him the following day. *Id.* Later in the evening on August 24, 2015, Mr. Kussin replied to Mr. Hoffman's e-mail with a list of Thornton-assigned reviewers, "according to our accounting." **TLF-SST-001947 to TLF-SST-001949**.

- The following day, **August 25, 2015,** Todd Kussin followed up on the prior day's e-mails by sending Evan Hoffman "a spreadsheet containing a breakdown of the hours worked daily by each of the Labaton reviewers on Thornton's payroll." The attached spreadsheet detailed the time worked by each of the Thornton-assigned reviewers by name and date.[2] **TLF-SST-031158 to TLF-SST-031159**. This spreadsheet was the basis of Thornton's lodestar chart in its fee declaration ultimately filed in September

[2] Of note, the title of the report states that it covers "STA" (Staff Attorney) hours "from 01/01/2015 thru 02/28/2015," but this title was in error, as the content of the report goes through 07/02/15.

2016. Because the Staff Attorneys had completed their work on the project nearly two months before this spreadsheet was provided to Thornton, and because the spreadsheet captured the Staff Attorneys' time through the end of the project, Thornton reasonably assumed that these were static numbers on which it could rely.

- Other e-mails from this time period show that all three firms were making efforts to gather their lodestar reports during this time, which places important context around these e-mails between Thornton, Labaton, and Lieff Cabraser.

  For example, in an e-mail chain dated **August 28-30, 2015** initiated by Mike Rogers of Labaton to Michael Lesser of Thornton and Dan Chiplock of Lieff Cabraser (with others added along the chain), the firms agreed to "gather time and daily backup" "in anticipation of making a formal fee request." They also discussed the need to "pick consistent rates" for document reviewers, and whether to "cap" rates. **TLF-SST-011289 to TLF-SST-011292**.

  As the thread continued into mid-September 2015, Mr. Chiplock, Mr. Rogers, and Mr. Lesser all noted that they had gathered or nearly gathered their firms' respective lodestar and expenses, and would soon exchange them. Thus, as the e-mails show, Mr. Hoffman – whom Mr. Lesser informed Labaton and Lieff was "the captain" of Thornton's lodestar assembly project – was requesting detailed information concerning Staff Attorney hours from Labaton in the very days leading up to discussions among the three firms about exchanging their lodestar numbers. *Compare* **TLF-SST-001947, TLF-SST-031155**, and **TLF-SST-011289**.

  As concerns Lieff Cabraser, Thornton has not identified any e-mail correspondence with that firm requesting detailed Staff Attorney hours reports. This is explained by the fact that Thornton already had this information. As it was paying two third-party staffing agencies directly for the Staff Attorneys housed at Lieff Cabraser, Thornton approved their timesheets. Hoffman Dep. (June 5, 2017) at 69:15-25. Thornton received contemporaneous records for those Staff Attorneys from the staffing agencies, which Evan Hoffman referenced in aggregating the number of hours attributable to work by Thornton-assigned reviewers at Lieff Cabraser -- just as he

used the reports Labaton supplied to him to calculate the number of hours attributed to work by Thornton-assigned reviewers at Labaton.[3]

- Additionally, the firms' communications regarding the November 10, 2016 letter to the Court support Thornton's understanding that it properly accounted for Thornton-assigned Staff Attorneys in its fee declaration. In an e-mail chain dated **November 9, 2016**, Dan Chiplock of Lieff Cabraser wrote to Labaton partner David Goldsmith, copying Michael Lesser and Evan Hoffman of Thornton, that time for two Staff Attorneys "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015" who worked on Lieff Cabraser's premises. Mr. Chiplock went on to note that Lieff Cabraser had inadvertently included their time because of a lack of description in the time entries on Lieff Cabraser's end. With regard to two other Thornton-assigned reviewers at Lieff Cabraser, Mr. Chiplock explained that they did work for both Thornton and for Lieff Cabraser at different times, and that Lieff Cabraser had "neglected to exclude" the time entries that related to Thornton-assigned work. **TLF-SST-012138 to TLF-SST-012140**. Thus, Mr. Chiplock clearly understood and thought it proper for Thornton to have listed Thornton-assigned reviewers in its fee declaration. Mr. Chiplock confirmed this in both of his depositions, and Lieff Cabraser's interrogatory responses also confirm this belief. *See* Chiplock Dep. (June 16, 2017) at 135:20 – 137:11; 145:12 – 146:7 & 228:19 – 229:16; Chiplock Dep. (Sept. 8, 2017) at 49:3-12; LCHB Interrog. Resp. 23, 32 ("With respect to Staff Attorneys, [LCHB's] understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment"), 34 ("[I]t was [LCHB's] understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne financial responsibility"), & 65.

  Evan Hoffman recalls hearing this sentiment from Lieff Cabraser, as well as a similar explanation concerning inadvertent mistakes from Labaton. Hoffman Dep. (June 5, 2017) at 102:4-21. Indeed, in the process of putting together the November 10 letter,

[3] For the initial period for which Thornton was paying Lieff Cabraser for two Staff Attorneys' work – before the direct payments to the staffing agencies were put into place – Thornton received invoices from Lieff that stated the hours worked by those two Staff Attorneys. *See* TLF-SST-000400, TLF-SST-000395; *see also* TLF-SST-000154. (*See also* Thornton's Interrogatory Response 75, in which Thornton noted the discovery of an eight-hour transcription error relevant to one of these two attorneys' hours in the lodestar.)

> David Goldsmith of Labaton assured Thornton in an e-mail that the removal of any overlapping Staff Attorney hours from Thornton's lodestar was the result of a conservative, lowest-rate approach only, and that "the intent is not to suggest that Thornton time is less legitimate[.]" **TLF-SST-012191.**

(B) Deposition Testimony

In addition to the e-mails described above, deposition testimony and discovery responses from numerous attorneys among the three firms confirm that Thornton reasonably assumed, based on the financial responsibility it had and the risk it was assuming, that it should list the Staff Attorneys assigned to it in its fee declaration.

1. Labaton Sucharow

Labaton partner Michael Rogers testified that although he does not recall there being an explicit discussion concerning how Staff Attorneys would be listed on the firms' fee declarations – a point with which Thornton concurs – he assumed that Thornton would list the Staff Attorneys for whose services it was paying on its own fee declaration. *See* Rogers Dep. (June 16, 2017) at 91:18 – 92:16 ("Q: And did you have an understanding during this time period about what the implications were of that cost sharing? In other words, whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up-front, I assume they wanted to get paid on the back end"); Labaton Interrogatory Resp. 33 ("Michael Rogers does not recall a specific discussion, at the time it was agreed that the cost of some Staff Attorneys would be paid by Thornton, regarding how their hours would be reported. He assumed, however, that Thornton would take credit for the hours spent by the Staff Attorneys for which it paid on its own lodestar").

Eric Belfi, the Labaton partner who had the original discussions about a cost- and risk-sharing agreement with Thornton partner Garrett Bradley, testified that he was not involved in

the mechanics of the cost splitting; rather, Mr. Rogers handled that aspect of the arrangement. Belfi Dep., June 14, 2017, at 63:17 – 64:22. However, in Labaton's responses to the Special Master's interrogatories, Mr. Belfi confirmed that, had he been asked at the time, he "likely would have assumed that Thornton would report the time spent by Staff Attorneys for whom it was paying on a Thornton lodestar" – just as Mr. Rogers assumed. *See* Labaton Interrog. Resp. 33.

Only one Labaton deponent, partner David Goldsmith, has challenged the notion that Thornton was "authorized" (implicitly or explicitly) to list the Staff Attorneys in its lodestar. Mr. Goldsmith testified that he believes "the Thornton firm assumed that that is what they were supposed to do because they were paying or reimbursing the costs of those attorneys," but that he "personally" does not think there is evidence that Thornton was "authorized" to list the Staff Attorneys for whom it was paying. Goldsmith Dep. (Sept. 20, 2017) at 225:24 – 226:12. Thornton respectfully submits that when Mr. Goldsmith's opinion is weighed against that of his colleagues Mr. Belfi and Mr. Rogers (one of whom struck the cost-sharing agreement, and the other of whom corresponded contemporaneously with the Thornton firm about Staff Attorney time – including to send Thornton a detailed time report in response to a request from Evan Hoffman), the Special Master must also acknowledge Mr. Goldsmith's testimony that he thought Thornton believed it should do so <u>because it (Thornton) was paying the costs of those attorneys</u> – *i.e.*, for a good-faith, fact-based reason. Moreover, Thornton notes that when Mr. Goldsmith was drafting the November 10, 2016 letter to the Court disclosing the inadvertent billing errors, he did not suggest to Thornton, or tell the Court, that Thornton's inclusion of the Staff Attorneys assigned to it was unauthorized. To the contrary, the letter to the Court attributed the overlap in hours to the firms' efforts to share financial responsibility generally, and specifically attributed

the overlap involving Labaton-housed Staff Attorneys to Labaton's "mistakenly" reporting the hours of certain Staff Attorneys in its own lodestar report. Dkt. 116-2. Furthermore, during the drafting process, Mr. Goldsmith explained to Mr. Lesser that Labaton was taking a lowest-rate approach to reducing the overlapping time as a conservative measure, and assured Mr. Lesser that "the intent is not to suggest that Thornton time is less legitimate[.]" TLF-SST-012191.

Thornton's listing of the Staff Attorneys assigned to it was reasonable based on the risk and financial responsibility borne by Thornton for those attorneys' work. Moreover, contemporaneous documents demonstrate that Thornton requested information concerning the time spent by the Staff Attorneys assigned to it both before and after the completion of the document review work in July 2015. The fact that the partner tasked with preparing the fee declaration at Labaton, who was not otherwise involved in the case, was unaware of the sharing arrangement between the firms should not be construed against Thornton. Thornton believed in good faith that because it bore the cost for certain Staff Attorneys' work (as well as the attendant risk of non-payment for that work), it was proper for Thornton to include that work in its lodestar. To the extent Labaton compartmentalized different case functions within the firm, as has been discussed during depositions in this matter, that should not reflect negatively on Thornton, which made a reasonable assumption, and communicated with Labaton consistent with that assumption.

2. Lieff, Cabraser, Heimann & Bernstein

For its part, Lieff Cabraser has confirmed its understanding that Thornton would claim the Staff Attorneys assigned to it. Lieff Cabraser partner Dan Chiplock testified that, in light of the risk Thornton was assuming, it was "obvious" that Thornton would include the Staff Attorneys for whom it was bearing financial responsibility in its own lodestar, even if the firms

did not reduce that understanding to writing. *See* Chiplock Dep. (June 16, 2017) at 135:20 – 137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."). Mr. Chiplock testified that he had a general understanding with Thornton partner Garrett Bradley that it would be done this way, and that it seemed to him "common sense that if a firm is paying for labor, they can get credit for that labor in their fee petition." *Id.* at 228:18 – 229:16 & 136:10-22 ("I would say it was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done, then, just as with any other employee when you're paying them, that you include their hours in your lodestar when you report it at the end of the day. I don't think that needed to be spelled out for me or for Garrett; it was just obvious.") Lieff Cabraser's responses to the Special Master's interrogatories confirm this. *See* LCHB Interrogatory Resp. 34, 39, 40.

Lieff Cabraser understood that Thornton's motivation for sharing the cost and risk associated with the document review work was so that its contribution to that piece of the case would be equal, or close to equal, to what Labaton and Lieff Cabraser were contributing. Dan Chiplock testified that he understood this and had no issue with it. *See* Chiplock Dep. (June 16, 2017) at 131:15 – 132:13 ("Because we knew we had to staff up the review to get it done, Thornton wished to contribute to that effort on equal terms, or on as equal terms as it could with the other firms, understanding that it did not have the facilities to host a dozen -- or however many -- attorneys who were strictly doing document review. And so they asked -- and I think it was a telephone conversation I had with Garrett Bradley, who asked me whether we at Lieff Cabraser would be willing to house some staff attorney document reviewers that Thornton would

pay for, so that Thornton could be making its equal contribution to bearing the risk in the litigation. And I agreed to that. I had no problem with that." Q "And were you aware as to whether there was a parallel agreement with Labaton? A: "I was aware at that time that the same ask or arrangement was being requested of Labaton."); 143:13-23 ("The reason why Thornton included these people in their lodestar was simply to recognize, I think, that apart from that distinction, their physical location, Thornton was not making any less of a contribution to this document review effort than the other two firms were. That was my belief. And that's what we were trying to implement by keeping the numbers equitable as much as we could."); & 145:13-25 ("I viewed Thornton as a co-equal partner in the venture in getting the job done and in bearing the risk of the case. And as part of that I viewed it as fair that they would contribute the overall -- they would contribute to the overall burden of making sure that document review was staffed and completed appropriately. And they did that. And I had no issue with them seeking to be treated on an equitable basis for purposes of their fee petitions from us."); *see generally* Chiplock Dep. (Sept. 8, 2017) at 48:2 – 63:6 (noting Lieff Cabraser's understanding that Thornton would list the Staff Attorneys assigned to it on its own fee petition).

3. Thornton Law Firm

Mike Thornton, Garrett Bradley, and Evan Hoffman of Thornton all testified that they believed or assumed that Thornton should list the Staff Attorneys assigned to it, for whose services it was paying, on its individual lodestar. M. Thornton Dep. (June 19, 2017) at 81:3-5 ("I mean, it was my understanding that if you paid for it, if you paid for the staff attorney, you'd get the hours"); G. Bradley Dep. (June 19, 2017) at 76:6 – 77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily

breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application"); Hoffman Dep. (June 5, 2017) at 58:12-16 ("My understanding was that for attorneys who Thornton was financially responsible for, they would be included on whatever the ultimate fee petition [was] that Thornton would submit").

During the investigation, the Special Master has questioned why the three law firms entered into a cost- and risk-sharing arrangement that involved the assignment of individual Staff Attorneys to Thornton – in other words, why Thornton did not simply pay a general amount, possibly into the litigation fund, instead of being assigned particular attorneys. *See* Lesser Dep. (June 19, 2017) at 54:9-10; Heimann Dep. (June 17, 2017) at 79:7-15; Goldsmith Dep. (July 17, 2017) at 92:21-24. As Thornton has explained in depositions, and as has been confirmed in other counsel's testimony (see section B.2 above), Thornton wanted to share equally because it wanted its cost and risk, and accordingly its *individual* lodestar, to place it on equal footing when it came to dividing the unallocated percentage of the Consumer Class Firms' portion of the fee (meaning, the fee remaining after the ERISA counsel's payment, and after the payment to Mr. Chargois).

While entering into an arrangement that spread cost and risk but did not involve the assignment of Staff Attorneys may have avoided the inadvertent double counting errors that were made, the amount of lodestar (without the double counting) would have been exactly the same had Thornton listed the Staff Attorneys, or had Lieff and Labaton listed them instead. In other words, the firms' *aggregate* lodestar submitted to the Court would have been the same.

Thornton believed in good faith that entering into this cost- and risk-sharing staffing agreement was a means of achieving parity among the firms that would translate into parity in the division of the unallocated portion of the fee. On the State Street matter, Thornton was thus aware of the need to share both cost and risk with co-counsel. As Garrett Bradley testified in this

matter, "If you're not sharing in the risk as you go along, you're not going to have a very strong or any argument" when it comes to division of the fee. G. Bradley Dep. (June 19, 2017) at 46:4-6. *See also* G. Bradley Dep. (June 19, 2017) at 50:22 – 51:8 ("Clearly, I had a concern about our load star…I wanted to make sure we were keeping pace with the other two firms who were bigger than us and doing more of these type of cases. But I most definitely had a concern that we were doing, taking our fair share of the risk so that we could get our fair share of the reward"); G. Bradley Dep. (June 19, 2017) at 67:2-13 (testifying that Thornton did not want to take the risk, do the work, and not have evidence of such work in the form of lodestar). Mike Lesser also recalled the firms' efforts to make things equal. Lesser Dep. (June 19, 2017) at 54:18-20 ("[T]he division of the staff attorneys was a logical progression of that kind of parity between the firms") *and* Lesser Dep. (June 19, 2017) at 54:9-20 ("[E]verything we'd done through the discovery process with Lieff and Labaton had been a joint effort and we had achieved some level of parity. And we had started with contributions to the litigation fund. Every time Catalyst needed more money or Jonathan Marks needed more money, which was a few times because of all the mediation sessions, we contributed equally. And the division of the staff attorneys was a logical progression of that kind of parity between the firms").

The other firms understood this concern as well. Dan Chiplock of Lieff Cabraser testified that the Consumer Class Firms' desire to bear cost and risk equally was "the overarching understanding that animated the case throughout," and that the firms were concerned about making equal contributions "so at the end of the day we wouldn't have one firm saying, "Well, we did everything," or, "We did all this stuff and you didn't take on any of the risk, therefore you don't get your fair share of the fee." Chiplock Dep. (June 16, 2017) at 129:6-13; *see also* Chiplock Dep. (Sept. 8, 2017) at 49:6-12 (reiterating that although there was no written

agreement, "[i]t seemed understood to me, and I believe the reason for Garrett's request, that they be allowed to contribute financially to the document review process would be for them to be able to say that they were contributing to the document -- to document review in the case and credit that in their lodestar"). Others from Lieff Cabraser shared this understanding. Partner Steve Fineman testified that, to his knowledge, the cost-sharing agreement with respect to the Staff Attorneys was part of "was an effort to balance out the lodestar[.]" Deposition testimony of Steve Fineman ("Fineman Dep.") (June 6, 2017) at 80:8-11. Labaton likewise viewed the cost-sharing agreement as a hedge against some of the risk inherent in a large contingent litigation. *See* Belfi Dep. (June 14, 2017) at 51:8-16 ("I was concerned about the status of where the case was, and the risk to or firm, so I wanted to make sure that this review was shared equally among the three firms[.]")

Staff Attorney Rates

A matter intertwined with the above issue, which the Special Master also has raised, is whether Thornton was "authorized" to include the Staff Attorneys in its lodestar at higher rates than what Thornton was paying Labaton, Lieff Cabraser, or the third-party staffing agencies for those attorneys' work. *See* M. Thornton Dep. (Sept. 1, 2017) at 55:18-2; G. Bradley Dep. (Sept. 14, 2017) at 166:14-17; *see also* Chiplock Dep. (Sept. 8, 2017) at 49:21 – 50:1. E-mails produced to the Special Master make clear that all three firms discussed billing Staff Attorneys at higher rates than what those Staff Attorneys were being paid (which all firms ultimately did). Dan Chiplock confirmed these discussions in his deposition testimony. *See* LCHB-0052627, TLF-SST-011289-011292, and Chiplock Dep. (Sept. 8, 2017) at 52:2-15 ("It was my expectation that the three firms would be billing their document reviewers at comparable rates. And perhaps the same rate as I'm suggesting here" [referring to August 30, 2016 e-mail chain cited above]).

As Steve Fineman, the managing partner of Lieff Cabraser, testified, the billing rates of lawyers who perform work for the firm are not determined by the hourly rate paid to those lawyers, but rather by the market rate for those services. *See* Fineman Dep. (June 6, 2017) at 48:3-17 ("[T]he amount we pay the lawyers is not relevant to our discussion about how much we're going to peg their hourly rate at. That's a function of what the market in our view pays for those people and how much we pay them is insignificant. It is like an associate…the hourly rate for an associate is set based on what we understand to be the market rate for legal services provided by that person, not based on how much we pay that person."). The billing of Staff Attorney work at market rates instead of cost is a commonly accepted practice in the legal industry that is supported by public policy. This is equally true of how firms bill work by partners, associates, and paralegals. *See* Declaration of Professor William Rubenstein submitted with the Consumer Class Firms' August 1, 2017 Consolidated Response ("Rubenstein Decl.") at 27-30. The analysis performed by Professor Rubenstein confirms that the rates used by the three firms in this litigation were reasonable. *See* Rubenstein Decl. at 2, 27-30.

How Thornton paid for the Staff Attorneys' work – whether by paying invoices from Labaton or Lieff Cabraser, or by paying a third-party staffing agency directly – does not change this conclusion. Both agency and non-agency attorneys performed document review and drafted topical issue memoranda, both groups were barred attorneys who were well qualified for their roles, and both groups were supervised in the same manner. *See* Consolidated Response at 4-5. Accordingly, the firm claiming the attorneys' hours was entitled to use a reasonable market rate, instead of the cost rate, for the two groups alike. *See* Chiplock Dep. (Sept. 8, 2017) at 53:13 – 54:9 ("Now I don't know if you're suggesting that Lieff Cabraser ought to get to bill them at 415 or whatever we bill, but Thornton only gets to bill them at 40. That doesn't seem fair to me

because we're taking turns paying the agency . . . the agency lawyers [] were doing the same work as everybody else"); *see also* Fineman Dep. (June 6, 2017) at 41:4-8. While all three firms have readily admitted their inadvertent errors in listing the same Staff Attorney time on more than one fee application, no firm has argued that it was an error for any firm to include the Staff Attorneys' hours at market rates instead of cost. The Staff Attorneys on this case provided legal services that, under other circumstances, could have been performed by associates at the various firms. The services they provided on this case were not akin to expenses, such as copying, that would be charged at cost. *See* Fineman Dep. (June 6, 2017) at 53:15-24 ("[I]f I send documents out for copying charges and a copying charge is an acceptable expense in the jurisdiction which we're submitting a fee application, we will include that expense. But I don't equate the work being done for us by the lawyers with somebody running a copying machine, it is not a legal service"). There is no legal basis for distinguishing Thornton's use of market rates for Staff Attorneys from Lieff Cabraser's or Labaton's use of market rates. All three firms paid for work performed by Staff Attorneys that was essential to the case, and all three firms charged reasonable market rates for that work, a commonly accepted and supportable industry practice. *See* Rubenstein Decl. at 2, 27-30.

The Consumer Class Firms' Use of Current Rates

To the extent there is any remaining question about Thornton's use of current billing rates for the individuals listed in its fee declaration, Thornton submits that using current rates for this six-year-plus litigation, instead of using historical rates, comported with law and with typical industry practice. *See* Rubenstein Decl. at 16, fn. 26. Thornton understood from lead counsel that current rates were to be used, as demonstrated in a September 8, 2016 e-mail chain between Nicole Zeiss and Evan Hoffman previously produced to the Special Master. In this e-mail

exchange, Mr. Hoffman asked Ms. Zeiss: "[A]re we using historical billing rates or current rates for calculating lodestar? The language in your fee sample seems to indicate we're using current rates. Just want to make sure, thanks[.]" Ms. Zeiss responded to Mr. Hoffman: "Current." TLF-SST-013739 – TLF-SST-013741.

Dated: November 3, 2017

Respectfully submitted,

/s/ Brian T. Kelly

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EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM LLP'S APRIL 12, 2018 RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) REQUEST FOR ADDITIONAL SUBMISSION

On February 23, 2018, Special Master Gerald E. Rosen, through counsel, provided the parties to this investigation with a report by the Special Master's expert, Professor Stephen Gillers, titled "Ethical Report for Special Master Gerald E. Rosen" (hereinafter, "Gillers Report" or "Report"). The Special Master then invited Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton Law Firm") (collectively, the "Law Firms") to submit additional supplemental submissions addressing issues raised in the Gillers Report and Professor Gillers' deposition testimony, and the declarations and deposition testimony of the rebuttal experts designated by the Law Firms. The Thornton Law Firm submits this response to the Special Master's request.

In making this submission, the Thornton Law Firm incorporates by reference its prior submissions to the Special Master, namely: (1) the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission, dated August 1, 2017, and (2) Thornton Law Firm LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) September 7, 2017 Request for Additional Submission, dated November 3, 2017.

Procedural Background

On November 30, 2017, the Law Firms were notified that the Special Master had retained an expert, Professor Stephen Gillers of the New York University School of Law, to address issues relating to the portion of the fee paid to attorney Damon Chargois.[1] With the Law Firms' agreement, the Special Master sought an extension of the December 15, 2017 deadline for his Report and Recommendation. In a letter to the Court seeking the extension, the Special Master

[1] Professor Gillers testified that he was first contacted by the Special Master in October 2017. 3/20/18 Gillers Dep. at 16:17-21.

informed the Court that he and his counsel had retained the expert to opine on "additional issues" raised by the discovery in the case, specifically in response to a "second, more narrowly focused expert" retained by the Law Firms.[2] The letter further provided that the Special Master's expert hoped to have his report completed by the end of January 2018. On December 14, 2017, the Court issued an order granting the request for an extension to March 15, 2018, and attaching the Special Master's letter to the Court. Dkt. 214.

The Law Firms received Professor Gillers' Report on the evening of Friday, February 23, 2018. In his 85-page report, Professor Gillers opined not only on legal issues concerning the fee paid to attorney Damon Chargois (*i.e.*, the "additional issues" mentioned in the Special Master's letter to the Court), but also addressed other issues that did not concern Mr. Chargois, namely, whether the use of inaccurate, boilerplate language in the fee declaration filed by Garrett Bradley constituted sanctionable conduct.[3] Notably, the Gillers Report did not mention the fact that Labaton and Lieff Cabraser used some of the exact same boilerplate language in their declarations.[4]

When the Report was issued to the Law Firms on February 23, 2018, it was immediately clear that depositions of Professor Gillers and other (to-be-designated) rebuttal experts could not be completed in any meaningful fashion before the March 15, 2018 deadline for the Special

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[2] The expert referenced is Camille Sarrouf, who was retained by Labaton, and whose declaration was included with Labaton's November 3, 2017 submission to the Special Master.

[3] "[E]xpert testimony proffered solely to establish the meaning of a law is presumptively improper." *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001). Here, where Professor Gillers opines on questions of law, or applies the law to a statement of facts—particularly where the statement of facts was not subject to scrutiny by the adversarial process—his expert testimony is improper. *See Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code.").

[4] For example, while all three Law Firms generally work on a contingency basis, *see* 3/17/17 Hearing at 79:9-80:3; 88:8-13; 93:11-21, all three Law Firms asserted in their Declarations that the rates listed "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions" and are "based on my firm's current billing rates." *Compare* Declaration of Lawrence Sucharow (Dkt. 104-15) and Declaration of Dan Chiplock (Dkt. 104-17) *with* Declaration of Garrett Bradley (Dkt. 104-16).

Master's Report and Recommendation. Accordingly, the Special Master sought another extension for his Report and Recommendation—this time to April 23, 2018—in a letter to the Court dated February 28, 2018. This detailed letter recounted the discussions between the Special Master, his counsel, and the Law Firms regarding the issues raised by the February 23, 2018 issuance of Professor Gillers' Report. On March 1, 2018, the Court issued an order on the docket granting the Special Master a final extension to April 23, 2018, and attaching the Special Master's February 28, 2018 letter.

Following the issuance of the Gillers Report, expert discovery proceeded swiftly. The Law Firms were required to identify and designate any rebuttal experts by March 10; submit the expert reports by March 26; and participate in expert depositions held on March 20, 21, 24, and April 3, 4, 9, and 10. Professor Gillers was deposed on March 20 and 21, and Labaton's previously designated expert Camille Sarrouf was deposed on March 21 and 24. In response to the scope and substance of Professor Gillers' Report, the Law Firms designated a total of seven rebuttal experts (four by Labaton, one by the Thornton Law Firm, and two by Lieff Cabraser, one of whom is Professor William Rubenstein, who submitted an expert declaration in support of the Law Firms' consolidated submission dated August 1, 2017). These experts' reports were due and submitted on March 26, 2018 (16 days after the March 10 deadline for expert designations). The Special Master deposed the Law Firms' experts on April 3, 4, 9, and 10. Per the schedule mandated by the Special Master and his counsel, written submissions by the Law Firms, including this submission, were submitted on April 12, 2018 in advance of oral argument on April 13, 2018.

Preliminary Statement

As Professor Gillers' Report states, and as he confirmed in his deposition testimony, he incorporated and relied on a detailed statement of facts prepared by counsel for the Special Master in reaching the conclusions in his Report. This statement of facts (titled "Factual Background") comprises 53 pages of the 85-page Gillers Report. The statement of facts – which Professor Gillers "assume[d] is true for purposes of [his] opinion," Gillers Rep. at 2 – is riddled with blatant errors and repeated mischaracterizations of the record evidence. When confronted with a sampling of these issues at his deposition, Professor Gillers conceded that he did not do any investigation into the facts beyond relying on the statement provided, and acknowledged that he did not know why other directly pertinent evidence had not been provided to him. *See, e.g.*, 3/20/18 Gillers Dep. at 262:12-263:6; 290:6-292:1; 302:18-303:3; 308:3-308:5.

Where conclusions are based on misstated, incomplete, or misleading facts, their reliability is inherently questionable and should be rejected. *See United States v. Rubashkin*, No. 08-CR-1324-LRR, 2010 WL 4362455, at *6 n.7 (N.D. Iowa Oct. 27, 2010) (rejecting, in another matter, Prof. Gillers' testimony and noting, "Given these experts' proclivity to rely on defense counsel's mischaracterization of the facts, the court declines to credit their affidavits."). And where, as here, the drafters of the facts clearly ignored evidence that would make the statement of facts more accurate, more complete, and more fair, it appears that the drafters are intent on proving a preconceived narrative and are not engaged in a neutral fact-finding process. Indeed, the Special Master's insistence that Professor Gillers participate in all of the other experts' depositions, over the objections of the Law Firms, undermines the appearance of a neutral fact-finding process. Accordingly, and for reasons set forth more fully below, the

Thornton Law Firm objects to the Special Master's use of, reliance on, and/or incorporation of the Gillers Report.

I. BECAUSE "FACTS MATTER," THE GILLERS REPORT IS NOT RELIABLE.

As Professor Gillers testified at his deposition, "facts matter." 3/20/18 Gillers Dep. at 155:11. Here, the facts supplied to Professor Gillers, which he expressly assumed to be true, are riddled with errors, omissions, and material mischaracterizations. As Professor Gillers conceded, his opinion would be worthless if it were found to be based on inaccurate, misleading, or incomplete facts. *Id*. at 265:11-15.

In his deposition, after being shown multiple examples of record evidence that had been ignored, misquoted, or taken out of context, Professor Gillers attempted to explain away at least some of these deficiencies by immediately asserting that he did not rely on the erroneous facts for his opinions. *See, e.g.*, *id*. at 289:21-290:9; 360:3-11. For at least two reasons, this tactic must be rejected. First, where so many of the facts provided to Professor Gillers were erroneous, incomplete, or mischaracterized—in contrast to a situation in which only a few facts are wrong—it becomes clear that the entire Report is infected with those deficiencies. Second, whether or not he expressly ties each fact to a particular conclusion, Professor Gillers assumed the facts in the statement are true, *see* Gillers Rep. at 2, and all of his conclusions derive in some fashion from his overall understanding of the facts.

The 53-page statement of facts is replete with erroneous and incomplete facts. For example:

Page 16 of the Gillers Report states that "No explicit or implicit agreement to allow TLF to claim the Labaton and Lieff SAs on TLF's lodestar has been disclosed during the Special Master's investigation." This assertion bears directly on Professor Gillers' conclusions regarding

misstatements in Garrett Bradley's declaration (and, as is clear from other depositions, the Special Master's view of motive). Yet this "fact" is clearly contradicted by testimony and other record evidence from members of all three Law Firms showing the existence of an agreement.[5]

The Thornton Law Firm addressed this issue at length in its November 3, 2017 submission to the Special Master, citing deposition testimony, interrogatory answers, and contemporaneous emails evidencing the existence of an agreement. *See* Thornton Law Firm's November 3, 2017 submission at pp. 3-18 (which the Thornton Law Firm incorporates here by reference). For unknown reasons, Professor Gillers apparently did not have or take the opportunity to review that submission. As that submission details, Dan Chiplock of Lieff Cabraser testified at length in his two depositions that he understood there was an agreement: "It was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done…that you include their hours in your lodestar when you report it at the end of the day…it was just obvious." 6/16/17 Chiplock Dep. at 136:10-22.[6] Both Michael Rogers and Eric Belfi, partners at Labaton, assumed (or, if they had been asked at the time, would have assumed) that the Thornton Law Firm was going to claim the staff attorneys in its (Thornton's) fee declaration. *See, e.g.*, 6/16/17 Rogers Dep. at 91:18-23. Much for the same reasons cited by Dan Chiplock, Michael Rogers surmised that the Thornton Law Firm would include them: "They were paying for it up-front, I assume they wanted to get paid on the back end." *Id*. at 92:14-16. *See also* Labaton Response to Interrogatory No. 33. And, naturally, the Thornton Law Firm believed in good faith—and based on its understanding with Labaton and Lieff Cabraser—"that for attorneys for who Thornton was

[5] At a minimum, there was an implicit agreement. *See* Implicit, *American Heritage Dictionary* (5th ed. 2018) ("Implied or understood though not directly expressed.").

[6] Additional relevant citations from Mr. Chiplock's testimony are listed on pages 3 to 18 of the Thornton Law Firm's November 3, 2017 submission.

financially responsible for, they would be included on whatever the ultimate fee petition [was] that Thornton would submit." 6/5/17 Hoffman Dep. at 58:12-16.

The Gillers Report does not cite any of this testimony. In fact, on page 15, the Report entirely omits Dan Chiplock's testimony in providing support for the assertion that Lieff Cabraser and Labaton were focused on the cost-spreading aspect of the arrangement, and not on what information would be reported on a fee petition. The negative and unfair inference, of course—which is clear because this sentence is followed by one stating that the Thornton Law Firm claimed the staff attorneys allocated to it—is that no one from Lieff Cabraser or Labaton thought about this, and therefore the Thornton Law Firm took advantage. This flies in the face of the testimony Professor Gillers failed to review.

Even if the Special Master has determined (without offering any basis for so concluding) that he does not credit the testimony of Dan Chiplock, Michael Rogers, or Evan Hoffman on this issue, the November 10, 2016 letter to the Court plainly states the Law Firms' view that the overlap in the listing of Staff Attorneys was the result of mistakes in Labaton's and Lieff Cabraser's lodestars, not in the Thornton Law Firm's. *See* 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf at 2 (Dkt. 116). Contemporaneous emails sent during the drafting of the November 10, 2016 letter support this as well. *See* TLF-SST-012138 (11/9/2016, 7:01 PM email from Dan Chiplock to David Goldsmith, Michael Lesser, and Evan Hoffman stating that two Staff Attorneys appearing on both TLF and Lieff Cabraser petitions "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015," and remarking that he "failed to catch that after our accounting department ran everyone's lodestar, and apologize"). *See also* TLF-SST-012191 (11/10/2016 email from David Goldsmith of Labaton to Mike Lesser of the Thornton Law Firm, copying

entire counsel group, assuring Mr. Lesser that removal of any overlapping Staff Attorney hours from the Thornton Law Firm's lodestar for the November 10, 2016 letter was the result of a conservative, lowest-rate approach only, and stating that "the intent is not to suggest that Thornton time is less legitimate"). The Gillers Report ignores these emails and the other record evidence that substantiate the agreement between the Thornton Law Firm, Lieff Cabraser, and Labaton that the Thornton Law Firm would include the Staff Attorneys for whose work it paid in its lodestar chart.

Pages 15-16 and 50 of the Gillers Report discuss the Thornton Law Firm's use of a rate of $425 per hour for work by the Staff Attorneys assigned to the Thornton Law Firm. On pages 15-16, the Gillers Report states: "In its fee petition, TLF billed all SA time at an hourly rate of $425 (a rate approved by the Court for Lieff SAs in BONY Mellon). Except for three SAs, the $425 per hour rate charged by TLF was greater than the rates requested by Lieff or Labaton for the same individuals in their lodestar petitions." And on page 50, the Gillers Report states that the cross-allocation of the Staff Attorney time "dramatically inflated the lodestar of TLF."

As to the first issue, the $425 per hour rate, the Gillers Report makes no mention of contemporaneous emails produced to the Special Master that make clear that the Thornton Law Firm used the $425 per hour rate because Lieff Cabraser suggested it, and because it had been accepted in BONY Mellon. *See* TLF-SST-011263. Nor does the Report mention Dan Chiplock's testimony on this issue, namely: "And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425." 6/16/17 Chiplock Dep. at 184:20-25. The result is that the Gillers Report

provides no context for the Thornton Law Firm's use of this hourly rate even when context plainly exists in the record.

Further, this section of the Gillers Report tellingly does not address the declaration of Professor William Rubenstein that the Law Firms submitted to the Special Master on August 1, 2017. In his declaration, which dealt squarely with rates, Professor Rubenstein concluded, based on empirical research, that an hourly rate of $425 was within the range of reasonableness for this work. *See* 7/31/17 Declaration of William B. Rubenstein at 27-30. Yet Professor Gillers testified that he was not provided with this declaration by Professor Rubenstein, and does not know why. 3/20/18 Gillers Dep. at 299:2-16.

As to the second issue, the effect of a $425 per hour rate on the Thornton Law Firm's lodestar, the Gillers Report asserts on page 50 that the cross-allocation of Staff Attorney time "dramatically inflated the lodestar of TLF." This statement wrongfully suggests that the duplication errors acknowledged by the Law Firms were the Thornton Law Firm's errors, and had the effect of "inflat[ing]" the Thornton Law Firm's lodestar number beyond what it should have reported. This prejudicial statement ignores contemporaneous emails in which lawyers from both Labaton and Lieff Cabraser acknowledged that the errors were theirs and/or that "the intent is not to suggest that Thornton time is less legitimate[.]" *See* TLF-SST-012138 (11/9/2016, 7:01 PM email from Dan Chiplock to David Goldsmith, Michael Lesser, and Evan Hoffman stating that two Staff Attorneys appearing on both Thornton Law Firm and Lieff Cabraser petitions "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015," and remarking that he "failed to catch that after our accounting department ran everyone's lodestar, and apologize"). *See also* TLF-SST-012191 (11/10/2016 email from David Goldsmith of Labaton to Mike Lesser of the Thornton

Law Firm, copying counsel group, assuring the Thornton Law Firm that removal of any overlapping Staff Attorney hours from the Thornton Law Firm's lodestar for the November 10, 2016 letter was the result of a conservative, lowest-rate approach only, and assuring Mr. Lesser that "the intent is not to suggest that Thornton time is less legitimate"). Neither of these emails is referenced anywhere in the Gillers Report.

Furthermore, the description of the Thornton Law Firm's lodestar in the Gillers Report as having been "dramatically inflated" echoes statements the Special Master and his counsel have made about the Thornton Law Firm's supposed motive for listing Staff Attorneys in its fee petition, for charging them at a rate of $425, and for failing to clarify template language concerning the Staff Attorneys. Specifically, the Special Master and counsel have asserted in front of numerous witnesses that this was an effort on the Thornton Law Firm's part to "jack up" the firm's lodestar. *See, e.g.*, 4/10/18 Vairo Dep., *passim*. As with numerous other "facts" in the Gillers Report, however, there is evidence flatly contradicting the Special Master's theory, which apparently was not provided to Professor Gillers. Specifically, the evidence shows that the Law Firms reached an agreement among themselves as to how to split their *entire* portion of the fee—including how to divvy up the previously unallocated 40%—in August 2016, *i.e.*, **before any fee declarations were filed with the Court**. *See* TLF-SST-056305 (signed fee agreement); 6/19/17 G. Bradley Dep. at 46:24-47:3 ("[W]e had a fee agreement in place in August of '16 before we filed the fee application. We knew at the time what our fee was going to be"); *id*. at 62:9-63:8; 9/8/17 Chiplock Dep. at 135:6-9 (stating that "the fee agreement, the fee allocation agreement was reached in late August of 2016"). It therefore makes no sense to suggest, where the Court had already indicated its approval of a 25% fee based on the common fund approach, and the fee split among the Law Firms had been agreed to in August 2016, that the Thornton Law Firm

would have had any motive to "dramatically inflate[]" the lodestar in its September 2016 fee declaration in an attempt to mislead the Court.

Pages 20 to 21 of the Gillers Report quote a portion of an August 30, 2015 email from Dan Chiplock (TLF-SST-031166) and characterize it as follows: "The discussion turned to lodestar reporting in State Street with Chiplock warning Bradley not to include unwarranted hours in TLF's fee petition."

In this email, which was read and discussed at length in numerous depositions, Mr. Chiplock comments on information he heard regarding the Thornton Law Firm's expected total lodestar number. The quoted portion of this email itself has clear indicia of uncertainty: Mr. Chiplock notes that he heard the information "third-hand" and that it occurred on a call in which he did not participate. TLF-SST-031166. The Gillers Report cites the email to support the wholly unsubstantiated notion that there was concern among the Law Firms about the Thornton Law Firm inflating its lodestar. Indeed, the conclusion here previews another faulty portion of the Gillers Report, on page 50, where the Report states that the cross-allocation of the Staff Attorney time "dramatically inflated the lodestar of TLF."

As with other record evidence cited in the Report, the Gillers Report selectively quotes this email and omits other pertinent portions of the chain. The Report ignores a later email in this very chain in which Mike Thornton clarifies that his estimate was a guess. Nor does the Report mention an internal Thornton Law Firm email, sent a half hour after Mike Thornton's email, in which Mike Lesser remarks that the number estimated by Mike Thornton would represent the Thornton Law Firm's share of the fee, not the size of its lodestar (and thus suggests that Mike Thornton had, indeed, mistakenly transposed terms earlier). TLF-SST-038587.

In quoting only the email from Dan Chiplock, the Gillers Report entirely ignores other record evidence specifically regarding it, including deposition testimony of Mr. Chiplock directly addressing what he meant in this email. When asked about this email during his deposition, Mr. Chiplock testified: "Probably I am frustrated at this point given the dialogue that's led up to that e-mail, but I think Mike Thornton may have simply been mistaken because that's not the number they ultimately reported. What they ultimately reported was a number closer to what I had been informed of on June 29th." 9/8/17 Chiplock Dep. at 64:14-20.

The Special Master and his counsel focused on this email in multiple depositions, quoting it at length to multiple witnesses. Yet not a single interpretation of this email that contravenes the Special Master's interpretation—including the one in Mr. Chiplock's own testimony—is cited in the Report, demonstrating that the effort here was to fit the facts to a particular theory rather than to conduct a neutral search for the truth.

Moreover, the portion of this email that *is* cited in the Gillers Report supports another key point that the Report otherwise ignores. Specifically, in this email, Mr. Chiplock states that Mike Lesser provided him with an estimate of the Thornton Law Firm's hours as of June 29, 2015, which were "around 12,750." TLF-SST-031166. Indeed, the Thornton Law Firm has identified this June 29, 2015 email from Mr. Lesser to Mr. Chiplock in this submission and in its previous submission to the Special Master. In that email, numbered TLF-SST-011206, Mr. Lesser estimated the hours in the Thornton Law Firm's lodestar. Mr. Lesser broke down the document review hours contributing to the Thornton Law Firm's lodestar into two categories: "Thornton doc review external (Thornton reviewers working Lieff + Labaton paid by Thornton)" and "Thornton doc review internal." Mr. Lesser's e-mail clearly informed Mr. Chiplock that the Thornton Law Firm was including the Thornton-assigned reviewers working at Lieff and at

Labaton in its lodestar calculation. Mr. Chiplock then referred to this estimate of 12,750 hours in his email dated August 30, 2015, which was sent to lawyers from all three Law Firms. There can be no question than an estimate of more than 12,000 hours was clearly understood to include document review hours, based on the relative hours of the other firms. *See* Gillers Rep. at 25 (chart showing time spent by Law Firms' "Partners and Associates" versus "Staff Attorneys"). Mr. Chiplock, at least, knew this explicitly, and in fact references the Staff Attorneys in his email.[7]

In sum, as these examples demonstrate, it is unfair and misleading for Professor Gillers to fail to reference these pieces of pertinent record evidence, and many others, in the statement of facts underpinning his Report. Indeed, the value of his opinion depends on the completeness and truthfulness of the facts. *See, e.g.*, 3/20/18 Gillers Dep. at 265:11-15.

II. SANCTIONS AGAINST THORNTON LAW FIRM PARTNER GARRETT BRADLEY ARE NOT JUSTIFIED.

Page 24 of the Gillers Report states: "There is ample evidence in the record that Garrett Bradley actually knew the Declaration contained inaccurate information but signed it anyway." In support of this broad and false assertion, the Gillers Report cites only to the transcript of the Court's March 7, 2017 hearing. Conspicuously absent is citation to any statement, in that hearing or otherwise, demonstrating that Garrett Bradley knew or realized, when he signed the boilerplate declaration, that it contained inaccurate statements. At his deposition, when asked about this statement, Professor Gillers acknowledged that he did not have any basis to know

[7] With regard to this final sentence in the quoted email, the Gillers Report fails to mention the testimony of Labaton's Ray Politano, which confirmed that the Thornton Law Firm paid the overhead for the Staff Attorneys housed at Labaton. *Compare* TLF-SST-000415 (Ray Politano of Labaton stating the $50 hourly rate Labaton was charging to Thornton) and TLF-SST-000403 to TLF-SST-000414 (Labaton invoices paid by Thornton showing $50 per hour rate) *with* 6/14/17 Politano Dep. at 18:3-9 (Politano stating that Staff Attorneys were paid between $32 and $40 per hour). *See also* 7/19/17 G. Bradley Dep. at 93:23-95:5; 9/1/17 Thornton Dep. at 52:9-17.

whether or not Garrett Bradley knew he submitted a false statement to the Court. 3/20/18 Gillers Dep. at 315:12-317:1. Professor Gillers also acknowledged that he had no basis for making any conclusion as to Garrett Bradley's mental state and was simply assuming the facts provided to him were true. *Id.* at 269:1-4, 19-23; 270:15-24:

> Q: You yourself don't personally know whether or not Garrett Bradley knowingly made any false misrepresentation, do you?
> A: That's correct.
>
> ***
>
> Q: So you have not concluded anything about Garrett Bradley's mental state. You're relying on an assumption that was provided to you?
> A: Correct.
>
> ***
>
> Q: Well you don't, as you said, know what he was thinking when he signed this, do you?
> A: No.
> Q: You don't know how careless he may have been in scrutinizing the boilerplate template that he signed, right?
> A: I do not know.
> Q: So you're not in a position to testify that he knowingly submitted anything, are you?
> A: Correct.

A. Garrett Bradley Did Not Violate Massachusetts Rule of Professional Conduct 3.3(a)(1).

As Professor Gillers himself acknowledged, the test for whether an attorney violated Rule 3.3(a)(1) is subjective. 3/20/18 Gillers Dep. at 272:4-21. That is, in determining whether there has been a violation, the tribunal must ask not what the reasonable attorney would have known, but what the attorney actually knew when he presented facts to the Court. The Rules define "knowingly" as "actual knowledge of the fact in question." Mass. Rule of Prof. Conduct 1.0(g). This intent standard does not reach negligent misrepresentations. *See* Gillers Dep. at 316:13-16 ("Q: And would you agree that not every careless mistake an attorney makes amounts to an ethical violation? A: Yes.").

Here, as Professor Gillers stated in his Report, his conclusions with regard to Garrett Bradley depend on the crucial factual assumption that "Garrett Bradley knew these statements were false **when he submitted his Declaration**." Gillers Rep. at 81 (emphasis added). Of note, there is a difference between knowing the underlying factual matters (*e.g.,* that the Staff Attorneys were not "employees of [the Thornton Law] firm") and knowing that **at the time the declaration was being submitted to the Court, it contained inaccuracies**.

Here, there is no evidence that Garrett Bradley had "actual knowledge" that the declaration submitted on September 14, 2016 contained "false" information. On the contrary, the record is consistent with the fact that Garrett Bradley relied on Labaton's boilerplate fee petition and assumed it was correct rather than engaging in a careful review of the language prior to submitting the fee petition to the Court. The "ample evidence" cited in Professor Gillers' statement of facts for the proposition that Garrett Bradley "knew" his declaration contained false information is nothing more than a collection of cites to the March 7, 2017 hearing before Judge Wolf. At that hearing, Garrett Bradley was forthcoming about the mistakes in the declaration and noted that "we should have been clearer in this and that fault lies with me." 3/7/17 Hearing at 91:4-7. Garrett Bradley's admission of an inadvertent mistake does not lead to the conclusion that he knowingly submitted false statements to the Court. As Professor Gillers admitted in his deposition, a careless mistake is not equivalent to a knowing misrepresentation. 3/20/18 Gillers Dep. at 269:5-7 ("Q: And a careless mistake does not equal a knowing misrepresentation to a Court, does it? A: It does not."). This is a critically important distinction yet—to date—one that is being clearly ignored.

B. Garrett Bradley Did Not Violate Massachusetts Rule of Professional Conduct 8.4(c).

For the same reasons Garrett Bradley did not violate Massachusetts Rule of Professional Conduct 3.3(a), he also did not violate Rule 8.4(c). Rule 8.4(c) requires intentionality and does not reach negligence. *See In re Royal C. Thurston, III*, 13 Mass. Att'y Disc. R. 776 (Board Memorandum, May 12, 1997) (striking hearing committee's finding that attorney violated DR 1-102(A)(4) [predecessor to 8.4(c)] and noting, "As Bar Counsel concedes, a negligent misrepresentation does not violate DR 1-102(A)(4) because the rule prohibits only intentional conduct."). Professor Gillers agrees that the mental state required for a Rule 8.4 violation should not be lower than the mental state required for a Rule 3.3 violation. 3/20/18 Gillers Dep. at 275:9-21. *See also id.* at 316:17-20 ("Q: And not every careless mistake an attorney makes is willful misconduct designed to mislead a federal judge? A: Yes, I agree.").

As set forth above, Garrett Bradley did not have "actual knowledge" of any false statements to the Court and did not intend to make any false statements to the Court. Any inaccuracies contained in his declaration were the result of mistakes or inadvertent errors—not knowing and intentional false submissions to the Court.

C. Garrett Bradley Did Not Violate Rule 11.

As Rule 11 expert Professor Georgene Vairo testified, sanctioning a lawyer pursuant to Rule 11 is a severe penalty that should not be imposed broadly. 4/10/18 Vairo Dep. at 77:1-8. *See also McGee v. Town of Rockland*, No. 11-CV-10523-RGS, 2012 WL 6644781, at *1 (D. Mass. Dec. 20, 2012) ("Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps."). *See also* 3/20/18 Gillers Dep. at 276:10-13 ("Q: So now you'd agree, sir, that not every mistake a lawyer makes should be subject to a Rule 11 sanction, correct? A: Yes, I agree. Yes."). As the First Circuit noted in reversing a district court's imposition of sanctions,

"Courts ought not to invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39-40 (1st Cir. 2005).

In this proceeding, it is vital to heed the First Circuit's warning that "Civil Rule 11 is not a strict liability provision." *Eldridge v. Gordon Bros. Grp.*, 863 F.3d 66, 88 (1st Cir. 2017) (internal quotation marks omitted). Statements that are "literally inaccurate" may not be sanctionable because "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993). Here, although certain statements in the declaration were "inaccurate or overstated, … further inquiry would not have shown the motion's requests to have been baseless." *Id.*

The case at bar is on all fours with *Navarro-Ayala*. There, the First Circuit reversed the District Court's finding of sanctions because "the motion, **read fairly and as a whole**, contain[ed] **no significant false statement** that **significantly harmed** the other side." *Id.* (emphasis added). In so holding, the First Circuit noted that "We emphasize the word 'significant' because the district court found one sentence literally false," and further explained that, "the district court, at most, could have found a few isolated instances of noncritical statements that further inquiry might have shown to be inaccurate or overstated. That further inquiry would not have shown the motion's requests to have been baseless." *Id.* at 467-468. *See also Obert v. Republic W. Ins. Co*, 398 F.3d 138, 143-144 (1st Cir. 2005) (reversing Rule 11 sanctions where "the affidavit was not knowingly false as to any material fact, although one of the statements may well have been factually inaccurate and another was a dubious and

unattractive piece of lawyer characterization" and describing the affidavit as "an unsound piece of lawyer advocacy rather than a lie about a fact.").

Viewed fairly and in context, Garrett Bradley's declaration was an isolated instance of inattentiveness due to reliance on boilerplate language that he knew had been prepared by experienced counsel. Much of this boilerplate language was used by all three Law Firms. Once the errors were brought to Garrett Bradley's attention, he took corrective action. With respect to the double counting, he immediately contacted co-counsel and ensured that within two days the Court was informed of the errors. 6/19/17 G. Bradley Dep. at 85:23-86:11; 6/5/17 Hoffman Dep. at 99:7-102:24; 6/14/17 Zeiss Dep. at 18:13-19:9; 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf (Dkt. 116). With respect to the template language issues in the declaration, which, unlike the "double counting," Garrett Bradley only realized later, Mr. Bradley took responsibility and acknowledged, during the March 2017 hearing, that certain aspects of his declaration were factually incorrect. *See, e.g.*, 3/7/17 Hearing at 91:4-7. There is simply no evidence that Garrett Bradley had any intention to mislead the Court. *Cf. United States v. Jones*, 686 F. Supp. 2d 147, 150 (D. Mass. 2010) (Wolf, J.) (imposing no sanctions against prosecutor who, due to "inexplicable and inexcusable" errors, inadvertently neglected to disclose important exculpatory material to defendant).

III. CONCLUSION

For the reasons expressed in this submission and in the record evidence, the Thornton Law Firm submits that reliance on the Gillers Report is unsound, and accordingly objects to the Special Master's use of, reliance on, and/or incorporation of the Report. Additionally, no sanction in this case is justified.

Dated: April 12, 2018

Respectfully submitted,

*/s/ Brian T. Kelly*_____

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EXHIBIT 4

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April 17, 2018

BY ELECTRONIC MAIL

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RE: *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, No. 11-cv-10230-MLW

Dear Bill:

During last Friday's oral argument, it appeared that Special Master Rosen has reached the erroneous conclusion that the Thornton Law Firm bears more responsibility than Labaton Sucharow ("Labaton") and Lieff Cabraser Heimann & Bernstein ("Lieff") for the inadvertent double counting errors identified in the November 10, 2016 letter to the Court. This conclusion, if one the Special Master is inclined to reach, is clearly contradicted by the evidence.

As I noted during the oral argument, the November 10, 2016 letter itself states that the inadvertent double counting occurred in the Labaton and Lieff lodestars. This letter was the product of drafting and close review by all three firms. In the bullet point list on page two of that letter, the word "mistakenly" clearly modifies the references to the Labaton and Lieff lodestar reports:

" • The hours of the Alper SAs reported in the Thornton lodestar report **mistakenly were also reported in the Labaton Sucharow lodestar report.**

• Certain hours reported by one of the Alper SAs (S. Dolben) in the Thornton lodestar report mistakenly duplicated certain hours of another Alper SA (D. Fouchong).

• A portion of the hours of two of the Jordan SAs reported in the Thornton lodestar report (C. Jordan and J. Zaul) **mistakenly were also reported in the Lieff Cabraser lodestar report.**

- The hours of two other Jordan SAs (A. Ten Eyck and R. Wintterle) **mistakenly were included in the Lieff Cabraser lodestar report**."

See Exhibit A, Dkt. 116 at 2 (emphasis added).

In addition to the language in the November 10, 2016 letter, an email sent by Dan Chiplock of Lieff during the letter drafting process leaves no doubt that Lieff accepted responsibility for the double counting in the Lieff and Thornton lodestars. As Mr. Chiplock very clearly laid out in the following email to David Goldsmith (Labaton), Michael Lesser (Thornton), and Evan Hoffman (Thornton), dated November 9, 2016:

"Here is what I've been able to determine, in order of most to least significant:

(1) Rachel Wintterle and Ann Ten Eyck **should not have been included in LCHB's lodestar at all.** They were Thornton contract reviewers throughout 2015, but worked on our premises. Many if not most of **their detailed time entries did not specifically indicate that the work was being done on Thornton assignments in the "narrative" field, which resulted in their time inadvertently being included with other LCHB reviewers they were working with when our accounting department ran lodestar reports. I failed to catch that after our accounting department ran everyone's lodestar, and apologize.** These two reviewers account for $551,719.50 in total lodestar from LCHB **that should be removed from LCHB's total. Thornton's lodestar attributable to these two reviewers should not change.**

(2) Chris Jordan and Jonathan Zaul each did work for both LCHB and Thornton. **Again, we neglected to exclude time entries specifically relating to "Thornton" assignments, which took place between 2/9/15 and 4/14/15 only, from LCHB's lodestar.** Once that time is removed, their respective hours and lodestar attributable to LCHB should be as follows:

Christopher Jordan: 540 hours, for $224,100
Jonathan Zaul: 503 hours, for $208,745

Which results in an additional net reduction from LCHB lodestar of $281,619. Add this to the reduction for Ten Eyck and Wintterle, and you get a total reduction of $833,338 from LCHB's reported lodestar.

Thornton's adjusted total hours/lodestar for Jordan and Zaul (using Thornton rates), based on the hours invoices to Thornton, should be:

Christopher Jordan: 359.50 hours, for $152,787.50
Jonathan Zaul: 319 hours, for $135,575.00

This results in a net lodestar *increase* of $26,987.50 for these two attorneys for Thornton Law. This should be noted as at least a modest net offset against the lodestar that needs to be cut elsewhere."

See Exhibit B, TLF-SST-033277 (emphasis added).

Furthermore, during their depositions in this investigation, both Mr. Chiplock and Lieff's staff attorney supervisor, Kirti Dugar, explained the circumstances that led Lieff to mistakenly include these Staff Attorneys' time in its lodestar. *See* 6/16/2017 Chiplock Dep. at 154:18 – 160:8 (attached as Exhibit C); 6/16/2017 Dugar Dep. at 114:9 – 115:22 (attached as Exhibit D).

As these documents and testimony make clear, a conclusion that the lodestar errors are solely or primarily attributable to the Thornton Law Firm is contradicted by the record evidence. As representatives of all three firms have repeatedly testified, and as the documents bear out, the double counting errors that occurred here were certainly unfortunate, but also entirely inadvertent.[1] When the firms learned of the double counting errors, they quickly acted to identify, quantify, and disclose them.

Copies of the documents referenced herein are attached.

Sincerely,

Brian T. Kelly

cc: Joan A. Lukey, Esq.
Richard M. Heimann, Esq.

[1] I do not repeat here Thornton's previous submissions addressing the record evidence that demonstrates the implicit agreement between the three firms regarding to staff attorneys, but rather incorporate those submissions by reference. *See* Thornton's Nov. 3, 2017 submission at pp. 3-18 and Thornton's April 12, 2018 submission at pp. 5-8.

EXHIBIT A

Labaton Sucharow

David J. Goldsmith
Partner
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212 883 7079 fax
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November 10, 2016

By ECF

Hon. Mark L. Wolf
United States District Judge
United States District Court
District of Massachusetts
John Joseph Moakley
United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Re: Arkansas Teacher Retirement System v. State Street Bank & Trust Co.,
No. 11-CV-10230 MLW

Dear Judge Wolf:

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

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

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

The professionals and paraprofessionals listed in these firms' respective lodestar reports include persons denoted as Staff Attorneys, or "SAs." SAs are bar-admitted, experienced attorneys hired on a temporary, though generally long-term, basis, and are paid by the hour. The SAs in this action

Labaton Sucharow

were tasked principally with reviewing and analyzing the millions of pages of documents produced by State Street.

Seventeen (17) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Labaton Sucharow lodestar report.[1] Six (6) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Lieff Cabraser lodestar report.[2] Both sets of overlap reflect the fact that as the litigation proceeded, efforts were made to share costs among counsel, such that financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices was borne by Thornton.

We have now determined that:

- The hours of the Alper SAs reported in the Thornton lodestar report mistakenly were also reported in the Labaton Sucharow lodestar report.
- Certain hours reported by one of the Alper SAs (S. Dolben) in the Thornton lodestar report mistakenly duplicated certain hours of another Alper SA (D. Fouchong).
- A portion of the hours of two of the Jordan SAs reported in the Thornton lodestar report (C. Jordan and J. Zaul) mistakenly were also reported in the Lieff Cabraser lodestar report.
- The hours of two other Jordan SAs (A. Ten Eyck and R. Wintterle) mistakenly were included in the Lieff Cabraser lodestar report.[3]

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

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[1] These SAs, listed alphabetically, are D. Alper, E. Bishop, N. Cameron, M. Daniels, S. Dolben, D. Fouchong, J. Grant, I. Herrick, D. Hong, C. Orji, D. Packman, A. Powell, A. Rosenbaum, J. Saad, B. Schulman, A. Vaidya, and R. Yamada (collectively, the "Alper SAs"). *Compare* ECF No. 104-16, at 7-8 (Thornton lodestar report) *with* ECF No. 104-15, at 7-8 (Labaton Sucharow lodestar report).

[2] These SAs, listed alphabetically, are C. Jordan, A. McClelland, A. Ten Eyck, V. Weiss, R. Wintterle, and J. Zaul (collectively, the "Jordan SAs"). *Compare* ECF No. 104-16, at 7 (Thornton lodestar report) *with* ECF No. 104-17, at 8 (Lieff Cabraser lodestar report).

[3] The lodestar reports in the individual firm declarations submitted by ERISA counsel (ECF Nos. 104-18 to 104-23) are unaffected.

Labaton Sucharow

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

Cross-checking the $37.27 million reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of **2.00**.[4] This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing.

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

Accordingly, Plaintiffs' counsel respectfully submits that the Court should adhere to its ruling on attorneys' fees. *See* Fee Order ¶¶ 4, 6 (ECF No. 111)[5]; Nov. 2, 2016 Hrg. Tr. at 36:1-2 (finding 1.8 multiplier "reasonable").

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

Respectfully submitted,

David J. Goldsmith

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[4] The Court found it "appropriate in this case to use the percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded." Nov. 2, 2016 Hrg. Tr. at 22:25-23:2; *see also id.* at 35:12-13 ("I have used the percentage of common fund method. I've used the reasonable lodestar to check on that.").

[5] The Fee Order, at Paragraph 6(d), references the approximately 86,000 combined hours and $41.32 million combined lodestar reported in our written submissions.

Labaton Sucharow

DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

I certify that on November 10, 2016, I caused the foregoing Letter to be filed through the ECF system in the above-captioned action, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ David J. Goldsmith
David J. Goldsmith

EXHIBIT B

From: Chiplock, Daniel P. <DCHIPLOCK@lchb.com>
Sent: Wednesday, November 9, 2016 7:01 PM
To: 'Goldsmith, David'
Cc: Hoffman, Evan (ehoffman@tenlaw.com); Michael Lesser
Subject: RE: State Street

Importance: High

Here is what I've been able to determine, in order of most to least significant:

(1) Rachel Wintterle and Ann Ten Eyck should not have been included in LCHB's lodestar at all. They were Thornton contract reviewers throughout 2015, but worked on our premises. Many if not most of their detailed time entries did not specifically indicate that the work was being done on Thornton assignments in the "narrative" field, which resulted in their time inadvertently being included with other LCHB reviewers they were working with when our accounting department ran lodestar reports. I failed to catch that after our accounting department ran everyone's lodestar, and apologize. These two reviewers account for $551,719.50 in total lodestar from LCHB that should be removed from LCHB's total. Thornton's lodestar attributable to these two reviewers should not change.

(2) Chris Jordan and Jonathan Zaul each did work for both LCHB and Thornton. Again, we neglected to exclude time entries specifically relating to "Thornton" assignments, which took place between 2/9/15 and 4/14/15 only, from LCHB's lodestar. Once that time is removed, their respective hours and lodestar attributable to LCHB should be as follows:

Christopher Jordan: 540 hours, for $224,100
Jonathan Zaul: 503 hours, for $208,745

Which results in an additional net reduction from LCHB lodestar of $281,619. Add this to the reduction for Ten Eyck and Wintterle, and you get a total reduction of $833,338 from LCHB's reported lodestar.

Thornton's adjusted total hours/lodestar for Jordan and Zaul (using Thornton rates), based on the hours invoices to Thornton, should be:

Christopher Jordan: 359.50 hours, for $152,787.50
Jonathan Zaul: 319 hours, for $135,575.00

This results in a net lodestar *increase* of $26,987.50 for these two attorneys for Thornton Law. This should be noted as at least a modest net offset against the lodestar that needs to be cut elsewhere.

(3) Andrew McClelland's and Virginia Weiss's lodestar checks out OK on our end - everything we reported for them was specific to LCHB, even if they may also have done work for Thornton, which Thornton appears to have accounted for separately on their report. I do not see duplication based on my review of our records. I can't speak to the accuracy of their hours for Thornton on Thornton's end.

Evan/Mike, please feel free to check my math on your end. I tried to double-check but am also in grief over the election so my mind's a little hazy.

Dan

-----Original Message-----
From: Goldsmith, David [mailto:dgoldsmith@labaton.com]
Sent: Wednesday, November 09, 2016 3:38 PM
To: Chiplock, Daniel P.
Subject: RE: State Street

Appreciate your input

-----Original Message-----
From: Chiplock, Daniel P. [mailto:DCHIPLOCK@lchb.com]
Sent: Wednesday, November 09, 2016 2:55 PM
To: Goldsmith, David
Subject: Re: State Street

For what it's worth I strongly agree with just one fulsome letter on this issue.

Sent from my iPhone

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 11-cv-10230 MLW

- -x

ARKANSAS TEACHER RETIREMENT SYSTEM, et al.,

Plaintiffs,

-against-

STATE STREET BANK AND TRUST COMPANY,

Defendant.

- -x

JAMS
Reference No. 1345000011

- -x

In Re: STATE STREET ATTORNEYS' FEES

- -x

June 16, 2017
8:14 a.m.

B e f o r e :

SPECIAL MASTER HON. GERALD ROSEN
United States District Court, Retired

Deposition of DANIEL P. CHIPLOCK, taken by Counsel to the Special Master, held at the offices of JAMS, 620 Eighth Avenue, New York, New York, before Helen Mitchell, a Registered Professional Reporter and Notary Public.

These new agency attorneys, when they came on in March, were trained to do what every other staff attorney is trained to do when they do work in our office, which is religiously send your time to our internal time keeping department, keep careful record of your time. Which they did. Religiously so.

We did not know, because we didn't have reason to believe that they were doing that, and that's why the time for those two individuals -- even though they're constantly sending their time to their agency and they're constantly letting the Thornton lawyers know what they're doing, they're also inputting their time into our system, which they should not have been doing.

So that -- the process broke down. And from my vantage point, it was sort of an anomaly created by the absence of some key people, as evidenced to me by the fact that we got

it right earlier that year when one of our key people was around.

So that's not an excuse --

JUDGE ROSEN: So earlier in the year the time was not double counted?

THE WITNESS: Correct, yes.

So it's just for those two individuals for the three or so months that they worked on the case, because at the get-go they were trained by somebody, I think in our IT department, who didn't know who from who, that this is how we keep track of our time at Lieff Cabraser; you need to be careful, you need to send it to our timekeeper, and that's what they did.

So that's why the time for those two individuals was included in our system and it was never caught. And that falls on me. When I'm reviewing our time in September of 2016, which is more than a -- almost a year and a half later, you know, the passage of time and my ignorance that

these people were not trained in the way they should have been trained with respect to their time keeping -- I'm paying attention to their work product, to everybody's work product, and I'm assuming that they were trained correctly, but when I'm reviewing time in September of 2016, over a year later, it's not at the forefront of my mind that there may be time in there for certain staff attorneys which shouldn't be. I think it's been taken care of.

So I've kicked myself a thousand times since this process began as to why my memory banks didn't work better in September of 2016 --

JUDGE ROSEN: You had a lot on your mind and a lot to dangle, and you didn't have a process in place to capture this at a later point.

THE WITNESS: Right.

JUDGE ROSEN: Neither firm did, neither Labaton nor Lieff.

THE WITNESS: That was a breakdown in the process, and it was made possible by the absence of some important people at the time they were trained.

With respect to Mr. Zaul and Mr. Jordan, who you met, who we shared responsibility for a time with Thornton, I think Thornton was financially responsible for about eight weeks of their time. They entered their time into our system so that we had the capacity to create an invoice that we could then send to Thornton.

I delegated that process to Nick, and to Kirti, to work out with our accounting department creating an invoice and sending it off to Thornton so that those hours are properly accounted for and paid for.

What did not happen is once we got paid for that time, once the check came in --

JUDGE ROSEN: Didn't come off

Chiplock

the rolls.

THE WITNESS: -- that time needed to be deleted from our system, and that instruction, that specific instruction, was never given to our accounting department. And, again, that ultimately falls on me.

Now, in my defense, I'm thinking I've delegated the issue of billing and accounting for time appropriately, I've delegated it elsewhere, and it's being taken care of, but I was not explicit enough with that -- with that final instruction, which is, "Once we get paid, that time has to come out of our system, because Thornton is obviously going to take credit for time that it's paid for, as it should." So that's my fault also.

And so in September of 2016, when I'm reviewing time records, I am not thinking to myself, "There's time in our system that should not be there, I should go back and check."

Chiplock

JUDGE ROSEN: So that's at the front end.

THE WITNESS: Yes.

JUDGE ROSEN: At the back end --

THE WITNESS: What would have helped me to figure it out?

JUDGE ROSEN: Yes.

THE WITNESS: It would have helped -- it probably would have helped had I seen the other firms' fee petitions before they got filed.

JUDGE ROSEN: And you didn't?

THE WITNESS: I did not.

JUDGE ROSEN: Either you or some monitor for the three firms to homogenize the petition to make sure that things like this didn't happen?

THE WITNESS: Yeah, and clearly there were overlapping names on the different fee petitions.

That was completely transparent. Nobody was hiding the fact that there was the same people on

Chiplock

different ledgers. And Judge Wolf did not comment on that fact, after -- he called the papers excellent.

So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger.

Had I seen the other two petitions and seen the overlapping names, it might have spurred me -- I can't say for certainty, but it might have spurred me to say, "I'm going to go back and -- it's okay that there are the same names here, but I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in."

JUDGE ROSEN: And that the same names and the same time was not on both petitions?

THE WITNESS: Right. Which is what I'm saying.

JUDGE ROSEN: For the same time frame?

Chiplock

THE WITNESS: For the same time -- yeah. The hours that needed to be deleted should have been deleted, and weren't. So that's...

JUDGE ROSEN: Look, we all learn from hindsight --

THE WITNESS: Correct.

JUDGE ROSEN: -- but in the benefit of hindsight, and best practices going forward, do you believe that allocating work done by staff attorneys employed by your firm, or by Labaton, for purposes of a fee petition to another firm, is a best practice in terms of transparency to the court, in terms of transparency to the public, in terms of avoiding these kinds of errors, which are human errors -- you're beating yourself up. You're a busy guy and you have substantive responsibility for the case, you're beating yourself up for that when in fact inherent in this system was a very high potential for exactly this sort of

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 11-cv-10230 MLW

- -x

ARKANSAS TEACHER RETIREMENT SYSTEM, et al.,

Plaintiffs,

-against-

STATE STREET BANK AND TRUST COMPANY,

Defendant.

- -x

JAMS
Reference No. 1345000011

- -x

In Re: STATE STREET ATTORNEYS' FEES

- -x

June 16, 2017
1:35 p.m.

B e f o r e :

SPECIAL MASTER HON. GERALD ROSEN
United States District Court, Retired

Deposition of KIRTI DUGAR, taken by Counsel to the Special Master, held at the offices of JAMS, 620 Eighth Avenue, New York, New York, before Helen Mitchell, a Registered Professional Reporter and Notary Public.

Dugar

A No. It's a -- historically, I have not. Although, now lately I have begun to implement measures to do that. In fact, I mean, we've implemented a script in our Relativity where I am now able to gather that.

In many ways it is still complicating and a lot of work to do that, but should a need like this arise again I would be able to do it now. So that is a change I've implemented, probably after the situation here.

JUDGE ROSEN: How did you learn about the double counting error?

THE WITNESS: Pardon me?

JUDGE ROSEN: How did you learn about the double counting error?

THE WITNESS: Dan Chiplock would have told me. I would have asked him -- one day he's asking, you know, "Do you have this data," I said, "Dan, what's going on? Do you want to tell me?" So he would have told me then.

JUDGE ROSEN: Were you involved in figuring out how it happened?

THE WITNESS: In a general

Dugar

sense I've been helping Dan Chiplock --

JUDGE ROSEN: I'm talking back in the November 8 through 12 time period.

THE WITNESS: I was not involved with the fee petition at all.

JUDGE ROSEN: No. No, no, no. Once the double counting error was discovered, did you work with Dan to figure out how it happened?

THE WITNESS: We were wracking our brain to figure out that answer, and I think the only thing I could come up with, it was just network oversight, there was nothing intentional about it.

It's a small amount of time -- it's not in the global scheme of things. Not to say it doesn't have value, it has value. It was just -- in fact, if you go by intention -- to my mind, I'm speaking for myself and behalf of my firm -- you know, we clearly, with Jon Zol and Chris Jordan, if you look at it, I have instructions

Dugar

to them that "Make sure in your time entry you enter for, you know, review of TNN folders." So the intention was always to transfer.

The only thing is that in this whole -- all the structures and everything we have, Chris Jordan and Jon Zol were entering time in our system, or their time was getting entered in our system. So in this particular -- and then they were getting invoiced. So the time entry would maintain there because that's the source of the generation of an invoice, but it just -- you know, when you're doing the fee petition, putting all things together, I am not involved, and usually never involved in that process. It just got lost. It is just -- what do you just call -- inadvertent honest mistake. That's really what it is.

Our intention always was -- I knew it at the time, and whether if I had been involved with the fee petition

Dugar

would I -- chances are I may have picked it up, because I generally keep these things in the back of mind.

But that's really all that happened here. From that point of view.

JUDGE ROSEN: Okay.

Elizabeth, anything else?

BY MS. MCEVOY:

Q One small point.

You mentioned there was another case other than BoNY Mellon that had ended in the beginning of 2015. Was that Schwab?

A Schwab was still continuing at that time.

Q Did that case --

A But there were a lot of reviewers in Schwab that were released. Two of the people I put onto State Street were from that group, and they were -- also had been working with me for a long time, and they had actually worked on the -- Peter Roos, one of them, he was a former partner at Baker McKenzie, and Ryan Sturtevant is the other one, who is a

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

CONSOLIDATED RESPONSE BY LABATON SUCHAROW LLP, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, AND THORNTON LAW FIRM LLP TO SPECIAL MASTER'S JULY 5, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Labaton Sucharow LLP ("Labaton Sucharow"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton," and collectively with Labaton Sucharow and Lieff Cabraser, the "Firms"), respectfully provide this consolidated response to the Special Master's July 5, 2017 Request for Supplemental Submission.

I. PRELIMINARY STATEMENT

The Special Master invites the Firms to now "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation." The Firms wish to note for the record that in the course of the Special Master's investigation, the Firms have provided an abundance of information that should inform the Special Master's findings, conclusions, and recommendations. Specifically, the Firms each participated in multi-hour informal interviews with the Special Master, his counsel, and his technical advisor on April 4 and 5, 2017; collectively responded to 193 interrogatories on June 1, June 9 and July 10, 2017; collectively responded to 104 document requests by producing more than 176,000 pages of requested documents; and produced witnesses for a total of 27 depositions between June 5 and July 17 2017.

The Firms respectfully submit that the substantial factual record developed by the Special Master during his investigation does not warrant any change in the Court's November 2, 2016 Fee Award [Dkt. No. 111] nor the imposition of sanctions on any of the Firms. The reasonableness of the Firms' Fee Petition is further supported by the accompanying declaration of William B. Rubenstein ("Rubenstein Decl."), the Sidley Austin Professor of Law at Harvard Law School, and one of the nation's leading national experts on class action law and practice.

II. RESPONSE TO AREAS OF CONCERN RAISED BY THE COURT AND ADDRESSED BY THE SPECIAL MASTER

The Firms submit that the extensive factual record, along with the declaration of Professor Rubenstein, should lead the Special Master to make the following findings:

- The Firms employed the correct legal standards in their request for an award of attorneys' fees and expenses. *See* Mem. of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Brief") [Dkt. No. 103-1] at 3-5, 24; Rubenstein Decl. at 7-12, 27-34.

- Except as stated below and previously on the record in this case, as well as in the Firms' discovery responses to the Special Master, the representations made by the Firms in the request for awards of attorneys' fees and expenses were accurate and reliable, and counsel asserted a proper factual basis for what was represented to be the lodestar for each firm. *See* LS Interrog. Resp. Nos. 17-19, 23-25, 27-29, 32, 33, 36, 37, 40, 41, 44-47, 51, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 47, 48, 53, 57, 62, 63, 64, 72, 73; Thornton Interrog. Resp. Nos. 49-51, 55, 64, 66.

- The Firms acknowledge, as they did in their November 10, 2016 letter to the Court [Dkt. No. 116], that some Staff Attorney lodestar was "double-counted" in the Firms' request for attorneys' fees. These errors were unintentional and brought to the Court's attention by the Firms promptly upon their learning of the mistakes. *See* LS Interrog. Resp. Nos. 63-66; LCHB Interrog. Resp. Nos. 39, 40, 67, 68; Thornton Interrog. Resp. Nos. 67, 69, 74, 75. The factual record submitted to the Special Master during the course of this investigation confirms the Firms' position that the errors were unintentional.

- The representations made in the November 10, 2016 letter to the Court [Dkt. No. 116] were and are materially accurate and reliable. LS Interrog. Resp. Nos. 63, 66, 67, 71; LCHB Interrog. Resp. Nos. 65, 68, 69, 72, 73; Thornton Interrog. Resp. Nos. 70, 71, 74-76.

- Labaton Sucharow submits that its representations requesting a service award to Arkansas Teacher Retirement System were accurate and reliable. *See* LS Interrog. Resp. Nos. 4, 17; Belfi Dep. at 33:23-34:9, 37:12-41:6; Goldsmith Dep. at 18:6-23:18.

- Neither Lieff Cabraser nor Thornton had clients in this matter for which they sought service awards.

- None of the Firms made representations to the Court concerning the service awards sought by counsel for the ERISA plaintiffs.

- The attorneys' fees, expenses and service award to Arkansas Teacher Retirement System were reasonable, and none should be reduced beyond the $2 million the Firms already have contributed to the cost of the Special Master's investigation. In addition to this $2 million, the Firms have incurred substantial other costs relating to this investigation, including, for Labaton Sucharow and Thornton, the costs of outside counsel; and, for all three firms, the substantial time spent by senior members of each firm participating in this investigation. The costs already associated with this investigation shall continually serve as an important reminder to the Firms to double check future fee petitions to ensure their clarity and accuracy to the court. The Firms are fully cognizant of the lessons of this investigation, as reflected in the Firms' recommendations on best practices described below. That fact notwithstanding, the net effect of the errors in reported lodestar were modest with respect to the lodestar multiplier that was used as a cross-check against the requested percentage-based fee, and still well within the bounds of what is considered acceptable in this Circuit. *See* LS Interrog. Resp. Nos. 59, 63; LCHB Interrog. Resp. Nos. 59, 61; Fee Brief at 7, 24-25; Rubenstein Decl. at 30-34.

- No misconduct occurred in connection with the attorneys' fees, expenses, or service award to Arkansas Teacher Retirement System previously ordered. The double-counting of lodestar at the center of the Special Master's inquiry, while regrettable both in terms of the initial confusion caused to the Court and the subsequent substantial time and expense devoted to explaining the matter, was an inadvertent and honest mistake. LS Interrog. Resp. Nos. 33, 36, 37, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 39, 65, 67; Thornton Interrog. Resp. Nos. 67, 69, 75.

- None of the Firms should be sanctioned in this matter.

III. SPECIAL MASTER'S REQUEST FOR INPUT ON SPECIFIC TOPICS

A. Request No. 1 – Billing Practices Relating To Staff Attorneys

For all three of the Firms, billing rates for Staff Attorneys are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of an appropriate market rate for the legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22; Politano Dep. at 35:22-37:2, 38:19-42:2, 45:6-49:4; Johnson Dep. at 12:5-16; 13:4-17. This approach is consistent with the general practice of the marketplace and applicable case authority. *See* Rubenstein Decl. at 2, 12-30. Billing Rates for Staff Attorneys are not dependent on what they are actually paid, in the

same way that billing rates for associates and partners are not dependent on what they are actually paid. Fineman Dep. at 48:3-17, 50:6-11; Rubenstein Decl. at 29-30; Johnson Dep. at 20:5-22:13, 25:7-19.

With respect to the second part of this request, Labaton Sucharow responds that all of its Staff Attorneys were Labaton Sucharow employees, and accordingly the question of whether "agency" versus non-agency Staff Attorneys should appropriately be billed at the same rate does not apply to it. *See* Johnson Dep. at 19:4-11, 22:5-13.

Lieff Cabraser responds that those of its Staff Attorneys who were paid directly by the firm (versus those paid through an agency) performed the lion's share of Lieff Cabraser's document review in the litigation. *See* LCHB Interrog. Resp. No. 24. Some Staff Attorneys actually began their work on the litigation as agency attorneys before being hired directly by Lieff Cabraser. *Id.* By the time the Staff Attorneys were working on the detailed issue memoranda discussed during discovery in this matter (which entailed a deeper analysis of the documents reviewed), only one LCHB Staff Attorney was still being paid through an agency—Virginia Weiss. *Id.* The remaining LCHB Staff Attorneys were all being paid directly by Lieff Cabraser, and their hours heavily outnumbered those contributed by agency attorneys. *Id.* Throughout the litigation, LCHB Staff Attorneys were given the same type of assignments, supervised in the same manner, and expected to produce the same quality of work regardless of whether they were paid directly by the firm or through an agency. *See, e.g.*, LCHB Interrog. Resp. Nos. 19, 22, 29-30; Chiplock Dep. at 113:14-116:10; Dugar Dep. at 95:7-99:12; Fineman Dep. at 41:4-8, 43:14-44:11; Heimann Dep. at 51:18-53:2.

For instance, while being paid through an agency in 2015, Ms. Weiss authored detailed issue memoranda just as the other Staff Attorneys did. These memoranda have been produced to

the Special Master. *See* LCHB-0028663-0028672 (and exhibits at LCHB-0028677-0029118); LCHB-0029119-0029124 (and exhibits at LCHB-0029125-LCHB-0029182). So, for that matter, did the two Staff Attorneys (Ann Ten Eyck and Rachel Wintterle) who were physically situated in LCHB's San Francisco offices for several months but contracted through an agency that was paid directly by Thornton. These memoranda have also been produced. *See* LCHB-0003314-0003319; LCHB-0029183-0029200 (and exhibits at LCHB-0029201-0031489); LCHB-0031490-0031528 (and exhibits at LCHB-0031529-0039667). The only two (2) other LCHB Staff Attorneys who were still paid by an agency in 2015 (Jade Butman and Andrew McClelland) did not produce memoranda simply because they had stopped working on the State Street Litigation well before those assignments were given. *See* LCHB Interrog. Resp. No. 24.

Billing rates for Staff Attorneys at Lieff Cabraser are not impacted by whether they are being paid directly by the firm or are being paid through an agency; they are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of appropriate market rates for similar legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22. Even so, in 2015, the amount paid by the firm to an agency for an agency attorney's work, on an hourly basis, was comparable to the hourly pay the firm would have made directly to a Staff Attorney being paid directly by the firm. *See* Fineman Dep. at 36:21-38:7.

B. Request No. 2 – The Appropriate Venue For Determining Hourly Billing Rates

The Firms set their billing rates based on what they perceive to be, as described under applicable Supreme Court and First Circuit authority, "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *See Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) (quoting *Blum v. Stenson*, 465

U.S. 886, 895 n.11 (1984)); LS Interrog. Resp. No. 51; Johnson Dep. at 12:5-14:19; LCHB Interrog. Resp. Nos. 47, 48, 53, 64; Fineman Dep. at 76:7-77:8; Thornton Interrog. Resp. Nos. 49, 50, 51, 55. Labaton Sucharow is in New York, Lieff Cabraser is principally in San Francisco, and Thornton is in Boston. *Id.* Each of the Firms, however, maintains a national class action practice and litigates in many locations other than these home bases. Given the specific role that hourly rates play in determining the reasonableness of the overall fee award in this case, the Firms' rates should not be adjusted to Boston rates for purposes of analyzing the fee petition. *See* Rubenstein Decl. at 19-20 and n.31.

As was mentioned above, the Firms' rates were not provided in the fee application as the "basis" for their requested fee, but rather simply to enable a "cross-check" of the overall time and effort expended on the case against the requested "percentage-of-fund" fee. The First Circuit, it should be noted, is predominantly a percentage-of-fund jurisdiction, and does not mandate a lodestar cross-check. *See In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting the "distinct advantages" of the percentage-of-fund method over the lodestar method of calculating fees); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005); Rubenstein Decl. at 8-9. When a lodestar cross-check is performed regardless, the focus is not on the "necessity and reasonableness of every hour" expended by counsel, but rather on whether the fee broadly reflects the degree of time and effort expended by counsel. These points were briefed before Judge Wolf in support of the Firms' fee award, and were not disputed. *See* Fee Brief at 3-4, 24. Indeed, when David Goldsmith revealed to Judge Wolf that the Firms were "contemplating [a percentage of the fund] in the 25 percent range" for the attorneys' fees, Judge Wolf responded, "That's great . . . I usually start with 25 percent in mind." Trans. of Status Conference (Dkt. No. 85), June 23, 2016, at 15:5-22.

As noted above, Labaton Sucharow, Lieff Cabraser and Thornton all maintain complex class action practices that are national in scope. Accordingly, the Firms' billing rates – which were based on rates used by national peer plaintiff and defense law firms that litigate matters of a similar magnitude – are appropriate and were set using the correct legal standard. *See* LS Interrog. Resp. Nos. 44, 51, 62; Thornton Interrog. Responses 49, 51, 55, 66; LCHB Interrog. Resp. Nos. 47, 48, 53, 64.

To the extent that rates prevailing in the Boston legal market have particular or greater relevance, Professor Rubenstein has opined that Plaintiffs' counsel's billing rates were reasonable. Professor Rubenstein forms these opinions on the basis that (a) Plaintiffs' counsel's rates are consistent with rates that courts in Massachusetts have awarded in approving class action fee petitions in recent years; (b) the rates fall far below those that have been judicially approved in the context of fee petitions submitted by defense firms in bankruptcy cases in this District; and (c) the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in the District of Massachusetts and in $100-$500 million cases throughout the country. *See* Rubenstein Decl. at 1-3, 12-27. Professor Rubenstein has also shown that if one goes to the trouble of adjusting the out-of-town rates to the Boston market, it has about a 3% effect on the total lodestar, meaning that the cross-jurisdictional rate differentials are immaterial, especially for cross-check purposes. *Id.* at 21-22. Moreover, Thornton has many years of experience in the Boston market, and its court-approved rates are comparable to those of the other firms here.

C. Request No. 3 – The Role Of Lead Counsel In Preparing And Filing Fee Petitions In Multi-Firm Class Actions

In multi-firm class action cases, lead counsel has overall responsibility for preparing and filing a fee petition. This responsibility generally includes researching and drafting the

supporting brief, drafting the principal fee declaration or portion of the omnibus settlement and fee declaration in support of the fee petition, securing individual fee and expense declarations from co-counsel (often by circulating a model declaration), and securing any client or expert declarations that may be submitted. Lead counsel may and often will delegate certain research and drafting assignments to co-counsel.

Lead counsel's responsibility with respect to the accuracy of individual fee declarations other than its own has limitations. For example, lead counsel supplies a template for such declarations, but does not require the use of any particular language. Moreover, because lead counsel does not have access to co-counsel's internal timekeeping records, lead counsel must rely on co-counsel to report their own lodestar accurately. *See* LS Interrog. Resp. No. 56; Goldsmith Dep. at 119:3-20; Chiplock Dep. at 228:7-9 ("I don't view it as Labaton's ultimate responsibility to ensure that Lieff Cabraser's lodestar was reported accurately.").

Lead counsel has a responsibility to make reasonable efforts to detect and remedy errors in co-counsel's fee declarations to the extent they may be apparent on their face. *See* Goldsmith Dep. at 119:3-120:17. Here, the existence of double-counting between the Thornton and Labaton Sucharow fee declarations, and between the Thornton and Lieff Cabraser fee declarations, was not apparent on the face of any single fee declaration, but rather would become apparent only if the fee declarations were compared with one another. *Id.*

Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys, all of whom were Labaton Sucharow employees, to Thornton and invoiced it on a monthly basis for the work those Staff Attorneys performed. *See* Goldsmith Dep. at 91:20-92:3, 95:19-22; Rogers Dep. at 70:3-73:3; Politano Dep. at 22:8-24:23, 26:11-19, 28:15-23; LS Interrog. Resp. Nos. 23, 32, 37. Labaton Sucharow

invoiced Thornton at a rate of $50 per hour for each staff attorney. *See e.g.* TLF-SST-000153; TLF-SST-003418 – TLF-SST-003420; TLF-SST-000415. The $50 hourly rate included a share of the overhead costs associated with each staff attorney. Garrett Bradley Dep. at 93:23-95:5.

In reaching and implementing this cost-sharing arrangement, Labaton Sucharow and Thornton did not discuss which firm would claim the hours expended by these Staff Attorneys in its individual fee declaration. *Cf.* Sucharow Dep. at 26:20-22, 38:20-39:4; Belfi Dep. at 59:6-15; Goldsmith Dep. at 104:12-107:5, 122:6-13; Rogers Dep. at 95:16-96:2; Zeiss Dep. at 24:19-25:4; Politano Dep. at 22:22-25; LS Interrog. Resp. No. 33. It has since become apparent that the Firms had different views as to which firm would claim which Staff Attorneys on its respective fee petitions. *See* Chiplock Dep. At 135:20-137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."); Garrett Bradley Dep., at 76:6-77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application."); Rogers Dep., at 91:18-96:2 ("Q: And did you have an understanding . . . whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up front," and later stating that he had "no knowledge" of any discussions concerning why Thornton was allocated staff attorneys, nor any discussions concerning whether or how Thornton would claim staff attorneys on its fee petition)"; Goldsmith Dep., at 105:9-106:13 (also acknowledging that there was never an agreement concerning how Labaton Sucharow and Thornton would claim

staff attorneys on their respective fee petitions, but clarifying that he "certainly never made" an assumption "that the Thornton firm would put those people on its lodestar report").

In other cases involving staff attorney cost-sharing, Labaton Sucharow's general practice has been to report all hours billed by its staff attorney employees on its own fee declaration, and to work out any associated economic issues with co-counsel separately. *See* Politano Dep. at 22:18-25 (Q: "Did you have any understanding of whether those staff attorneys would be reported on the firm's fee petition? 'The firm' being Labaton." A: "The common practice was that it would be on Labaton's fee declaration, but there was no discussion at that point as to the way it would be handled."), 23:14 (testifying that this "common practice" was followed "[n]inety percent of the time"); Rogers Dep. at 96:13-17 ("I've seen it done both ways. I think it's more common to do what Judge Rosen's referring to as the latter . . . one big omnibus fee petition and then kind of dole it out at the end."); Johnson Dep. at 32:3-4 (alternative practice of cross-reporting has been used in "very, very few cases"); Goldsmith Dep. at 97:11-99:16 (alternative practice used in two other cases); Goldberg Dep. at 46:10-11 (alternative practice used in "[o]nly one case that I remember"); LS Interrog. Resp. No. 32; *see also* Zeiss Dep. at 24:21-25:2 ("[F]rom my perspective . . . the lodestar reports are reports of each firm's personnel based on their own time records. . . . It would never occur to me that one firm could be reporting personnel from Labaton.").

Indeed, among the 16 class action matters that Labaton Sucharow has identified in discovery as involving staff attorney cost-sharing, *see* LS Interrog. Resp. No. 32, ten (10) have proceeded to a court-approved settlement to date.[1] Labaton Sucharow adhered to its general

[1] The 10 settled cases are *City of Providence v. Aeropostale*, *Broadcom*, *Celestica*, *Countrywide*, *J. Crew Group*, *Lehman Brothers*, *Massey Energy*, *Nu Skin*, *Regions Morgan Keegan*, and *Semtech*.

practice of reporting staff attorney time exclusively in its own fee declaration in at least seven (7) of the ten (10) settled cases. Still, Labaton Sucharow acknowledges that, like here, other law firms have occasionally claimed Labaton Sucharow employed staff attorneys on their fee petitions. Johnson Dep. at 28:24-29:7.

Here, the lack of discussion (both internally and externally) as to which firm would report the hours on its individual fee petition, Labaton Sucharow's familiarity with its own general practice, and Thornton's reasonable belief that it would list the Staff Attorneys for whose labor and overhead it had paid, caused a good faith error to occur: Labaton Sucharow followed its general practice, while Thornton acted in accord with its own reasonable beliefs, and a good faith mistake was made.[2]

Nicole Zeiss, Labaton Sucharow's Settlement Counsel, reviewed each fee declaration individually for form, pursuant to her usual practice at the time. *See* Zeiss Dep. at 11:15-22, 55:25-56:3; LS Interrog. Resp. No. 54. She did not compare the declarations to each other, however. It was not her usual practice to do so; there is ordinarily no reason to believe that there should be any overlap between employees of different firms; and she was not told by anyone at Labaton Sucharow that there was the potential for attorney time to be reported in more than one fee declaration. *See* Zeiss Dep. at 24:19-25:4, 56:3-10; LS Interrog. Resp. No. 56.

Additionally, the existence of double-counting between Thornton and Lieff Cabraser fee declarations was smaller in kind and less obvious on its face, and would not have been immediately clear on first comparison, particularly to a reviewing attorney from Labaton

[2] The differential in hours reported by the two firms for some Staff Attorneys appears to have occurred at least in part because the firms used different sources. Thornton used numbers that were in a report sent to Thornton by Todd Kussin in an email dated August 25, 2015 (TLF-SST-031158); Labaton Sucharow used numbers that it pulled from its system approximately a year later (LS Interrog. Resp. No. 54).

Sucharow. Although the Thornton and Lieff Cabraser fee declarations include a handful of overlapping Staff Attorney names, the numbers of hours and lodestars for such Staff Attorneys consistently differ, and Labaton Sucharow in any event was unaware of any agreement between Thornton and Lieff Cabraser regarding which of those two firm's fee declarations should reflect the time of attorneys hosted by Lieff Cabraser but paid for by Thornton. See LS Interrog. Resp. No. 36; Goldsmith Dep. at 122:8-10. Moreover, of the six (6) attorneys who reported time that was listed by both Lieff Cabraser and Thornton in their fee declarations, the hours for two (2) of them (Virginia Weiss and Andrew McClelland)[3] were ***correctly*** allocated between Lieff Cabraser and Thornton and not double-counted—meaning there actually were no errors as to these two particular attorneys for Labaton Sucharow to detect. *See* LCHB Interrog. Resp. No. 40; Chiplock Dep. at 151:8-152:2.

This leaves only four (4) attorneys who reported at least some time that was inadvertently duplicated and incorrectly included in both Lieff Cabraser's and Thornton's fee declarations—Christopher Jordan, Jonathan Zaul, Ann Ten Eyck, and Rachel Wintterle.[4] *See* LCHB Interrog.

[3] It bears mentioning that both Ms. Weiss and Mr. McClelland were agency attorneys who were not paid directly by Lieff Cabraser, meaning Thornton paid an outside agency (not Lieff Cabraser) directly for the hours spent by Ms. Weiss and Mr. McClelland reviewing documents assigned to Thornton. *See* LCHB Interrog. Resp. Nos. 19, 24, 31; Hoffman Dep. at 60:2-8; 60:19-61:16; 80:8-13. Lieff Cabraser accordingly did not send invoices to Thornton for these two attorneys. Furthermore, Ms. Weiss worked remotely and thus was not making use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

[4] Messrs. Jordan and Zaul were the only Staff Attorneys who were directly paid by Lieff Cabraser but who also performed at least some work (roughly 9 weeks) that was reimbursed by Thornton (and later included in Thornton's fee declaration). *See* LCHB Interrog. Resp. Nos. 24, 31, 38; Hoffman Dep. at 61:17-62:5. Messrs. Jordan and Zaul were accordingly the only two Lieff Cabraser lawyers whose time (again, 9 weeks' worth) was invoiced to Thornton. Messrs. Jordan and Zaul, like Ms. Weiss, also worked remotely, and therefore did not make use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

Ms. Ten Eyck and Ms. Wintterle, meanwhile, were lawyers hired from and paid via an outside agency for the entirety of the 3 to 4 months they worked on the case. *See* LCHB

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Resp. Nos. 31, 65; Chiplock Dep. at 152:3-154:20, 156:7-21. And for each of these four (4) attorneys, the duration of the cost-sharing or hosting arrangement (and the resulting inadvertent redundancy in time-reporting) ranged from just 9 weeks to roughly 3 ½ months—modest, in other words, in comparison to the more than 5-year lifespan of the litigation. *See* LCHB Interrog. Resp. Nos. 31, 38, 65; Hoffman Dep. at 61:17-62:5 (describing sharing relationship as to Messrs. Jordan and Zaul "[t]hat didn't go on for maybe more than a month or two."). This factor (combined with the correct allocation of the lodestar by the two (2) other shared Lieff Cabraser/Thornton Staff Attorneys named above) made any timekeeping duplication between Lieff Cabraser's and Thornton's fee declarations even less readily detectable by Labaton Sucharow than the duplication between Labaton Sucharow's and Thornton's fee declarations.

Notwithstanding the foregoing, Labaton Sucharow acknowledges that it, as lead counsel, bore final responsibility to avoid errors in the Fee Petition that reasonably could be detected. *See* Goldsmith Dep. at 117:4-11. The double-counting in both pairs of fee declarations regrettably was not detected before the Fee Petition was filed. Upon learning of the double-counting, however, Labaton Sucharow disclosed it to the Court promptly, publicly, and candidly. *See* Goldsmith Dep. at 165:15-166:15.

D. Request No. 4 – Accuracy Of Fee Declaration Language

The language concerning "hourly rates" that was contained in the individual fee declarations was never intended to mislead the Court, but rather was intended to inform the Court that the hourly rates were the same as or materially similar to rates accepted by courts in other class action matters in which the Firms had filed fee petitions, and were not special rates

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Interrog. Resp. Nos. 19, 24, 31, 40. Lieff Cabraser did not send invoices for the hours worked by these two attorneys because Thornton paid the agency directly for their time. *See* LCHB Interrog. Resp. Nos. 19, 24, 38, 40.

for this action. *See* LS Interrog. Resp. Nos. 61, 71; LCHB Interrog. Resp. No. 63. For Labaton Sucharow and Lieff Cabraser, the fee petitions were also meant to impart that the same annual rates for each attorney and non-lawyer staff person listed therein are used in the lodestar reports for all fee petitions in a given year (typically for purposes of a lodestar cross-check). *Id.*; *see also* Rubenstein Decl. at 12 n.14.

Nonetheless, we recognize that the Court and perhaps others have interpreted this sentence in a manner other than as intended. In particular, we understand that the Court read this sentence to mean that the law firms' rates are billed to clients that pay for the firms' services on an hourly basis. Labaton Sucharow and Lieff Cabraser have in limited circumstances had clients who have paid by the hour that were actually billed at those rates, or the analogous rates in a given year, and the rates in question (or comparable rates in earlier years) were in fact the "regular" rates charged in such circumstances. *See* LS Interrog. Resp. Nos. 45, 46; Johnson Dep. at 53:13-16; Politano Dep. at 43:4-11; LCHB Interrog. Resp. Nos. 49, 54, 63; Heimann Dep. at 87:7-89:7; Chiplock Dep. at 194:24-198:5, 204:6-205:3. Therefore, even if the word "charged" were read in the literal fashion described above (rather than in the manner it was intended), the "hourly rates" sentence on its face is not misleading as to Labaton Sucharow and Lieff Cabraser. It nonetheless remains true that the overwhelming majority of these firms' clients (and all of Thornton's clients) retain the Firms' services on a contingency basis.

As concerns the language in Garrett Bradley's declaration that refers to the rates as those of attorneys and professional support staff "in my firm," Thornton responds that it did not intend through this language to suggest that all persons listed in the fee declaration were employees of Thornton. This language resulted from Thornton's use of a template declaration provided to all firms by Labaton Sucharow. Unfortunately, Thornton did not modify the template language

stating that all of the individuals listed in its fee petition were its own employees. As Thornton has acknowledged in its responses to the Special Master's inquiries and in depositions of its partners – *see, e.g.*, Garrett Bradley Dep. at 81:12-83:13 – it should have modified the language in the template Labaton Sucharow provided to make it more precise (for example, by inserting an additional phrase after "in my firm," such as "or performing work on behalf of my firm").

In an effort to avoid any potential confusion, misinterpretation, or perceived lack of transparency going forward, we recommend that counsel be encouraged to use the following revised and expanded language:

> The hourly rates for the attorneys and professional support staff in my firm, ***or performing work on behalf of my firm***, included in Exhibit A are the ~~same as my~~ firm's regular rates charged for their type of services ***in contingent-fee matters.*** ~~charged for their services, which~~ ***These rates (or materially similar rates)*** have been accepted ***by courts*** in other complex class actions ***for purposes of "cross-checking" lodestar against a proposed fee based on the percentage-of-fund method or determining a reasonable fee under the lodestar method.***
>
> ***Based on my knowledge and experience, these rates are within the range of rates normally and customarily charged in their respective cities by attorneys and professional support staff of similar qualifications and experience in cases similar to this litigation.***
>
> ***To the extent the firm represents clients in non-contingent/ hourly fee matters, these rates are also the regular rates that generally would be charged to those clients for services rendered. The firm's current clients, however, do not typically pay an hourly rate and instead retain the firm's services on a contingent-fee basis.***

This revised and expanded language is derived in part from the individual fee declarations submitted in the similar *Bank of New York Mellon* Indirect FX class action in which Lieff Cabraser and Thornton, but not Labaton Sucharow, were involved. *See* LCHB Interrog. Resp. No. 63; Chiplock Dep. at 195:14-202:22. The language is intended to clarify, among other

things, that the hourly rates used in connection with the lodestar cross-check of the requested fee—while fully supported, customary in the industry, and accepted by courts in other complex class actions—are used for all lodestar reports in a given year but are not typically billed to the firms' clients because the firms' clients do not typically pay by the hour. *See* Chiplock Dep. at 200:3-201:7, 208:15-209:18; Chiplock Dep. Ex. 2 (Lieff Cabraser fee declaration in *Bank of New York Mellon*); *see also* LS Interrog. Resp. Nos. 46 (setting forth rates charged to clients that paid by the hour), 71; LCHB Interrog. Resp. No. 63.

E. Request No. 5 – Factors To Consider In Setting Hourly Billing Rates Of Staff Attorneys

Labaton Sucharow submits that the appropriate factors and criteria law firm management should consider in setting hourly billing rates of "off-track" staff attorneys, including the Staff Attorneys referenced in the Fee Petition, are described in Labaton Sucharow's Responses to Interrogatory Nos. 44 and 45. *See also* Politano Dep. at 38:2-42:2.

Lieff Cabraser, for its response, refers to the response to Sections A and B above (and the testimony and discovery responses cited therein), in addition to the documents produced by Lieff Cabraser and the declaration by Professor Rubenstein.

Thornton, for its response, states that given the contingency nature of its work, Thornton does not set hourly billing rates annually or as a routine matter. *See* Thornton Interrog. Resp. Nos. 49, 51, 52, 55. In this case, Thornton used a rate of $425 per hour for the Staff Attorneys for whose labor and overhead it paid because that rate had been used and accepted by the court in *In re Bank of New York Mellon Corp.*, 12-MD-02335, S.D.N.Y., and because it was Thornton's understanding, from communications with co-counsel more than a year prior to the submission of the Fee Petition, that a rate of $425 per hour therefore would be reasonable to use in the State

Street Litigation. *See* Hoffman Dep. at 58:17-59:18; Garrett Bradley Dep. at 48:20-49:5; Thornton Interrog. Resp. Nos. 27, 52.

Thornton submits the following information concerning the hourly rate of Michael Bradley, the outside attorney who performed document review work on the matter, and for whose work Thornton used an hourly rate of $500 in its lodestar calculation. As Thornton has previously identified in its interrogatory responses, Mr. Bradley is an actively practicing, Massachusetts-admitted lawyer who occasionally performs work for Thornton and its clients. *See* Thornton Interrog. Resp. No. 45; Michael Bradley Dep. at 29:11-16. As detailed in his deposition and in Thornton's responses to interrogatories, Mr. Bradley is an experienced lawyer who has been practicing since 2005, including for the government and as a solo practitioner. *Id*. at 11:7-12:9. Michael Bradley is not an employee of the firm, but rather has provided legal services to the firm and its clients on occasion.

A need for Mr. Bradley's services arose in 2013, when the Firms began to receive documents in the State Street matter and, consequently, began staffing a document review. Garrett Bradley believed that Michael Bradley's experience as an attorney and his background, specifically his service as the former head of the Massachusetts Underground Economy Task Force, might make him particularly qualified to potentially provide a unique perspective on the documents he reviewed. As such, Garrett Bradley approached Michael Bradley, who agreed to assist Thornton with the document review. Garrett Bradley sought and received the approval of Michael Thornton, then-managing partner of Thornton, for this arrangement.

Michael Bradley was justified in requesting and receiving $500 per hour for his services. Michael Bradley Dep. at 28:17-29:5. Mr. Bradley and Garrett Bradley have testified that Michael Bradley's rate of $500 per hour was based on two key benchmarks. First, Michael Bradley had

been paid $450 per hour by a private client prior to beginning his work on the State Street matter.[5] Michael Bradley Dep. at 28:17-29:5. Second, Michael Bradley's $500 per hour rate was also benchmarked to his risk of receiving nothing for his time. Unlike in the case of his paying client, in the State Street matter Michael Bradley performed the work on a contingent basis, thus saving Thornton the upfront cost of paying him for his work, and taking on the risk that, if the case did not have a positive resolution for the Plaintiffs, he would not be compensated for his work. *See* Thornton Interrog. Resp. Nos. 43, 44; Michael Bradley Dep. at 28:17-29:5; Garrett Bradley Dep. at 53:22-54:10. Michael Bradley took this risk and performed work, without pay, for more than two years. Charging a slightly higher rate for Mr. Bradley's work than for the work of attorneys who were paid concurrently for their work accords with commonly accepted principles governing contingent fee matters. *See United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 13 (1st Cir. 2010) (quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969)) ("[T]he fact that a fee arrangement is contingent upon success is a relevant factor in determining the appropriate fee level. The reason is that 'the fact that the attorney is willing to take an all-or-nothing-arrangement might justify a fee which is higher than the going hourly rate in the community'"); *see also* Restatement (Third) of the Law Governing Lawyers § 35, Comment c, "Reasonable contingent fees" (2000) ("A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk.") *See also* Rubenstein Decl. at 30, n. 48.

[5] Indeed, Michael Bradley charged a private client $500 per hour in early 2017 as well. Michael Bradley Dep. at 16:17-17-3.

Finally, Thornton submits that, as his testimony and documents produced by Thornton demonstrate, Michael Bradley consistently reviewed documents in the Catalyst database over a two-year period. Mr. Bradley's work during this period totaled 449.1 hours. Thornton mistakenly undercounted this time in its lodestar chart, accounting for only 406.1 hours of his time. *See* Michael Bradley Dep. at 30:5-12; 55:13-56:10; 58:19-59:11; *see e.g.* TLF-SST-005020; TLF-SST-000588 – TLF-SST-000611; TLF-SST-010790; TLF-SST-010826; TLF-SST-010832; TLF-SST-013319.

F. Request No. 6 – Reasoning For Entering Into The Cost-Sharing Agreement In This Matter

Labaton Sucharow states that the principal reasons for entering into a cost-sharing agreement by which a firm employing staff attorneys invoices another firm for the work performed by one or more of those staff attorneys are to share costs and risk, so that the firm receiving and paying the invoices has "skin in the game" with respect to an ongoing and expensive project. Staff attorney cost-sharing is simply one example of the arrangements that law firms in multi-firm class actions make in an effort to share work, costs, and associated risk equitably. *See* Belfi Dep. at 50:19-51:16; LS Interrog. Resp. 30, 32 ; *see also* Chiplock Dep. at 127:11-128:16; Garrett Bradley Dep. at 43:4-13.

Here, as noted in No. 3 above, Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys to Thornton and invoiced Thornton on a monthly basis for the work those Staff Attorneys performed. While attorneys from both firms recall the cost-sharing arrangement, no one from either firm recalls an explicit agreement about how these hours would be accounted for on eventual fee declarations, which led to the reasonable assumptions and good-faith error described above.

Lieff Cabraser, for its part, assumed (like Thornton) that Thornton would include any Staff Attorney hours for which Thornton had borne financial responsibility, and thus the risk of non-payment, in its own lodestar report. LCHB Interrog. Resp. Nos. 34, 39, 40; Thornton Interrog. Resp. Nos. 31, 36. As noted above, four of the Staff Attorneys for whom Thornton shared financial responsibility with Lieff Cabraser were agency lawyers, for whom Thornton paid outside agencies directly. *See supra n.* 3, 4. Only two of the Staff Attorneys shared between Lieff Cabraser and Thornton were ordinarily paid directly by Lieff Cabraser. For just those two attorneys, therefore, Lieff Cabraser prepared invoices for the time to be reimbursed by Thornton (roughly 9 weeks' worth). *See supra* n. 4.

G. Request No. 7 – Recommendations On Best Practices

The Firms collectively submit the following recommendations that the Special Master may wish to include in his Report and Recommendation to the Court. Together we respectfully submit five global reforms that, taken together, will significantly reduce the likelihood of confusion, misinterpretation, or any perceived lack of transparency regarding counsel's disclosure concerning hourly rates, and will significantly reduce the likelihood of recurrence of errors of the kind found here. In addition, we submit individual policy changes that each firm will implement in order to further safeguard against the inadvertent errors that occurred in this case.

First, the Firms agree that, promptly after a court grants preliminary approval to a proposed settlement,[6] lead counsel shall commence or revisit a substantive dialogue with all

[6] *See* Goldsmith Dep. at 115:23-116:22 (116:17-22:"[I]n my mind, one of the reasons this happened is because you had a very large passage of time between the end of the review project and putting in the papers where the review project impacted the presentation."); 123:23-124:7 (preliminary approval is "the right time to do it because that's the time you have an actual settlement . . . . That is the point the lawyers are looking ahead to filing a settlement motion and

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counsel in the case concerning protocols for reporting lodestar in a forthcoming petition for attorney's fees. The subjects of this dialogue shall include, without limitation, which law firms will submit an individual fee declaration; the hourly rates used for professionals and paraprofessionals; whether certain categories of time should be excluded in whole or in part; whether certain timekeepers should be excluded in whole or in part; and how time logged by staff attorneys or other attorneys engaged on a temporary basis will be reported. Lead counsel shall ensure that the lodestar reporting protocol is documented and circulated among all counsel, and that all counsel are in agreement before individual fee declarations are prepared and filed.[7]

Second, in cases where the costs of any staff may have been shared, lead counsel, upon receiving draft fee declarations from co-counsel, shall promptly circulate all such draft

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fee petition. So people are going to naturally have those issues in mind."), 124:8-18, 130:15-24; *see also* Chiplock Dep. at 174:24-176:17, 181:10-182:21 (testifying that significant and unusual factor here was passage of more than a year between (1) agreement in principle to settle litigation and discussions among counsel concerning lodestar reporting issues and (2) filing of fee petition).

[7] *See* Goldsmith Dep. at 122:4-127:3 (123:7-14: "[W]hen the court issues an order granting preliminary approval to the case, that should be the point, or at least the latest point, where all the counsel get together and discuss . . . how this is going to be handled."); Rogers Dep. at 105:12-15 ("[I]t probably would have been good for the three parties to have literally memorialized some kind of agreement."); Chiplock Dep. at 221:12-18 ("I think there should have been more coordination and communication amongst the firms before the individual fee declarations were submitted, in order to assure that we did not confuse the court."); Lesser Dep. at 90:13-15 ("Case of this size with this many firms, this number of attorneys involved, obviously, you can have better communication, more coordination . . . ."); Zeiss Dep. at 56:14-57:3 ("So now what I do is, when a settlement's passed to me, I ask our accounting department if there is any STA cost sharing, I speak with the litigation team, see if there's any STA cost sharing. . . . And then, if there is, yes, we talk internally about how we think it should be handled, and speak with the firms that are . . . sharing the costs and make sure we're all on the same page about how the time will be reported.").

declarations to all counsel before the fee petition is filed. All counsel shall review all the draft fee declarations closely and share any perceived errors or concerns with all other counsel.[8]

Third, each individual firm declaration submitted in support of a petition for attorney's fees shall include clear and accurate language concerning that firm's billing practices. For instance, the revised and expanded model language set forth in Section D above, or substantially similar language, will be used by the Firms in future fee applications. *See* Goldsmith Dep. at 126:3-11.

Fourth, the Firms agree that further direction from the presiding judge is necessary to ensure that all facts relevant to the court's analysis of a fee petition are brought to its attention. To that end, the firms suggest that the Special Master recommend that each judge presiding over a class action lawsuit draft a standing order that sets forth those facts which the presiding judge believes are important to his or her analysis of an eventual fee petition. Such direction would

[8] *See* Goldsmith Dep. at 125:4-9 ("Another issue that I would suggest or reform that I would suggest is that lead counsel, upon receiving drafts of all of the fee declarations from cocounsel, circulate them to all of the counsel in the case."), 125:18-24 ("What I would suggest going forward is that we particularly circulate them, everyone to everyone, so you've got multiple eyes, you got redundancy. And I think, again, it will prompt people to point out potential issues or problems."); *see* Johnson Dep. at 55:23-56:11 ("The second thing we have done is to work with Nicole Zeiss to expand the checklist that she uses for all settlements. In the past we focus[ed] that checklist on areas that we thought would potentially be more problematic, and those related primarily to expenses. We have now expanded that so that a cross check is done with all of the attorneys listed on the main fee application and any small fee declaration."); Chiplock Dep. at 159:5-18 ("So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger. Had I seen the other two petitions and seen the overlapping names, . . . it might have spurred me to say, ' . . . I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in.'"), 225:8-13 ("I think there would have been a benefit to the people who had been involved in the nitty gritty of the litigation maybe being more involved in eyeballing the fee declarations."), 228:10-16 ("[O]nly one firm [Labaton] had access to all the fee declarations before they were filed. And if there was an opportunity to catch a mistake, that was it, in addition to the opportunities that I had and missed before my individual fee declaration was filed."); Lesser Dep. at 90:16-18 ("[A]s far as reviewing critical documents, build some more redundancy into the system so that things don't get missed.").

ensure that class counsel do not mistakenly fail to identify facts that the court wishes to consider, enable class counsel to staff each case according to that judge's preferences (if any), and encourage the compilation and recordation of relevant information from the beginning of the case. *See, e.g.*, Heimann Dep. at 91:17-100:20.

Fifth, the Firms recommend that in complex class cases involving multiple firms, where there is a leadership structure amongst counsel imposed, the firms should report their lodestar to lead counsel on at least a semi-routine basis for the lifetime of the case. While typical in the multi-district litigation ("MDL") context (and often made mandatory in MDL orders appointing a leadership structure or committee), this practice is less regularized in class cases that are not MDLs. While such exchange was done in this case on several occasions and on an ad-hoc basis, regulating this process will aid in the capturing and correcting of errors or inadvertent duplication between the Firms as to any of their shared Staff Attorneys. Accordingly, it may be beneficial to make such periodic reports amongst plaintiffs' counsel a more regular and required feature of complex class cases such as this one, particularly if any timekeepers are performing work for more than one firm, and for lead counsel to be more specifically tasked with implementing and enforcing this requirement (*i.e.*, in the order appointing lead counsel) in addition to its other functions.

In addition to the above global recommendations, to avoid possible double-counting clerical errors like the ones that occurred here, Labaton Sucharow has now adopted for all cases going forward the following policy to formalize its general practice for the reporting of staff attorney hours in a fee petition: In all future class actions in which Labaton Sucharow serves as lead or co-lead counsel, all hours billed by staff attorneys who are Labaton Sucharow employees will be reported to the court exclusively in Labaton Sucharow's individual fee declaration and

lodestar report, regardless of whether or to what extent costs relating to such staff attorney were paid or reimbursed by another law firm during the pendency of the case.[9] Lieff Cabraser, for its part, will follow the same practice going forward.

For its part, when it enters into cost-sharing arrangements by which non-employee attorneys have performed work on a case, Thornton will disclose the existence of such agreements to the court in its individual fee declaration.

These reforms will be effective because they are straightforward, easy to implement, and widely if not universally applicable to the Firms' class action matters. We respectfully submit them for the Special Master's and the Court's consideration.

Dated: August 1, 2017

Respectfully submitted,

By: /s/ Joan A. Lukey

Joan A. Lukey, Esq.
Choate, Hall & Stewart LLP
Two International Place
Boston, MA 02110

Counsel for Labaton Sucharow LLP

[9] *See* Johnson Dep. at 55:2-8 ("[W]e are now prohibiting the practice of allowing staff attorneys to work as Labaton employees and for their hourly rates to be reimbursed to us by another firm. So that is prohibited in all cases."); Goldsmith Dep. at 126:12-127:3 ("I think personally that our firm should have a specific policy going forward on how this will be done. . . . And the policy that I would advocate is that all Labaton Sucharow staff attorney time should be on the Labaton Sucharow lodestar."); *see also* Belfi Dep. at 55:2-15; G. Bradley Dep. at 78:17-79:1; Chiplock Dep. at 138:3-21; Lesser Dep. at 55:15-20; Rogers Dep. at 93:2-11; Sucharow Dep. at 26:7-15; Thornton Dep. at 74:16-75:6 (remarks of Special Master describing method of reporting staff attorney lodestar and cost-sharing consistent with this policy).

By: /s/ Richard M. Heimann

Richard M. Heimann
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111

Attorney for Lieff Cabraser Heimann & Bernstein, LLP

By: /s/ Brian T. Kelly

Brian T. Kelly, Esq.
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110

Counsel for The Thornton Law Firm LLP

8241244

EXHIBIT 6

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES DUE ON JULY 10, 2017

The Firm's overall strategy, along with that of the other Plaintiffs' Law Firms, remained constant throughout the SST Litigation, which was to maximize the recovery to the class as a whole while taking into account the risk of litigation and the eventual possibility of an adverse judgment or denial of class certification. By the time the agreement in principle was reached to settle the SST Litigation, the Firm was prepared to accept (as was similarly accepted in the BNY Mellon settlement) that ERISA plans who were members of the class justifiably could be afforded a slight premium in their shares of the overall recovery given the separate litigation threat posed by the DOL and the potentially greater ease with which ERISA claims could be certified for class treatment (assuming such claims got past a motion to dismiss, which never technically happened in either the SST Litigation or in BNY Mellon). Accordingly, the Firm participated in discussions with Plaintiffs' Law Firms, ERISA counsel, and the DOL to construct the settlement plan of allocation in a manner that would afford participating ERISA plans a modest premium in their recoveries.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 24:

Please list the full name of each Staff Attorney who worked on the SST Litigation/ Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action

litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition.

RESPONSE TO INTERROGATORY NO. 24:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. Most of the information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The LCHB Staff Attorneys who worked on the SST Litigation/Document Review were Tanya Ashur, Joshua Bloomfield, Elizabeth Brehm, Jade Butman, James Gilyard, Kelly Gralewski, Christopher Jordan, Jason Kim, James Leggett, Colleen Liebmann, Andrew McClelland, Scott Miloro, Leah Nutting, Marissa Oh (Lackey), Peter Roos, Ryan Sturtevant, Virginia Weiss, and Jonathan Zaul. The hourly rate listed in the Fee Petition for all of these Staff Attorneys was $415, except for Joshua Bloomfield, Jade Butman, and Marissa Oh, whose listed hourly rate was $515.

Two other Staff Attorneys – Rachel Wintterle and Ann Ten Eyck – worked in LCHB's San Francisco offices alongside LCHB Staff Attorneys, were supervised in the same manner, and were assigned similar work as the other Staff Attorneys, but were contracted and paid for by Thornton through an outside agency, and thus are not included in the definition of "LCHB Staff Attorneys" for this Response. They were inadvertently and erroneously included in LCHB's lodestar calculation for reasons previously and elsewhere explained in these Responses.

The following LCHB Staff Attorneys were payroll employees paid directly by LCHB for the duration of the SST Litigation: Tanya Ashur, Elizabeth Brehm, James Gilyard, Kelly

Gralewski, Jason Kim, Christopher Jordan, Coleen Liebmann, Scott Miloro, Marissa Oh, Peter Roos, and Jonathan Zaul.

The following LCHB Staff Attorneys were payroll employees paid through an outside agency for the duration of the SST Litigation: Jade Butman (24 hours total), Andrew McClelland (58 hours total), and Virginia Weiss (473.50 hours total).

The following Staff Attorneys were, at different times during the SST Litigation, either paid directly by LCHB or paid through an outside agency, as follows:

Joshua Bloomfield: Paid via agency in 2013, paid directly by LCHB in 2015.

Leah Nutting: Paid via agency in 2013, paid directly by LCHB in 2015.

James Leggett: Paid via agency from 1/21/15—1/25/15, paid directly by LCHB as of 1/26/15.

Ryan Sturtevant: Paid via agency from 1/20/15—1/27/15, paid directly by LCHB as of 1/28/15.

The LCHB Staff Attorneys who did at least some work allocated to Thornton during the life of the SST Litigation were Chris Jordan, Andrew McClelland, Virginia Weiss, and Jonathan Zaul.

The following LCHB Staff Attorneys physically worked on the SST Litigation/Document Review in LCHB's San Francisco offices: Tanya Ashur, Jade Butman, James Gilyard, Jason Kim, James Leggett, Coleen Liebmann, Andrew McClelland, Marissa Oh, Peter Roos, and Ryan Sturtevant.

Scott Miloro physically worked in LCHB's New York offices.

The following LCHB Staff Attorneys worked remotely on the SST Litigation/Document Review (remote work locations are in parentheses): Joshua Bloomfield (San Francisco, CA),

Elizabeth Brehm (Shoreham, NY), Kelly Gralewski (San Diego, CA), Chris Jordan (Houston, TX and Atlanta, GA), Leah Nutting (San Francisco, CA), Virginia Weiss (Rochester, MN and Sacramento/Roseville, CA), and Jonathan Zaul (San Francisco, CA).

The following LCHB Staff Attorneys are still employed by or performing work for LCHB (total number of years worked for LCHB, with any gaps in employment excluded, are indicated in parentheses): Tanya Ashur (3.5 years), Kelly Gralewski (8.5 years), Chris Jordan (4.5 years), Jason Kim (5.5 years), James Leggett (3.5 years), Coleen Liebmann (2.5 years), Scott Miloro (5.5 years), Leah Nutting (4.5 years), Marissa Oh (3.5 years), Peter Roos (4.5 years), Ryan Sturtevant (3 years), Virginia Weiss (2.5 years), and Jonathan Zaul (4.5 years).

The following LCHB Staff Attorneys are no longer employed by or performing work for LCHB (number of years at LCHB is indicated in parentheses): Joshua Bloomfield (2 years), Elizabeth Brehm (2 years), Jade Butman (1 year), James Gilyard (2.5 years), and Andrew McClelland (1.5 years).

The following LCHB Staff Attorneys worked at least part-time on the SST Litigation/Document Review in 2013-2014, with any other LCHB cases to which they were assigned during that time-period indicated in parentheses: Joshua Bloomfield (BNY Mellon, British Airways Fuel Surcharge); Elizabeth Brehm; Kelly Gralewski (BNY Mellon, Microsoft-Canada, Florida Tobacco); Scott Miloro (BNY Mellon, Copytele, Siskin Patent, ING Direct Flat Fee, Multaq Qui Tam, Takata, Merck/Vioxx Securities Litigation, NYSCRF-Pratcher); and Leah Nutting (BNY Mellon).[1]

[1] For purposes of this Response, "BNY Mellon" refers to *In re Bank of New York Mellon Corp. Foreign Exchange Transactions Litigation*, MDL No. 2335 (LAK) (S.D.N.Y.); "British Airways Fuel Surcharge" refers to *Dover v. British Airways*, Case No. 1:12-cv-05567 (E.D.N.Y.); "Microsoft-Canada" refers to *Pro-Sys Consultants and Neil Godfrey v. Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE*, Case No. LO43175 (Vancouver Registry); "Florida Tobacco" refers to *In re Engle Cases*, No. 3:09-cv-10000-J-32 JBT (M.D. Fl.); "Copytele" refers to *In the Matter of the Arbitration between CopyTele and AU Optronics*, Case No. 50 117 T

Footnote continued on next page

The following LCHB Staff Attorneys worked on the SST Litigation/Document Review from January through June 2015, with any other LCHB cases on which they performed work (even if only a handful of hours) during that time-period indicated in parentheses: Tanya Ashur (BNY Mellon), Joshua Bloomfield (British Airways Fuel Surcharge), Elizabeth Brehm, James Gilyard (BNY Mellon), Chris Jordan (BNY Mellon), Jason Kim (BNY Mellon), James Leggett (BNY Mellon), Coleen Liebmann (Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab), Scott Miloro (BNY Mellon, Multaq Qui Tam, Takata, Merck/Vioxx), Leah Nutting (BNY Mellon), Marissa Oh (BNY Mellon), Peter Roos (Nike Copyright, Apple Unlimited 3G, Benicar, Takata, Celera, Schwab), Ryan Sturtevant (Celera, Hong Leong Finance, Schwab), Virginia Weiss (BNY Mellon), and Jonathan Zaul (BNY Mellon, Photographer Copyright Class Actions).

The following Staff Attorneys put in more limited hours in 2015 on the SST Litigation/Document Review, with any other LCHB cases on which they performed work during that time-period indicated in parentheses: Jade Butman (Hong Leong Finance Limited,

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Footnote continued from previous page

009883 13 (Internat'l Centre for Dispute Resolution); "ING Direct Flat Fee" refers to *ING Bank Rate Renew Cases*, Case No. 11-154-LPS (D. Del.); "Multaq Qui Tam" refers to *U.S. ex rel. Abbate v. Sanofi-Aventis, et al.*, Case No. 2 :15-cv-01510-SRC (D. N.J.); "Takata" refers to *In re Takata Airbag Litigation*, MDL No. 2599 (S.D. Fl.); "Merck/Vioxx Securities Litigation" refers collectively to *Honeywell International Inc. Defined Contribution Plans Master Savings Trust. v. Merck & Co.*, No. 14-cv 2523-SRC-CLW (S.D.N.Y.), *Janus Balanced Fund v. Merck & Co.*, No. 14-cv-3019-SRC-CLW (S.D.N.Y.), *Lord Abbett Affiliated Fund v. Merck & Co.*, No. 14-cv-2027-SRC-CLW (S.D.N.Y.), and *Nuveen Dividend Value Fund (f/k/a Nuveen Equity Income Fund), on its own behalf and as successor in interest to Nuveen Large Cap Value Fund (f/k/a First American Large Cap Value Fund) v. Merck & Co.*, No. 14-cv-1709-SRC-CLW (S.D.N.Y.); "NYSCRF-Pratcher" refers to *Richardson v. Pratcher*, No. 12-cv-08451-JGK (S.D.N.Y.); "Hong Leong Finance Limited" refers to *Hong Leong Finance Limited (Singapore) v. Morgan Stanley, et al.*, No. 653894/2013 (Sup. Ct. N.Y.); "Nike Copyright" refers to *Rentmeester v. Nike, Inc.*, D.C. No. 3:15-cv-00113-MO (D. Or.); "Apple Unlimited 3G" refers to *In Re Apple and AT&T iPad Unlimited Data Plan Litigation*, No. 5:10-cv-02553 RMW (N.D. Ca.); "Benicar" refers to *Benicar Litigation*, MDL No. 2606 (D. N.J.); "Celera" refers to *Biotechnology Value Fund, L.P. v. Celera Corp.*, 3:13-cv-03248-WHA (N.D. Cal.); "Schwab" refers collectively to *The Charles Schwab Corp. v. BNP Paribas Sec. Corp.*, No. CGC-10-501610 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503206 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503207 (Cal. Super. Ct.); and *The Charles Schwab Corp. v. Banc of America Sec. LLC*, No. CGC-10-501151 (Cal. Super. Ct.); and "Photographer Copyright Class Actions" refers to *Dennis Kunkel Microscopy, Inc. et al. v. John Wiley & Sons, Inc.*, C.A. No. 15-00094 (JLL) (JAD) (D. N.J.). "Siskin Patent" was a possible patent infringement investigation that did not result in a filed case.

Merck/Vioxx Securities Litigation, Schwab), Elizabeth Brehm, and Andrew McClelland (BNY Mellon).

The majority of LCHB's Staff Attorneys had substantial experience working on cases involving foreign-exchange trading and mismanagement of custodial funds by virtue of their work on the BNY Mellon litigation. The number of hours worked by each of the following Staff Attorneys in the BNY Mellon litigation, as recorded in the fee petition submitted by LCHB in that litigation (and previously produced to the Special Master), is indicated in parentheses: Tanya Ashur (2,414.50 hours), Joshua Bloomfield (2,183.00 hours), James Gilyard (2,614.50 hours), Kelly Gralewski (301.50 hours), Christopher Jordan (1,572.90 hours), Jason Kim (2,659.00 hours), James Leggett (2,476.20 hours), Andrew McClelland (1,799.00 hours), Scott Miloro (3,146.80 hours), Leah Nutting (3,128.40 hours), Marissa Oh (Lackey) (2,575.70 hours), Virginia Weiss (1,445.80 hours), and Jonathan Zaul (2,197.90 hours).

Of the few LCHB Staff Attorneys who did not work on the BNY Mellon litigation, Jade Butman, Coleen Liebmann, Peter Roos, and Ryan Sturtevant otherwise had experience working on securities/financial fraud matters at the Firm, including the Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab, and Celera matters listed above.[2]

Elizabeth Brehm was the only LCHB Staff Attorney who did not work on any other LCHB cases apart from the SST Litigation. Prior to working for LCHB, however, Ms. Brehm

[2] In the Hong Leong Finance Limited case, LCHB represented a Singaporean bank in a lawsuit against Morgan Stanley to recover losses stemming from a failed complex financial investment product that was created by Morgan Stanley and distributed to the Singaporean bank's clients. In the Merck/Vioxx Securities Litigation, LCHB represented a number of mutual funds managed by major investment advisors against Merck for losses sustained in the clients' holdings of Merck stock stemming from Merck's alleged misrepresentations concerning the safety of the painkiller drug Vioxx. In the Schwab cases, LCHB represented Charles Schwab in four separate individual securities actions against certain issuers and sellers of mortgage-backed securities ("MBS") for materially misrepresenting the quality of the loans underlying the securities in violation of California state law. In Celera, LCHB represented a group of affiliated funds investing in biotechnology companies in a securities fraud action arising from misconduct in connection with Quest Diagnostics Inc.'s 2011 acquisition of Celera Corporation.

specialized in securities/financial fraud and antitrust cases while an associate at another plaintiffs' class action firm (Kirby McInerney LLP).

Daniel P. Chiplock, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 25:

For each of the Staff Attorneys listed above, please describe all compensation paid to the Staff Attorney and the total number of hours recorded for work on the SST Litigation/Document Review.

RESPONSE TO INTERROGATORY NO. 25:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The hours worked by and compensation paid to the LCHB Staff Attorneys for the SST Litigation are as follows: Tanya Ashur (843.50 hours, $33,740.00), Joshua Bloomfield (2,033.20 hours, $98,328.00), Elizabeth Brehm (1,682.90 hours, $75,747.38), Jade Butman (24.00 hours, $1,194.00), James Gilyard (882.00 hours, $35,280.00), Kelly Gralewski (1,478.90 hours, $67,650.50), Christopher Jordan (539.90 hours, $24,295.50), Jason Kim (904.00 hours, $37,968.00), James Leggett (893.00 hours, $35,810.00), Colleen Liebmann (24.00 hours, $1,008.00), Andrew McClelland (58.00 hours, $3,040.36), Scott Miloro (658.80 hours, $29,855.30), Leah Nutting (1,940.10 hours, $115,861.25), Marissa Oh (Lackey) (800.30 hours, $32,012.00), Peter Roos (780.00 hours, $39,230.00), Ryan Sturtevant (796.00 hours,

INTERROGATORY NO. 32:

For each of the categories listed above, explain the Firm's understanding of how those fees, costs and/or expenses would be reported to the Court in the event of a successful verdict and/or settlement.

RESPONSE TO INTERROGATORY NO. 32:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague. Subject to and without waiving those objections, LCHB responds as follows:

In the event of a successful verdict or settlement, the Firm's understanding was that the costs and expenses it had advanced during the litigation would be reported and broken out by category as they were in Exhibit B to the Firm's Fee Petition (e.g., Litigation Fund Contribution, Mediation Expenses, etc.). With respect to Staff Attorneys, the Firm's understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any attorney hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment. In this manner, the same Staff Attorney name could appear on more than one Plaintiffs' Law Firm's time report, since the financial responsibility for those particular Staff Attorneys shifted between firms during the litigation (in 2015 only, at least as far as LCHB is concerned).

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 46:

Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Film engaged in a fee dispute with a client or class representative

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

Dated: July 10, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT 7

From: Sucharow, Lawrence <LSucharow@labaton.com>
Sent: Tuesday, August 30, 2016 10:37 AM
To: Garrett J. Bradley
Subject: RE: State Street

Just to you.
I'm flying Tuesday but available til Noon your time & that day.
&

From: Garrett Bradley [mailto:GBradley@tenlaw.com]
Sent: Tuesday, August 30, 2016 10:27 AM
To: Michael Thornton; Daniel P. Chiplock; Sucharow, Lawrence
Cc: Belfi, Eric J.; Keller, Christopher J.
Subject: Fwd: State Street
&
Please see the attached fully executed fee agreement in the State Street matter.
&
Also when I spoke with Larry today he raised some concerns about the Judge's comments and the different percentages between Erisa and non-Erisa and would like to have a call tomorrow or next Tuesday to discuss this matter among the group and then, potentially, the Erisa counsel group as well. & Can everyone let me know their availability? &
&
Thank you ,
&
Garrett

EXHIBIT 8

The undersigned are co-counsel in the Arkansas Teacher Retirement System v. State Street Corporation, C.A. No. 11-CV-10230 (MLW) matter before Judge Mark L. Wolf which is scheduled for a final hearing on November 2, 2016. The matter relates to FX fraud.

The undersigned agree to the division of fees as follows:

10% ERISA Counsel
5.5% Labaton Sucharow's local counsel

Of the remaining 84.5%, the undersigned agree it shall be divided as follows:

47% Labaton Sucharow
29% Thornton Law Firm
24% Lieff, Cabraser, Heimann & Bernstein, LLP and Robert Lieff

Lawrence A. Sucharow for
LABATON SUCHAROW

Michael P. Thornton for
THORNTON LAW FIRM LLP

Daniel P. Chiplock for
LIEFF, CABRASER, HEIMANN &
BERNSTEIN LLP

Robert L. Lieff for Robert L. Lieff

EXHIBIT 9

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF [XXXXX] ON BEHALF OF
[XXXX] IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND PAYMENT OF EXPENSES

_____, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am [a member of] [associated with] with the law firm of [INSERT FIRM NAME] ("[ABREV. FIRM NAME]"). I submit this declaration in support of Lead Counsel's motion for an award of attorneys' fees and payment of litigation expenses on behalf of all Plaintiffs' counsel who contributed to the prosecution of the claims in the above-captioned class actions (the "Class Actions") from inception through August 30, 2016 (the "Time Period").

2. My firm is _____ [and counsel of record for plaintiff[s] [insert name]. [Supplement to explain role in the Class Actions and give overview of work performed.]

3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.

4. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

5. The total number of hours expended on this litigation by my firm during the Time Period is _____ hours. The total lodestar for my firm for those hours is $_____.

Comment [A1]: We realize that people investigated the claims before the cases were filed in 2011 and 2012. A reasonable inception date should be set, which would likely not be before Oct 2009 when the April 2008 qui tam complaint was unsealed.

Comment [A2]: In addition to not billing for fee/expense related time, you should only report lodestar that was directed at your clients in the Class Actions and the claims here, as opposed to other investigative work.

6. My firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expenses items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

7. As detailed in Exhibit B, my firm has incurred a total of $_____ in expenses in connection with the prosecution of the Class Actions. The expenses are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

Comment [A3]: Expenses should be vetted so that they all relate to the time period, the clients in the Class Actions, and the claims in the Class Actions. All first class airfare should be reduced to economy; working meal reimbursement (including meals with clients) should be reasonable; alcoholic drinks should not be claimed.

8. With respect to the standing of my firm, attached hereto as Exhibit C is a brief biography of my firm as well as biographies of the firm's partners and of counsels.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 2016.

_____
XXXXXXXXXXXXXXXX

EXHIBIT A

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

LODESTAR REPORT

FIRM: [NAME]
REPORTING PERIOD: INCEPTION THROUGH AUGUST 30, 2016

PROFESSIONAL	STATUS*	HOURLY RATE	TOTAL HOURS TO DATE	TOTAL LODESTAR TO DATE
TOTAL				

Partner	(P)	Paralegal	(PL)
Of Counsel	(OC)	Investigator	(I)
Associate	(A)	Research Analyst	(RA)
Staff Attorney	(SA)		

EXHIBIT B

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

EXPENSE REPORT

Comment [A4]: Please delete any items that don't apply

FIRM: [NAME]
REPORTING PERIOD: INCEPTION THROUGH AUGUST 30, 2016

EXPENSE	TOTAL AMOUNT
Duplicating	
Postage	
Long-Distance Telephone / Fax / Conference Calls	
Messengers	
Filing / Service / Witness Fees	
Court Hearing & Deposition Transcripts	
Online Legal & Financial Research	
Overnight Delivery Services	
Experts/Consultants	
Litigation Support/Electronic Discovery	
Work-Related Transportation/Meals/Lodging	
Litigation Fund Contribution	
Miscellaneous	
TOTAL	**$0**

EXHIBIT 10

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

EXPERT DECLARATION OF GEORGENE M. VAIRO

GEORGENE M. VAIRO, hereby declares and says:

1. I submit this declaration at the request of counsel for the Thornton Law Firm LLP. Specifically, I have been asked to provide an opinion as to whether Garrett Bradley of the Thornton Law Firm violated Federal Rule of Civil Procedure 11 in connection with the submission of Plaintiffs' Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs in the State Street FX litigation, *Arkansas Teacher Retirement System v. State Street Corp., et al.*, 11-cv-10230-MLW (D. Mass.) ("State Street Litigation").

2. Since 1995, I have been a Professor of Law and, in 2011, was named the David P. Leonard Professor of Law at Loyola of Los Angeles Law School. Currently, I am the David P. Leonard Professor of Law Emerita. Between 1982 and 1995, I was a Professor of Law at Fordham Law School in New York. Between 1987 and 1995, I served as the Associate Dean, and, in 1994, was named the Joseph R. Crowley Professor of Law, at Fordham Law School. I have been teaching, writing, and lecturing in the area of federal jurisdiction and procedure, including issues related to Rule 11 sanctions and class actions, since 1982. I have taught Federal Civil Procedure, Mass Tort Litigation, Federal Jurisdiction, International Dispute Resolution, and Class Action and Complex Litigation. I have written, and edited or co-edited, several books on federal practice and procedure. I have served as a member of the Board of Editors of Moore's Federal Practice since 1995, and have authored numerous law review and other articles about these subjects. I am the author of the chapters on removal jurisdiction, venue, change of venue, and multidistrict litigation for Moore's Federal Practice (3d ed. 1997), and update these chapters at least twice annually. Over the last 35 years, I have lectured or served on panels at numerous Federal Judicial Center, ALI-ABA, ABA, American Association of Law Schools, American College of Trial Lawyers, Pound Institute for Civil Justice, law school, local bar association, and other programs. In addition, I served on the Board of Trustees of the Dalkon Shield Claimants Trust from 1988, and as its Chairperson from August 1989, until the

termination of the Trust in 2000. I have served on the Board of Overseers of the RAND Institute for Civil Justice since 2006. Attached hereto as Exhibit A is a recent copy of my curriculum vitae.

3. One of my particular areas of expertise is Federal Rule of Civil Procedure 11. I have followed developments under the Rule since it was adopted in 1983. I have written numerous articles on Rule 11, including *Happy (?) Birthday Rule 11*, 37 Loy. L.A.L. Rev. 515 (2004) (Symposium ed.); *Rule 11 and the Profession*, 67 Fordham Law Rev. 589 (1998). I also have written a 1000 page treatise on Rule 11, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (3d ed. 2004) ("Vairo, Rule 11"). I was an invited speaker at the Advisory Committee on the Civil Rules hearings on Rule 11 in February 1992, which led to the amendments to Rule 11 that became effective in December 1993. I write and lecture on class action issues and developments, including *Is the Class Action Really Dead? Is that Good or Bad for Class Members*?, 64 Emory L.J. 477 (2014); *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 Univ. Texas Rev. of Litig. 721 (2013); and The Complete CAFA: Analysis and Developments Under the Class Action Fairness Act of 2005, LexisNexis (September 2011).

4. In addition to relying on my knowledge and experience, I have reviewed numerous documents supplied to me by counsel, including hearing transcripts, court filings, deposition transcripts, and interrogatory responses, in forming the basis for my opinions in this Declaration.

5. For the following reasons, it is my opinion that attorney Garrett Bradley of the Thornton Law Firm did not violate Fed. R. Civ. P. 11.

Rule 11 Background

6. In 1983, Rule 11 of the Federal Rules of Civil Procedure was substantially amended. The amendments to Rule 11 were part of a package of amendments designed to reverse the trends of increasing costs and delay in the federal courts. Unfortunately, Rule 11 became the source of debate and controversy.

7. One of the well-known problems with the 1983 version of Rule 11 was that it led to counterproductive satellite litigation that contributed to delay in the resolution of cases, rather than streamlining the administration of justice. For example, the Advisory Committee for Civil Rules noted that Rule 11 affected plaintiffs "more frequently and severely" than defendants; and that the Rule could lead to the counterproductive result that an attorney may decide not to withdraw a document that proves to be problematic because the act of doing so would trigger a sanctions proceeding either by opposing counsel or the court. The 1993 amendments to Rule 11 were designed to deal with these and other problems created by the 1983 version of Rule 11.[1]

8. The Advisory Committee expressly intended that its amendments to Rule 11 would reduce the volume of Rule 11 sanctions proceedings.[2] Although the 1993 amendments retained the "stop and think" requirement embodied in the Rule's reasonable inquiry requirement, as well as a "duty of candor," the amendments were designed to "generally provid[e] protection against sanctions if [attorneys] withdraw or correct contentions after a potential violation is called to their

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[1] Letter from Judge Sam C. Pointer, Chairman of the Advisory Committee for Civil Rules, To: Honorable Robert E. Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure (June 13, 1981, as revised in light of action taken by the Standing Committee at its meeting on July 18-20, 1991), at I. See Advisory Committee Note to 1993 Amendments to Rule 11, as approved by the Standing Committee ("Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.") (citing, G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1989)).

[2] Advisory Committee Note to 1993 Amendments to Rule 11.

attention."[3] Sanctions are appropriate, however, when an attorney "later advocat[es]" a paper presented to the court. Fed. R. Civ. P. 11(b).

9. Moreover, the Advisory Committee made clear in its Note to the 1993 amendments to Rule 11 that the rule is not a tool for compensation, and that sanctions ought to be imposed only to deter future conduct. The 1993 amendments to Rule 11, to put it another way, were designed to prevent and avoid hindsight sanctions determinations where an attorney or party withdraws or corrects contentions that otherwise might violate Rule 11.[4]

Procedural Context

10. On September 15, 2016, lead counsel in the State Street Litigation, Labaton Sucharow LLP ("Labaton"), filed Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Award Motion"). Dkt. # 102. That motion included a supporting declaration by Lawrence Sucharow ("Supporting Declaration") (Dkt. # 104) and additional declarations from the law firms seeking fees and expenses, including a declaration by Garrett Bradley of the Thornton Law Firm (Dkt. # 104-16).

11. The Thornton Law Firm, and other firms seeking fees and expenses, used a template provided by lead counsel Labaton in preparing their declarations. Dep. Testimony of Nicole Zeiss, June 14, 2017 at 20:13-21:17, 43:15-44:17; Dep.

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[3] *Id. See New Eng. Surfaces v. E. I. Dupont De Nemours & Co.*, 558 F. Supp. 2d 116, 123 n.7 (D. Me. 2008) (citing Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11 (the Rule now "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable")).

[4] Advisory Committee Note to 1993 Amendments to Rule 11 ("The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.) *See In re Disciplinary & Sanction Proceedings Against Gillig*, 807 F. Supp. 2d 604, 618 (N.D. Tex. 2011) ("In determining whether sanctions should be assessed, a court is not to judge an attorney's prefiling with the lens of 20/20 hindsight.").

Testimony of Garrett Bradley, June 19, 2017 at 81:19-82:8; Dep. Testimony of Evan Hoffman, June 5, 2017 at 93:10-94:8, 96:5-23.

12. Labaton collected the declarations from the various firms, and together with lead counsel's Supporting Declaration, filed such documents in support of the Award Motion. Dep. Testimony of Nicole Zeiss, June 14, 2017 at 16:10-18; Dep. Testimony of Evan Hoffman, June 5, 2017 at 103:5-15.

13. These declarations included lodestar analyses. Dkt. # 104.

14. Prior to the final settlement approval hearing and before any submission of fee declarations, during a status conference discussing the preliminary settlement agreement on June 23, 2016, Judge Mark L. Wolf asked attorney David Goldsmith of Labaton, lead counsel for the class, whether notice to the class of the proposed settlement would include the maximum amount of fees and expenses that Plaintiffs' class counsel would seek. Mr. Goldsmith said that the class attorneys were "contemplating in the 25 percent range." Dkt. # 85, Transcript of Status Conference, June 23, 2016 at 15:5-17. Judge Wolf responded: "That's great, . . . I usually start with 25 percent in mind." *Id.* at 18-22. On September 15, 2016, lead counsel filed the Award Motion containing the Supporting Declarations. Dkt. # 102.

15. On November 2, 2016, Judge Wolf held a hearing on the Award Motion. *See* Trans. of Hearing, Nov. 2, 2016, Dkt # 114 ("Hearing, Nov. 2, 2016"). Judge Wolf approved the $300 million settlement reached by the parties. Relying on the submissions of Plaintiffs' counsel, including the lodestar check showing fees and expenses for the Plaintiffs' firms of approximately $41 million, Judge Wolf approved an award of attorneys fees of $74,541,250, which represented 24.48% of the settlement fund. Together with an award of $1,257,697.94 in expenses, the Plaintiffs' attorneys were awarded 25.27% of the fund. Dkt. # 114 at 35:3-25.

16. On November 8, 2016, Garrett Bradley learned of a media inquiry concerning a potential double counting of fees for staff attorneys in the Supporting Declaration. Dep. Testimony of Garrett Bradley, June 19, 2017 at 85:23-86:11; Dep. Testimony of Nicole Zeiss, June 14, 2017 at 18:13-19:9.

17. Garrett Bradley immediately acted to alert his colleagues at his firm and co-counsel's firms of the need to investigate the media questions about potential billing errors. Dep. Testimony of Garrett Bradley, June 19, 2017 at 86:12-22. Two days later, on November 10, 2016, David Goldsmith of Labaton submitted a letter to Judge Wolf conceding that the Fee Petition included a double counting of staff attorney time. Dkt. # 116. A media article published December 17, 2016 discussed the letter and the contents of the Supporting Declaration. Dkt. # 117, Exhibit B.

18. On February 6, 2017, Judge Wolf issued an order calling for a hearing on March 7, 2017 and proposing the appointment of a Special Master, Gerald E. Rosen, a retired Federal District Court Judge. Dkt. # 117. In his order, Judge Wolf instructed that "Each of plaintiffs' counsel who submitted an affidavit in support of the request for an award of attorneys' fees, see Docket Nos. 104-15-104-24, shall attend" the March 7, 2017 hearing. Dkt. # 117 at 13.

19. At the hearing on March 7, 2017, Judge Wolf questioned several of the Plaintiffs' attorneys, including Garrett Bradley. Dkt. # 176 at 78:24-82:25 and 86:25-94:24. During the hearing, Garrett Bradley acknowledged the errors in the fee declaration language, including those that arose out of the Thornton Law Firm's use of the template provided by lead counsel. *Id.* at 87:10-12. He expressed regret for the errors. *Id.* at 86:25- 88:8-21, 90:24-91:7. At the conclusion of the hearing, Judge Wolf indicated that he would appoint Judge Rosen as Special Master, and the following day issued an order appointing Judge Rosen and setting forth his duties and powers. March 8, 2017 Order, Dkt. # 173.

Analysis

A. Garrett Bradley Met His Rule 11 Obligations Because He Took Immediate Action Once the Duplication and Template Issues Were Brought to His Attention.

1. Duplication Issue

20. As described in ¶¶ 7 and 8 above, a key aim of the 1993 amendments to Rule 11 was to encourage parties to correct offending papers presented to the court by prohibiting parties from "later advocating" a paper that otherwise would violate Rule 11.

21. Six days after Judge Wolf approved the settlement in the State Street Litigation, on November 8, 2016, Garrett Bradley learned of a media inquiry concerning apparent double counting of the names and time of several attorneys who were involved in document review. *See* ¶ 16, above.

22. Immediately upon learning of this possible issue ("the Duplication Issue"), Garrett Bradley acted to inform members of his firm and he, or others in his firm, informed Labaton and Lieff Cabraser attorneys who, in turn, immediately investigated whether there was a double count and found that there was. ¶ 17, above.

23. The three firms, with Labaton attorney David Goldsmith taking the lead, drafted a letter to Judge Wolf to inform him that there had, in fact, been a double counting of time. Garrett Bradley participated in the preparation of this letter, which conceded the mistake. The result of the double count was an approximately $4 million overstatement of the lodestar check -- in the Award Motion, the total lodestar amount stated was approximately $41 million, but it should have been approximately $37 million. On November 10, 2016, just two days after being informed about the possible double count, lead counsel submitted the letter to

Judge Wolf, confirming the double count and the overstatement of the lodestar amount. Dkt. # 116.

24. By immediately acting to inform his co-counsel, participating in the investigation of the possible double count and the preparation of the November 10, 2016 letter to the Court conceding the mistake, Garrett Bradley complied with his Rule 11 obligation as to the double count. Even if an attorney has failed to conduct a "reasonable inquiry" into factual contentions, Rule 11 sanctions may be imposed only when an attorney later advocates a position taken in a paper filed in court. Rule 11(b) provides that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or *later advocating* it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . ." that the paper is well-grounded in the facts and law, and not filed for an improper purpose. The "later advocating" language must be read together with Rule 11(c)(2), which provides a "safe harbor" for an attorney who is the target of a motion for sanctions if the offending paper is "withdrawn or appropriately corrected within 21 days." Fed. R. Civ. P. 11(c)(2).

25. Garrett Bradley ceased advocating the position taken in his declaration with regard to the double counting issue. Accordingly, it is inappropriate to find that Garrett Bradley violated Rule 11. While there is no "safe harbor" for an attorney who ceases relying on an offending paper AFTER the court issues an order to show cause, here Garrett Bradley took immediate action to investigate the issues raised by the media inquiry prior to Judge Wolf's February 6, 2017 Order. *See* Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 11 ("the Rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., **after** a show cause order has been issued on the court's own initiative") (emphasis added).

26. Moreover, "[*s*]*ua sponte* Rule 11 sanctions . . . must be reviewed with 'particular stringency.'" *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1256 (11th Cir. 2003). Only serious misconduct may be the basis for *sua sponte* imposition of sanctions. In *Young v. City of Providence*, 404 F.3d 33 (1st Cir. 2005), the First Circuit reversed the district court for imposing Rule 11 sanctions *sua sponte* based on an attorney's misstatements, stating: "It is true that courts ought not invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims. However, this is an argument for requiring *serious* misconduct, whoever initiated the inquiry into a violation -- not for distinguishing between the judge and opposing counsel. The "akin to contempt" language used by the Advisory Committee's Note may well have meant only that no safe harbor was needed *because* judges would act only in the face of serious misconduct." 404 F.3d at 39-40.

27. Garrett Bradley may not have fully complied with the "stop and think" aspect of Rule 11 because he signed the declaration without independently verifying whether the attorneys listed by the Thornton Law Firm in its declaration were also listed by one or the other of his co-counsel, with whom Thornton Law Firm had a fee allocation agreement. But Garrett Bradley did not violate Rule 11 because he informed the court that a mistake had been made two days after being alerted to the duplication problem.

28. Moreover, with respect to the Rule 11(b)(3) reasonable inquiry into the facts requirement, it is also significant that the double counting occurred on the fee petitions of co-counsel, the Labaton and Lieff Cabraser firms. The Thornton Law Firm, in fact, paid for the attorneys whose names appeared on Garrett Bradley's declaration. Nor did the Thornton Law Firm see the other firms' fee declarations before they were filed. Dep. Testimony of Evan Hoffman, June 5, 2017 at 103:5-15.

2. Use-of-Template Issues

29. In his February 6, 2017 Order, Judge Wolf raised additional issues, ones created by the Thornton Law Firm's use of the Labaton template. All lawyers who submitted fee declarations were ordered to attend the March 7, 2017 hearing. Garrett Bradley attended, and when confronted with inaccuracies related to the relationship of staff attorneys and others in his declaration to the Thornton Law Firm, he acknowledged that there were errors and apologized. *See* ¶ 19, above.

30. There is no evidence that Garrett Bradley recognized these errors before the Court issued its February Order.

31. For the same reasons discussed in ¶¶ 24-25 above, even if Garrett Bradley failed to conduct a reasonable inquiry, he did not violate Rule 11 because he acknowledged at the March 7, 2017 hearing that there were inaccurate statements in his declaration with respect to the nature of the staff attorneys, his firm's billing practices, and the other statements when he became aware of them. *See* ¶ 19, above; *see also* Ethical Report for Special Master Gerald E. Rosen prepared by Professor Stephen Gillers (Feb. 23, 2018) at 80-81 ("Gillers Report") (identifying six inaccuracies).

32. Even if the Court were to find that the inaccuracies violated Rule 11, the corrective action should obviate the need for the impostion of sanctions. *See New Eng. Surfaces v. E. I. Dupont De Nemours & Co.*, 558 F. Supp. 2d 116, 123 n.7 (D. Me. 2008) (citing Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11: the Rule now "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable"). *See also* Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11 ("Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.").

33. Although counsel should engage in their own Rule 11 investigation rather than rely on the work of co-counsel, it is reasonable under some circumstances for them to do so. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) ("We agree that reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry. See Fed. R. Civ. P. 11 advisory committee note."); *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 446 (5th Cir. 1992) (proper for attorney to rely on reports prepared by lawyer who was expert in the relevant area). Indeed, even the Advisory Committee Note to the generally more stringent 1983 version of Rule 11 suggests that reliance on co-counsel or forwarding counsel in appropriate circumstances may prevent a finding of a Rule 11 violation for a failure to engage in an independent investigation: "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as . . . whether he depended on forwarding counsel or another member of the bar." Fed. R. Civ. P. 11, advisory committee note. Given the complexity of the State Street Litigation and the time pressures associated with preparing for the settlement hearings, it was appropriate for the Thornton Law Firm attorneys to use the Labaton template as the basis for its lodestar analyis.

34. Moreover, for the reasons explained above, it was reasonable for counsel in a complex class action such as the State Street Litigation to rely on the template that was provided to them by Labaton, which was lead counsel in the State Street Litigation and especially experienced in submitting fee applications in complex class action litigation.

B. Garrett Bradley Did Not Violate the Rule 11 Duty of Candor to the Court Because the Record Fails to Show Clear and Convincing Evidence that Garrett Bradley Intentionally Misled the Court.

35. In his Report, Professor Gillers states that "There is ample evidence in the record that Garrett Bradley actually knew the Declaration contained inaccurarte information but signed it anyway." Gillers Report at 24, citing March 7, 2017 Hearing Tr., p.87: 13-14; 88: 2-9, 14-18;91: 5-7; 92: 3-8. As a predicate for concluding that Garrett Bradley's declaration contained false statements, Professor Gillers also states that he was "asked to assume that Garrett Bradley knew these statements were false when he submitted his Declaration." Gillers Report at 81. Professor Gillers then lists six statements from the declaration that contained inaccuracies.

36. Garrett Bradley admitted that these statements were inaccurate at the March 7, 2017 hearing, once he had been made aware of the issues. *See* ¶ 19, above. At the time he signed his declaration, he knew that staff attorneys from other firms and agencies were perfoming document review. But there is no evidence that he understood or believed that his declaration had incorrectly characterized these attorneys' relationship to his firm until the issue was raised in the February Order instructing him to appear at the March 7, 2017 hearing. In other words, although he had knowledge of certain facts, there is no evidence that he intended to mislead the court when he signed the declaration.

37. In the context of a sanctions proceeding or a proceeding that could lead to professional discipline, an attorney's reputation, among other things, is at risk. Accordingly, a high standard for finding misconduct must be met. *See In the Matter of Auerhahn*, No. 09-10206, WL 4352350 at *4 (D. Ma. Sept. 15, 2011 (adopting "clear and convincing" evidence standard in attorney disciplinary proceeding); *In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *81-86 (M.D. Fla. Oct. 18, 2017) (adopting the rule that "akin to

contempt" standard applies when courts consider Rule 11 sanctions *sua sponte*; collecting cases).

38. Although the statements identified by Professor Gillers were inaccurate, there is no evidence in the record that Garrett Bradley had intent to mislead the court, nor did he have reason to do so. Accordingly, his conduct did not rise to the level of culpability to justify sanctions for the following reasons:

1) Professor Gillers stated that there was ample evidence that Garrett Bradley knew the statements were inaccurate. Gillers Report at 24. Analysis of the statements cited by Professor Gillers do not support a finding of liability for failure to comply with the duty of candor imposed by Rule 11. For Rule 11 purposes, the "duty of candor" means that an attorney may not intentionally mislead the court. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) ("The district court's ruling appears to go even beyond the principle of Rule 3.3 of the ABA Model Rules which proscribes 'knowing' false statements of material fact or law. The district court made no finding of a knowing misstatement, and, given the well-established objective nature of the Rule 11 standard, such a requirement would be inappropriate. Both the earnest advocate exaggerating the state of the current law without knowingly misrepresenting it, and the unscrupulous lawyer knowingly deceiving the court, are within the scope of the district court's interpretation."). A violation of Rule 11 requires a finding of serious misconduct. *See In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *9 and *82 n.28 (M.D. Fla. Oct. 18, 2017) (imposing sanctions on counsel who "evinced a conscious disregard of their professional obligation" after receiving "numerous opportunities to voluntarily purge meritless

cases from the *Engle* docket, as well as several warnings about potential Rule 11 ramifications.")

2) The purpose for filing the Supporting Declaration was to provide a lodestar check on the request for a 25% fee award. All three law firms -- the Thornton Law Firm, Labaton, and Lieff Cabraser -- used the same template to support their fee declarations. Indeed, none of these declarations were wholly accurate. Dkt. # 176, Transcript of March 7, 2017 Hearing, at 78:24-82:85, 86:25-94-24.

3) Quite clearly, the key purpose of the fee declarations of all firms was to support the lodestar amount, meaning that the critical elements in the fee application were the hours worked by the various plaintiff attorneys and their hourly billing rates.

4) Although Garrett Bradley did not focus on the boilerplate language regarding staff attorneys in the declaration, the purpose of the declaration was to support the lodestar analysis. He should have read the entire declaration carefully, but his failure to do so does not undermine the validity of the number of hours and billing rates claimed for the staff attorneys in the declaration.

5) There is nothing in the record to indicate by clear and convincing evidence that Garrett Bradley intended to mislead the court regarding any aspect of the declaration. Rather, Garrett Bradley's reaction to the disclosure that the boilerplate language had resulted in Judge Wolf's believing that he had been misled was one of deep regret, thereby additionally belying any sense that he had intentionally misled the court. Dkt. # 176 at 88:8-21, 90:24-91:70. The inaccurate statements created a lack of clarity as to the nature of the relationship between many of the attorneys claimed in the

declaration and their relationship to the Thornton Law Firm. But, the material aspects of the declaration with respect to the hours and billing rates of the various attorneys listed in the declaration were true. Thus, there was no lack of candor for the purpose of Rule 11.

39. Garrett Bradley's "inaccurate statements" amount to mistatements, not lies. While unfortuante and regrettable, under the circumstances here, these statements amount to no more than mere "technical violations" of Rule 11. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986). The courts of appeals generally, both before and after the 1993 amendments to Rule 11, properly have taken a "lawyer sensitive" approach to Rule 11 to prevent an abusive use of the Rule. Vairo, Rule 11, at 68-69) (discussing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1987). Sanctions may be imposed when an attorney omits or mistates material facts, however, "courts generally will not impose sanctions for misstatements unless there is evidence that the proponent of the statement intended to mislead the court." Vairo, Rule 11, at 338 (collecting cases); *see also Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 146-47 (1st Cir. 2005) (reversing sanctions imposed by district court based on magistrate judge's Report and Recommendation: "In this case, the show cause order was prompted not by a concern that the recusal motion was objectively hopeless and so wasted a few hours but by what were perceived to be deliberate misrepresentations . . . This was the explicit and central concern of the show cause order. A judge is entirely warranted in pursuing suspected lies by counsel--probably this is done too rarely--but it is virtually certain that this show cause order would not have been issued absent the suspicion of deliberate falsehoods . . . Because there were no proven lies, we think that the Rule 11 findings cannot stand even though we agree that the motion was objectively hopeless."); *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069, 1077 (8th Cir. 2017) (the standard for imposing sanctions is whether the attorney's conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.") (citation omitted); *Midwest*

Disability Initiative v. JANS Enters., 2017 U.S. Dist. LEXIS 204669, at *12-13 (D. Minn. Dec. 13, 2017) (quoting *Adams*).

40. In a seminal First Circuit case, the court found that Rule 11 does not demand perfection. *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 468 (1st Cir. 1993). There, the First Circuit reversed a trial court's decision to impose Rule 11 sanctions for failing to make a "reasonable inquiry" because the attorney made "no significant false statement." *Id.* at 467. Speaking for the court, Judge Breyer noted: "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Id.* Similarly, in another seminal case, the Second Circuit ruled that mere "technical violations" -- such as the failure to edit the boilerplate language in the Labaton template -- are not sanctionable. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (*de minimis* violation of Rule 11 does not warrant imposition of sanctions; reversing sanctions), *cert. denied; County of Suffolk v. Grascek*, 480 U.S. 918 (1987); *Greenberg v. Sala*, 822 F.2d 882, 886-7 (9th Cir. 1987) (affirming denial of sanctions although complaint contained factual errors; sanctions appropriate only for significant errors such as "some error or admission by a litigant [that] undermined his entire case at a stroke").

41. More recently, the Second Circuit found that even if a statement is "literally false," if there is nothing in the record to suggest that counsel's mistatement is intentionally false and the statement had "a material impact on the meaning of the statement," sanctions are inappropriate. *Kiobel v. Millson*, 592 F.3d 78, 83 (2d Cir. 2010) (reversing sanctions). District courts are right to be concerned about inaccurate statements. However, not all inaccurate statements are sanctionable. For example, the Ninth Circuit reversed sanctions a district court imposed because the district court believed it was misled. The Ninth Circuit stated: "With the district court's salutary admonitions against misstatements . . ., we have no quarrel. It is, however, with Rule 11 that we must deal. The district court's interpretation of Rule 11 requires district courts to judge the ethical propriety of

lawyers' conduct with respect to every piece of paper filed in federal court." *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986); *Young v. City of Providence*, 404 F.3d 33, 41 (1st Cir. 2005) ("We are not suggesting that a deliberate lie would be immune to sanction merely because corrective language can be found buried somewhere else in the document. But here the trial judge did not find, and in these circumstances could not have found, that defense counsel had intended to deceive.").

42. The inaccurate statements in Garrett Bradley's declaration must be viewed in context and as a part of a whole. *See Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) ("'The focus of ... Rule [11] is the court paper as a whole, not individual phrases or sentences construed separately or taken out of context.... [A]t some level of analysis, every unsuccessful litigation paper contains an unsupported allegation or flawed argument.'") (quoting Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 9(D) at 133-34 (1989)); *see also Young v. City of Providence ex rel. Napolitano*, 404 F.3d. 33, 41 (1st Cir. 2005) ("The general rule is that statements must be taken in context, and that related parts of a document must be taken together." (internal citations omitted)). *See also Forrest Creek Associates, Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987) ("[Rule 11 sanctions] do[] not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well grounded in fact.'").

43. The purpose of the Supporting Declaration was to provide lodestar numbers to the court. Although Garrett Bradley's declaration contained inaccuracies, while regrettable and of understandable concern to the Court, taken as a whole, especially given the enormity and complexity of the State Street litigation and the Award Motion itself, Garrett Bradley's declaration did not violate Rule 11. A recent case in which a district court intitiated an investigation is instructive. In *In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *9-12 & *82 n.28 (M.D. Fla. Oct. 18, 2017), the four judge court noted: "As judges, we

are properly cautioned against using 20/20 hindsight in evaluating the actions of lawyers in the context of unprofessional conduct. We are insulated from the hurly-burly of the practice of law, the press of client demands, the call of time sheets to log, and the occasional dictatorial demands of the Court. So it is, with that caution in mind, that a full explanation of the factors that motivate us to impose sanctions." In a lengthy opinion, the court imposed sanctions, but in that case counsel had "evinced a conscious disregard of their professional obligation" after receiving "numerous opportunities to voluntarily purge meritless cases from the *Engle* docket, as well as several warnings about potential Rule 11 ramifications." *Id.* at *82 n. 28. There is no evidence that Garrett Bradley evinced conscious disregard of his professional obligations. Rather, he sought to correct the double counting error immediately upon learning of it, and when made aware of other issues raised by the use of the template language, he acknowledged and apologized for the misstatements made because he had failed to carefully read and edit the Labaton template.

44. In summary, for the reasons stated above, it is my opinion that Garrett Bradley's conduct in this action did not violate Rule 11.

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

Date and Place: March 26, 2018, Santa Barbara, CA

Georgene M. Vairo

Exhibit A

GEORGENE M. VAIRO
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EMPLOYMENT & PROFESSIONAL POSITIONS:

1995 - present: LOYOLA OF LOS ANGELES LAW SCHOOL, David P. Leonard Professor of Law Emerita; Courses: Complex Litigation, Federal Courts, Civil Procedure, Mass Tort Litigation, International Dispute Resolution

2007 – present: AUSWIN REALTY CORP., President; oversee and manage family owned residential and commercial real estate in New York City

1982 - 1995: FORDHAM UNIVERSITY SCHOOL OF LAW, Associate Dean (l988-1995) and Leonard F. Manning Professor of Law (appointed 1994); Awarded Dean's Medal of Recognition, May 1994; Courses: Complex Litigation, Federal Courts, Civil Procedure

1988 - 2000: DALKON SHIELD CLAIMANTS TRUST, Chairperson, Board of Trustees; Court appointed position; participation in design and implementation of plan to distribute over $3 billion to over 200,000 claimants

1994 - Present: EDITORIAL BOARD, Moore's Federal Practice

1981 - 1982: THE HONORABLE JOSEPH M. McLAUGHLIN, United States District Court, E.D.N.Y., Law Clerk

1979 - 1981: SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Associate, specialized in antitrust litigation; Pro Bono Activity: Special Deputy, New York State Division of Human Rights; prosecuted sex discrimination case

Summer 1978 - Spring 1979: HUGHES, HUBBARD & REED, Summer Associate and Law Clerk

1977 - 1979: RESEARCH ASSISTANT TO PROFESSOR SHEILA BIRNBAUM, Fordham University School of Law

1974 - 1976: SCHOOL OF THE TRANSFIGURATION, Corona, New York, Junior High School Math Teacher; Faculty editor of the school yearbook and literary magazine

1972 - 1973: BLUE RIDGE OPTICAL CO., Charlottesville, Virginia, Optical Technician

PROFESSIONAL LICENSES: Admitted to the New York bar, 1980; Certified U.S. Merchant Marine Officer, 50 Ton Master License, September 2008

EDUCATION: FORDHAM UNIVERSITY SCHOOL OF LAW, J.D., cum laude, 1979
Rank: 1 out of 320
Average: 91
Honors: Law Review, Associate Editor
1978 National Moot Court Competition
Champion: Best Oral Argument;
Runner Up Best Brief; Best Brief in Region
Honors of the Graduating Class for highest cumulative grade point average

Prizes: Law School Prize for highest rank in section, 1977 and 1979; Eugene Keefe Award for Outstanding Service to the Law School; Chapin Prize; Francis Thaddeus Wolff Memorial Prize; Andrew M. Stillman Memorial Prize; Prize of the West Publishing Company; American Jurisprudence Prizes for Torts, Corporations and Federal Courts

UNIVERSITY OF VIRGINIA, M.Ed., Social Studies, 1975
Average: A
Honors: Master's Thesis and Comprehensive Exam: Distinction

SWEET BRIAR COLLEGE, B.A., Economics, 1972
Average: B
Honors: Dean's List, 1972
Phi Beta Kappa, Inducted March 1989
Tau Phi Academic Society
1997 Distinguished Alumna Award

SELECTED PUBLICATIONS:

Georgene Vairo, *Passion for Justice: A Tribute to George Cochran*, 85 Miss. L. J. 1005 (2017)

Georgene Vairo, *The Role of Influence in the Arc of Tort "Reform"*, 65 Emory L. J. 1741 (2016)

Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members*?, 64 Emory L.J. 477 (2014)

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Georgene M. Vairo, *Symposium, Summary Judgment on the Rise: Is Justice Falling?*, Defending Against Summary Justice: The Role Of The Appellate Courts (Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges)

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and Litigation in Federal and State Courts (American Law Institute 1984, 1985)

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Hawk & Vairo, International Patent Licensing Restrictions, 8 Revue Suisse Du Droit International De La Concurrence 1 (1980)

Note, The Unionization of Law Firms, 46 Fordham L. Rev. 1008 (1978)

SELECTED PRESENTATIONS:

Loyola Law School Journalism School; Speaker on two panels; Basics of Civil Procedure & Class Action and Complex Dispute Resolution; LA; June 2014

PLI Class Action Program; keynote speaker; NYC; June/July since 2011

Pacific Pride Foundation; Supreme Court Marriage Equality Program; keynote speaker; Santa Barbara; July 2013

Thrower Symposium; Future of Class Actions; Panel Speaker; Emory Law School, Atlanta; Feb. 2014

International Assn. of Defense Counsel; Class Action Developments and Emerging Issues; Speaker; San Diego; Feb. 2014

Mass Tort Dispute Resolution Program; Speaker; Pepperdine; April 2014

ALI-CLE; Class Action and Aggregate Litigation Developments; moderator and speaker; April 2014

L.A. County Superior Court; Class Action Developments; presentation to all judges of the court; L.A.; May 2014

Panelist, AALS Section of Litigation Program, CAFA, Class Actions and Beyond (Jan. 2013)

Keynote Speaker, PLI Class Actions Program (July 2010-present)

Speaker, Loyola Law School Legal Journalism Program, "Complex Litigation and Class Actions Developments," (June 2011 & 2012)

Moderator and panelist, Loyola Law School Civil Justice Symposium on "Injuries Without Remedies" (March 2010)

Featured Speaker and Panelist, Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges, "Defending Against Summary Justice: The Role of the Appellate Courts" (July 2008)

Faculty Member of ALI/ABA Advanced Program on Federal and State Civil Litigation, since 1983

Panelist and Moderator, Mealey's TeleConference, Class Action Fairness Act and Other Recent Class Action Developments (Nov. 2007; March 2008)

Panelist, Mass Torts and Bankruptcy Panel, National Conference of Bankruptcy Judges, San Antonio (Nov. 2005)

Panelist, 2005 Stanford Law Review Symposium: The Civil Trial: Adaptation and Alternatives (Feb. 2005)

Moderator and Panelist, Mass Torts and Bankruptcy Panel, National Conference of Bankruptcy Judges, San Diego (Oct. 2003)

Moderator and Panelist, ADR and Mass Torts, CPR Institute for Dispute Resolution, San Diego (May 2003)

Featured Speaker, UBS Warburg Asbestos Litigation Conference (February 2003)

Featured Speaker and Panelist, Pound Institute for State Court Judges, "Trends in Federalism and their Implication for State Courts," (July 2002)

Featured Speaker and Panelist, ABA Section of Litigation Annual Meeting Program on New Federal Rules of Civil Procedure (August 1994)

Speaker, Burns Lecture, Loyola of Los Angeles Law School, "Rule 11: Past as Prologue," April 8, 1994

Speaker, New York State Bar Association and Association of the Bar of the City of New York Programs on 1993 Amendments to the Federal Rules of Civil Procedure (Winter, Spring and Summer 1994)

Lecturer, First and Third Circuit Judicial Workshop; Topic: Summary Judgment (March l992)

Invited Speaker, Civil Rules Advisory Committee Hearing on Fed. R. Civ. P. 11 (February 1991)

Panelist, Second Circuit Judicial Conference; Topic: Rule 11 (September l990)

Lecturer, Anglo-American Legal Exchange Program (September 1989); Topic: Rule 11

Lecturer, Eleventh Circuit Judicial Conference and Eighth and Tenth Circuit Judicial Workshop; Topic: Summary Judgment (May 1988; January 1989)

Lecturer, Fourth, Fifth, Sixth and Seventh Circuit Judicial Workshops (March - December 1988); Topic: Rule 11

Lecturer, Federal Judicial Center Seminar for Newly Appointed Judges (November 1987 and December 1988); Topic: Summary Judgment

Lecturer, Canada-United States Legal Exchange Program (October 1987) Topic: Rule 11

Panelist at Federal Bar Council program on sanctions; Annual Winter Meeting, St. John's, V.I., February 1987

Panelist at Federal Bar Council program on Rule 11, New York, New York, June 1986

Participant in Association of the Bar of the City of New York Program on Rule 11, April 1986

Panelist at NAACP Legal Defense and Education Fund Annual Lawyer Training Institute, Warrenton, Virginia, September 1985

Panelist at Legal Aid Society of New York Program on August 1983 Amendments to the Fed. R. Civ. P., February 1983

Lecturer for BAR/BRI, a major Bar Review course, in Massachusetts, Connecticut and New York on Conflict of Laws, Federal Jurisdiction and Business Organizations, 1983-1995

PROFESSIONAL SERVICE:

Editorial Board, *Moore's Federal Practice*, since 1995; Board of Overseers, Rand Corp. Institute for Civil Justice, since 2006; ABA Founding Academic Fellow of the Roscoe Pound Civil Justice Institute; Reporter, ABA TIPS Task Force on Asbestos Litigation, since January 2013; Member, Second Circuit Judicial Conference Planning Committee, l987-l990; Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1994-97; ALI/ABA Programs Subcommittee, since 1995; Member, Litigation Advisory Committee, Practicing Law Institute, 1990-2001; Member, Editorial Board, American Arbitration Association, *ADR Currents*, 1995-2002; Member, Advisory Group on American Law Institute Project on Complex Litigation (1987-1991); Editorial Board, The Practical Lawyer, 1990-2002; American Law Institute-American Bar Association, since l988.

BAR ADMISSIONS: New York, First Department, April 1980; United States District Court for the Southern District of New York and the Eastern District of New York, May 1980; United States Court of Appeals for the Second Circuit, May 1980; United States Supreme Court, May 1986; United States Court of Appeals for the Fourth Circuit, October l990; United States District Court, District of Connecticut, December l99l

BAR AND PROFESSIONAL ASSOCIATIONS: American Law Institute, elected October 13, 1989; American Bar Association, Section of Litigation, Subcommittee on Rule 11; American Bar Association, Judicial Administration Division, Federal Courts Committee; New York State Bar Association, Executive Committee of Commercial and Federal Litigation Section; Association of the Bar of the City of New York, Federal Courts Committee (l988-l99l term); Long Term Planning Committee (1993-1996 term); Women's Bar Association of the State of New York

OTHER SERVICE: Board of Directors, Sweet Briar College (Vice Chair); Board of Trustees, Museum of Contemporary Art Santa Barbara (First Vice President and member of Executive Comm.); Board of Directors, Pacific Pride Foundation

PERSONAL: Born May l4, l950; Activities include road bicycle racing (2005 National Championships, Women's 55+ Road Race & Criterium; 2005 CA State Championships, Women's 55+ Road Race, Criterium & Time Trial; 2004 CA State Women's 90 + 2-person TT Champion; Everest Challenge Road Race (5th Cat. 3, Sept. 2005), and charity bike rides (California AIDS Ride 3, 4 & 5 (San Francisco to Los Angeles); Florida AIDS Ride 2 (Orlando to Miami); Alaska AIDS Vaccine Ride (Fairbanks to Anchorage); Death Ride (Tour of the California Alps)); sailing; hiking; running (completed l98l N.Y.C.

Marathon in 3 l/2 hours); basketball (point guard on National Law School Basketball Tournament Championship (men's team, l978); 4 years College Varsity basketball, field hockey and lacrosse teams; cooking; vegetable gardening; and power and sail boating.

EXHIBIT 11

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Co-Lead Plaintiffs' Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation	Case No: 15-md-02617-LHK (NC) **DECLARATION OF ANDREW N. FRIEDMAN IN SUPPORT OF PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS** Date: February 1, 2018 Time: 1:30 p.m. Judge: Hon. Lucy H. Koh Ctrm: 8, 4th Floor

I, Andrew N. Friedman, declare:

1. I am an attorney admitted to practice in the Northern District of California *pro hac vice* in the above-captioned lawsuit ("Action") against the Anthem Defendants ("Anthem") and the Non-Anthem Defendants (collectively, "Defendants"), and am Court-appointed Co-Lead Plaintiffs' Counsel in this action. I have practiced law since 1983. I am a partner with the firm of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") in Washington, D.C. and have been litigating class actions at Cohen Milstein since 1985. I am making this declaration in support of Plaintiffs' Motions for Final Approval of Class Action Settlement and for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards.

2. I believe the proposed settlement of this Action is extremely beneficial to the Class. Among other things, the Settlement provides for at least two years of free credit monitoring and significant enhancements to Anthem's data security practices. By settling now, the Class is able to take advantage of these remedies that likely will be unavailable or worth substantially less by the time this case could be litigated to a final judgment.

3. I acted as Co-Lead Counsel in this case and worked in coordination with Co-Lead Counsel, Eve Cervantez, as well as all other co-counsel. As Co-Lead Counsel, my firm worked on virtually every aspect of this litigation, although I regularly made work assignments in this Action to avoid duplicative efforts. Ms. Cervantez and I conferred almost daily for nearly two years on strategic decisions in this case and ultimately made decisions concerning virtually every significant action in the litigation. For the nearly two years of active litigation, I spent approximately 60 percent of my billed time on this litigation, while the other partner and two associates who spent the most time on this case from my Firm spent approximately half of their billed time. As a result, these four attorneys were precluded from undertaking significant work in other cases during that time period. Among the tasks in which I, or legal professionals at my Firm, took primary responsibility include:

- Conducting an extensive factual investigation into the data breach, with particular focus on highly technical aspects and the potential disclosure of class member data on the Dark Web;
- Conducting discovery of BCBSA (including taking 2 depositions thereof);
- Responding to Defendants' Requests for Production;
- Responding to Defendants' Interrogatories;
- Collecting, redacting Personally Identifiable Information from, and producing documents for over 100 Named Plaintiffs;
- Regularly holding meet and confer conferences with Defendants' counsel over the scope of discovery requests and drafting numerous joint discovery dispute letters regarding same, some of which were submitted to Magistrate Judge Cousins;
- Coordinating the production of 29 Plaintiffs' computers and tablets (totaling 50 devices) to the Independent Forensic Examiner;
- Preparing for and defending Plaintiffs' depositions, as well as preparing other Plaintiffs' counsel to do same, for the 105 Plaintiffs who were deposed;
- Reviewing documents and deposing 9 senior Anthem executives and information security personnel;
- Deposing three of Defendants' experts who provided opinions regarding whether the Anthem Data Breach resulted in Plaintiffs' PII becoming available for online sale, whether Chinese advanced persistent threat groups steal personal information in order to commit financial crimes against individuals, and whether Plaintiffs' damages expert's proposed conjoint survey was feasible;
- Defending the deposition of Plaintiffs' expert witness regarding whether the Anthem Data Breach created an increased risk of PII exposure and fraud for class members; and
- Arguing at Hearings on various motions, including the motion regarding Request for Production No. 33 involving the forensic examination of Plaintiffs' computers and tablets.

4. In addition, as one of Co-Lead Counsel, I oversaw the litigation and, along with Co-Lead Counsel, Eve Cervantez, made final strategy decisions, and drafted, edited, reviewed

and/or approved all filings with the Court and correspondence with opposing counsel. Among the tasks in which we oversaw and assisted in include:

- Drafting the First, Second, Third, and Fourth Consolidated Amended complaints;
- Drafting sections of the oppositions to two Motions to Dismiss;
- Preparing for the hearings on the first and second motions to dismiss;
- Strategizing over the scope of Defendants' responses to Plaintiffs' discovery requests;
- Coordinating the preparation for and taking of numerous defendant witnesses;
- Coordinating the drafting of and argument of numerous discovery motions;
- Attending and arguing at nine Case Management Conferences;
- Coordinating with plaintiffs' counsel in the two remaining state court actions related to the Anthem data breach;
- Drafting sections of the class certification motion;
- Coordinating and assisting in the selection of Plaintiffs' experts and preparing for the deposition of Plaintiffs' expert on the increased risk of fraud to members of the Class and preparing for the deposition and defending the deposition of one of Plaintiffs' damage experts; and
- Conducting settlement negotiations, including participating in three mediation sessions before Judge Layn Philips.

ATTORNEY SKILL AND EXPERIENCE

5. For 47 years, Cohen Milstein has been a leading class action firm, recovering tens of billions of dollars for injured plaintiffs. Cohen Milstein is unique among class action firms in the breadth of its practice areas. It has demonstrated a commitment to protecting consumers and the public interest in dozens of antitrust, securities, consumer protection, product liability, civil

rights, and human rights class actions. Cohen Milstein has earned recognition as a "class-action powerhouse" (*Forbes*), "the most effective law firm in the U.S. for lawsuits with a strong social and political component" (*Corporate Legal Times*), one of "America's 25 Most Influential Law Firms" (*The Trial Lawyer*), and one of the "Most Feared Plaintiffs Law Firms" (*Law360*). In 2016, *Law360* included Cohen Milstein as one of only three Plaintiffs firms on its list of Class Action Groups of the Year.[1] A more detailed description of my firm's practice and achievements can been found at www.cohenmilstein.com

6. The attorneys primarily working on this matter from my firm also brought their significant collective experience and skill to bear in reaching this excellent result for the class.

- **Andrew Friedman.** I am a partner and Co-Chair of the firm's Consumer Protection practice group. Practicing in the class action field since 1985, I have specialized in litigating complex, multi-state class action lawsuits against manufacturers and consumer service providers such as banks, insurers, credit card companies and others. Over the years, I have been lead or co-lead counsel in numerous important cases, bringing relief to millions of consumers and recovering hundreds of millions of dollars in class actions. I was one of the principal counsel in cases against Nationwide and Country Life, which asserted sales marketing abuses in the marketing of so-called "vanishing premium policies," where insurance agents sold insurance policies to unsuspecting consumers promising that after a relatively short time the dividends generated from the policy would be so high as to be able to fully pay the premiums. The Nationwide case resulted in a settlement valued at between $85 million and $103 million, while a settlement with Country Life made $44 million in benefits available to policyholders. Recently, I litigated a lawsuit against Symantec, Corp., and Digital River, Inc., a four-year long nationwide class action battle regarding the marketing of a re-download service in conjunction with the sale of Norton software. The case settled in a $60 million all-cash deal one month before the case was about to go to trial – one of the most significant consumer settlements in years.

  I have significant experience specific to privacy and data breach cases. Among other cases, I was appointed to the Plaintiffs' Steering Committee in both *In re Vizio, Inc. Consumer Privacy Litig*. (C. D. Cal.) (a case alleging that a major television manufacturer surreptitiously collected sensitive personal information from television

[1] http://www.law360.com/articles/743097/class-action-group-of-the-year-cohen-milstein.

purchasers) and *In re The Home Depot, Inc. Customer Data Sec. Breach Litig.* (N.D. Ga) (a data breach case relating to the theft of credit cards from Home Depot customers on behalf of financial institutions). I also played significant roles in *In re: Science Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.* (D.D.C.) (case involving data breach of medical and personal health information of 4.7 million former and active duty military personnel dismissed on standing grounds) and *Nader v. Capital One Bank* (USA), N.A. (C.D. Cal.) (one of principal counsel in litigation involving bank covertly recording outbound customer service calls, resulted in $3 million settlement).

Prior to my current role as Co-Chair and member of the Consumer Protection group, I was a member of the Securities Litigation & Investor Protection practice, litigating many important matters, including the *Globalstar Securities Litigation* in which I served as one of the lead trial counsel. The case settled for $20 million during the second week of the trial.

Prior to joining the firm, I was an attorney with the U.S. Patent and Trademark Office. I graduated from Tufts University in 1980 and the National Law Center at George Washington University in 1983.

- **Geoffrey Graber.** Mr. Graber is a partner specializing in complex litigation aimed at protecting consumers deceived and harmed by consumer service providers such as banks, insurance, and health care companies. Prior to joining the firm, Mr. Graber served as Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities (RMBS) Working Group at the United States Department of Justice, overseeing the DOJ's nationwide investigation into the packaging and sale of mortgage-backed securities leading up to the financial crisis. The investigations overseen by Mr. Graber ultimately recovered more than $36 billion. Previously, he also served as Counsel in the DOJ's Civil Division, proposing and leading a three-year investigation of Standard & Poor's and its ratings and structured finance products from 2004 to 2007. Before joining the DOJ, Mr. Graber was an associate at a top-tier defense firm, where he defended Fortune 500 companies and their officers and directors in securities and derivative suits, consumer class actions, and government investigations. Mr. Graber graduated from Vassar College in 1995 and the University of Southern California Gould School of Law in 2000.

- **Sally Handmaker.** Ms. Handmaker is an associate and a member of the firm's Consumer Protection practice group, litigating actions to enforce consumer rights under federal and state laws. Ms. Handmaker has been the lead associate in several highly-successful consumer class actions in which she was involved in all aspects of litigation. These include a $60 million settlement against Symantec and Digital River alleging misrepresentations regarding the companies' Extended Download Service and a $60 million settlement against Caterpillar alleging that engine exhaust system defects resulted in power losses and shutdowns that prevented or impeded their vehicles from transporting goods or passengers. Prior to joining Cohen Milstein, Ms.

Handmaker was a litigation associate at a top-tier defense firm, working on complex commercial and general litigation matters in federal and state courts covering a variety of subject matters, including antitrust, securities litigation, sports, intellectual property, and employment. Ms. Handmaker graduated from the University of Southern California in 2007 and the University of Virginia School of Law in 2011.

- **Eric Kafka.** Mr. Kafka is an associate and a member of the firm's Consumer Protection practice group, litigating actions to enforce consumer rights under federal and state laws. Mr. Kafka is the lead associate in several complex and ongoing consumer class actions in which he is involved in all aspects of litigation. Prior to joining Cohen Milstein, Mr. Kafka was a litigation associate at a top-tier defense firm, working on complex commercial and general litigation matters. Prior to law school, Mr. Kafka worked on multiple successful political campaigns. Mr. Kafka graduated from Yale University in 2008 and Columbia University School of Law in 2014, where he was recognized as a Harlan Fiske Stone Scholar for superior academic achievement.

TIME AND EFFORT DEDICATED TO THE CASE

7. Exhibits 1 and 3 to the Declaration of Eve H. Cervantez provide detailed summaries of the amount of time spent by my firm's partners, attorneys, and professional support staff who were involved in this litigation through September 30, 2017. They do not include any time devoted to preparing this declaration or otherwise pertaining to the Motion for Attorneys' fees. The lodestar calculation is based on my firm's current billing rates, and was prepared from contemporaneous time records regularly prepared and maintained by my firm. The hourly rates for my firm's partners, attorneys, and professional support staff are the usual and customary hourly rates charged for their services in similar complex litigation. In addition, my firm has submitted fee petitions in other cases that have reported hourly rates at amounts comparable to those sought herein (or their historical equivalents), and courts have approved an award of attorneys' fees in such cases. *See, e.g.*, *Nitsch v. DreamWorks Animation SKG, Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161, at *9 (N.D. Cal. June 5, 2017) (Koh, J.) (finding that Cohen Milstein's 2017 "billing rates for the attorneys, paralegals, and litigation support staff . . . are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs

have submitted adequate documentation justifying those rates" – my rate of $870 per hour was approved for a partner (Daniel Small), who graduated law school four years after I did); *In Re Broadcom Corp. Stockholder Litig.*, No. 15-cv-00979-JVS-PJWx (C.D. Cal. Feb. 27, 2017) (finding Cohen Milstein's fees "to be high but reasonable," noting attached declarations and exhibits demonstrated "that the firm's attorneys are experienced and successful litigators" and that "other courts have recently approved the firm's proposed rates" and concluding that the 2017 "rates are also reasonable for the market" – my rate of $870 was approved for a partner (Carol Gilden), who graduated law school my same year; a rate ten dollars per hour lower than Mr. Graber's ($720) was approved for a partner (Joshua Devore) who graduated law school his same year); *In Re: Cast Iron Soil Pipe and Fittings Antitrust Litig.*, No. 1:14-md-2508-HSM-CHS (E.D. Tenn. May 26, 2017) (granting attorneys' fees of one-third of the settlement fund at Cohen Milstein's fees after considering "the value of the services on an hourly basis " – a rate $30 per hour more than my rate was approved for a partner (Kit Pierson) who graduated law school my same year; Ms. Handmaker's rate of $490 per hour was approved for an associate (Robert Braun) who graduated law school her same year as "fairly reflect[ing] the benefit of the services rendered."); *see also Khoday et al. v. Symantec Corp. et al.*, No. 0:11-cv-00180-JRT-TNL (D. Minn. Apr. 5, 2016) (fee award using Cohen Milstein's 2015 rates to calculate the lodestar value of class counsel's work to "double-check" the percentage-of-the-fund method, including my 2015 rate of $815 per hour and Ms. Handmaker's 2015 rate of $445 per hour).

8. Throughout the litigation, Plaintiffs' Counsel staffed the matter efficiently and took steps to avoid duplication of effort.

9. The total number of hours reasonably expended on this litigation by my firm from inception through September 30, 2017 is 16,350.9. The total lodestar for my firm at current rates is $7,719,178.50. Expense items are billed separately and are not duplicated in my firm's lodestar.

10. The expenses my firm incurred in litigating this action are reflected in the books and records of my firm. These books and records are prepared from expense vouchers, receipts, and check records and other source materials and accurately reflect the expenses incurred.

11. My firm incurred a total of $116,054.19 in unreimbursed internal expenses from inception through October 5, 2017. In addition, my firm contributed $228,000 to the cost fund. All of these expenses were reasonable and necessary for the prosecution of this litigation. A summary of those expenses by category is attached as Exhibit 7 to the Declaration of Eve Cervantez.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 1, 2017.

/s/ Andrew N. Friedman
Andrew N. Friedman

EXHIBIT 12

EXHIBIT 1

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Abington Cole & Ellery LLP	22.60	$ 12,430.00
Altshuler Berzon LLP	11,088.30	$ 6,509,819.50
Barrack, Rodos & Bacine	1,312.50	$ 653,171.50
Berger & Montague, P.C.	184.00	$ 114,831.50
Bonnett, Fairbourn, Friedman & Balint. P.C.	1,143.40	$ 443,085.00
Boucher LLP	801.30	$ 198,754.00
Branstetter, Stranch & Jennings, PLLC	2,196.30	$977,342.00
Cafferty, Clobes, Meriwether & Sprengel LLP	5.50	$3,632.50
Carlson, Lynch, Sweet, Kilpela & Carpenter LLP	205.80	$ 77,197.50
Chestnut Cambronne Attorneys at Law	16.80	$8,715.00
Cohen & Malad	2,253.80	$ 1,040,895.00
Cohen Milstein Sellers & Toll	16,350.90	$7,719,178.50
Consumer Law Practice of Dan LeBel	16.60	$ 8,531.00
Cotchett Pitre & McCarthy LLP	32.10	$ 12,840.00
Desai Law Firm PC	8.10	$4,175.00
Emerson Scott LLP	113.50	$ 74,099.50
Fagan Emert & Davis LLC	19.90	$ 7,960.00
Farmer, Jaffe, Weissing LLP	31.60	$16,410.00
Federman & Sherwood	316.10	$180,795.00
Finkelstein Thompson LLP	19.40	$ 13,530.00
Fitapelli & Schaffer LLP	17.90	$ 4,800.00
Forbes Law Group	310.50	$ 116,405.00
Gibbs Law Group LLP	10,844.20	$ 4,902,419.50

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Goldman Scarlato & Penny PC	2,006.90	$ 1,295,152.50
Harwood Feffer LLP	24.00	$ 18,600.00
Heins Mills & Olson PLC	665.00	$254,815.00
Janet, Jenner & Suggs, LLC	20.30	$6,885.00
Kantrowitz, Goldhamer & Graifman, P.C.	182.60	$ 94,092.50
Kaplan, Fox, & Kilsheimer LLP	367.70	$184,459.50
Karon LLC	10.30	$6,508.50
Keller Rohrback Law Offices LLP	3,607.00	$1,521,311.00
Law Offices of Paul C. Whalen, P.C.	133.10	$106,480.00
Law Office of Angela Edwards	191.00	$ 100,275.00
Levi & Korsinsky LLP	176.10	$ 97,039.50
Lieff Cabraser Heimann & Berstein	10,594.6	$ 5,097,053.00
Litigation Law Group	8.60	$5,195.00
Lockridge Grindal Nauen PLLP	410.40	$138,920.00
Milberg LLP	719.0	$302,157.50
Morgan & Morgan	692.00	$ 353,080.00
Murray Law Firm	576.70	$203,745.00
Pomerantz LLP	1,109.70	$528,869.00
Robinson Calcagnie Robinson Shapiro Davis, Inc.	370.50	$ 203,270.00
Schubert Jonckheer & Kolbe LLP	3,808.30	$ 1,423,234.00
Scott + Scott LLP	547.90	$ 219,970.00
Skepnek Law Firm	107.40	$ 60,015.00
Stritmatter Kessler Whelan Koehler Moore Kahler	175.80	$ 77,250.00

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Stueve, Siegel, Hanson LLP	2,244.10	$ 953,503.50
Stull, Stull & Brody	1,537.90	$ 1,059,189.00
The Giatras Law Firm	28.30	$7,895.00
Tousley, Brain Stephens	10.70	$ 6,096.50
Webb, Klase & Lemond LLC	238.50	$ 127,192.50
Weitz & Luxenburg, P.C.	135.40	$61,435.00
Zimmerman Reed LLP	542.10	$217,643.50
Total	**78,553.00**	**$37,832,349.00**

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Abington Cole & Ellery LLP	22.6	$ 12,430.00	Cornelius P. Dukelow	Partner	2001	$ 550.00	22.6	$ 12,430.00
Altshuler Berzon LLP	11,088.3	$6,509,819.50	Eve Cervantez	Partner	1992	$ 860.00	3,039.4	$ 2,613,884.00
			Jonathan Weissglass	Partner	1994	$ 820.00	623.6	$ 511,352.00
			Stacey Leyton	Partner	1998	$ 770.00	27.4	$ 21,098.00
			Danielle E. Leonard	Partner	2001	$ 690.00	2,395.3	$ 1,652,757.00
			Peder J. Thoreen	Partner	2001	$ 690.00	13.5	$ 9,315.00
			Zoe Palitz	Associate	2010	$ 460.00	11.1	$ 5,106.00
			Corinne Johnson	Fellow	2012	$ 405.00	47.7	$ 19,318.50
			Meredith Johnson	Associate	2012	$ 405.00	2,016.5	$ 816,682.50
			Tony LoPresti	Associate	2012	$ 405.00	774.5	$ 313,672.50
			Adan Martinez	Legal Clerk	Legal Clerk	$ 285.00	119.3	$ 34,000.50
			George A. Warner	Legal Clerk	Legal Clerk	$ 285.00	28.7	$ 8,179.50
			Hannah Kieschnick	Legal Clerk	Legal Clerk	$ 285.00	33.8	$ 9,633.00
			Lisa Bixby	Legal Clerk	Legal Clerk	$ 285.00	31.6	$ 9,006.00
			Ming Cheung	Legal Clerk	Legal Clerk	$ 285.00	47.0	$ 13,395.00
			Rebecca Chan	Legal Clerk	Legal Clerk	$ 285.00	16.1	$ 4,588.50
			Zach Manfredi	Legal Clerk	Legal Clerk	$ 285.00	60.9	$ 17,356.50
			Hannah Cole	Paralegal	Paralegal	$ 250.00	113.6	$ 28,400.00
			Jocelyn Smith	Paralegal	Paralegal	$ 250.00	303.0	$ 75,750.00
			Luke R. Taylor	Paralegal	Paralegal	$ 250.00	41.2	$ 10,300.00
			Matt Broad	Paralegal	Paralegal	$ 250.00	1,333.1	$ 333,275.00
			Rachel Busch	Paralegal	Paralegal	$ 250.00	11.0	$ 2,750.00
Barrack, Rodos & Bacine	1,312.5	$ 653,171.50	William J. Ban	Partner	1982	$ 660.00	69.8	$ 46,068.00
			Stephen R. Basser	Partner	1976	$ 770.00	100.0	$ 77,000.00
			Daniel J. Brooker	Associate	2008	$ 375.00	345.5	$ 129,562.50
			Chad A. Carder	Partner	2002	$ 500.00	248.8	$ 124,400.00
			Jeffrey W. Golan	Partner	1980	$ 770.00	11.1	$ 8,547.00
			Samuel M. Ward	Partner	2001	$ 600.00	179.2	$ 107,520.00
			Julie B. Palley	Associate	2007	$ 470.00	202.2	$ 95,034.00
			Matthew A. Toomey	Associate	2010	$ 440.00	130.5	$ 57,420.00
			Jennifer R. Mueller	Paralegal	Paralegal	$ 300.00	25.4	$ 7,620.00
Berger & Montague, P.C.	184.0	$ 114,831.50	Eric Lechtzin	Partner	1991	$ 665.00	1.1	$ 731.50
			Jon Lambiras	Partner	2003	$ 600.00	167.9	$ 100,740.00
			Michael Dell'Angelo	Partner	1997	$ 715.00	3.1	$ 2,216.50
			Shanon Carson	Partner	2000	$ 795.00	1.7	$ 1,351.50
			Sherrie Savett	Partner	1973	$ 960.00	10.2	$ 9,792.00
Bonnett, Fairbourn, Friedman & Balint, P.C.	1,143.4	$ 443,085.00	Amy L. Owen	Contract Attorney	2011	$ 275.00	287.9	$ 79,172.50
			Francis J. Balint, Jr.	Partner	1982	$ 750.00	1.0	$ 750.00
			Manfred P. Muecke	Associate	2002	$ 425.00	854.5	$ 363,162.50
Boucher LLP	801.3	$ 198,754.00	Shehnaz Bhujwala	Partner	2002	$ 750.00	87.1	$ 65,325.00
			Lauren Burton	Contract Attorney	2014	$ 185.00	707.6	$ 130,906.00
			Priscilla Szeto	Associate	2015	$ 395.00	6.2	$ 2,449.00
			Christine Cramer	Paralegal	Paralegal	$ 185.00	0.4	$ 74.00
Branstetter, Stranch & Jennings, PLLC	2,196.3	$ 977,342.00	Raquel Bellamy	Associate	2011	$ 350.00	6.3	$ 2,205.00
			Karla Campbell	Partner	2008	$ 575.00	240.3	$ 138,172.50
			Kourtney Hennard	Contract Attorney	2013	$ 385.00	66.7	$ 25,679.50
			Callie Jennings	Associate	2016	$ 275.00	31.3	$ 8,607.50
			Seamus Kelly	Associate	2013	$ 425.00	1,035.1	$ 439,917.50
			Megan Killion	Associate	2008	$ 575.00	8.9	$ 5,117.50
			Michael Isaac Miller	Associate	2009	$ 525.00	111.9	$ 58,747.50
			Anthony Orlandi	Associate	2006	$ 525.00	5.5	$ 2,887.50
			Christina M. Osbourne	Contract Attorney	2013	$ 410.00	596.9	$ 244,729.00
			Michael Stewart	Partner	1994	$ 700.00	44.0	$ 30,800.00
			J. Gerard Stranch	Partner	2003	$ 660.00	5.3	$ 3,498.00
			James G. Stranch	Partner	1973	$ 905.00	0.5	$ 452.50
			K. Grace Stranch	Associate	2014	$ 420.00	35.7	$ 14,994.00
			Jennifer Steele	Paralegal	Paralegal	$ 300.00	0.3	$ 90.00
			Amanda Winski	Paralegal	Paralegal	$ 190.00	2.2	$ 418.00
			Mariah Young	Paralegal	Paralegal	$ 190.00	5.4	$ 1,026.00
Cafferty Clobes Meriwether & Sprengel LLP	5.5	$ 3,632.50	Bryan Clobes	Partner	1988	$ 775.00	1.3	$ 1,007.50
			Daniel Herrera	Associate	2008	$ 625.00	4.2	$ 2,625.00
Carlson Lynch Sweet Kilpela & Carpenter LLP	205.8	$ 77,197.50	Gary Lynch	Partner	1989	$ 675.00	15.9	$ 10,732.50
			Jamisen Etzel	Associate	2011	$ 350.00	74.7	$ 26,145.00
			Pamela Miller	Associate	2003	$ 350.00	115.2	$ 40,320.00
Chestnut Cambronne Attorneys at Law	16.8	$ 8,715.00	Francis Rondoni	Partner	1980	$ 550.00	13.3	$ 7,315.00
			Gary Luloff	Associate	2008	$ 400.00	3.5	$ 1,400.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Cohen & Malad	2,253.8	$ 1,040,895.00	Alex C. Trueblood	Associate	2014	$ 350.00	218.5	$ 76,475.00
			Aaron J. Williamson	Associate	2015	$ 350.00	550.6	$ 192,710.00
			Edward B. Mulligan V.	Associate	2010	$ 350.00	0.8	$ 280.00
			Irwin B. Levin	Partner	1978	$ 775.00	1.1	$ 852.50
			Jeffrey A. Hammond	Partner	2004	$ 595.00	0.6	$ 357.00
			Lynn A. Toops	Partner	2006	$ 595.00	730.9	$ 434,885.50
			Laura C. Jeffs	Of Counsel	1990	$ 325.00	216.2	$ 70,265.00
			Richard E. Shevitz	Partner	1985	$ 775.00	85.8	$ 66,495.00
			Scott D. Gilchrist	Partner	1992	$ 675.00	0.3	$ 202.50
			Vess A. Miller	Partner	2006	$ 595.00	276.5	$ 164,517.50
			Cindy Meadows	Paralegal	Paralegal	$ 200.00	107.1	$ 21,420.00
			Aaron J. Williamson	Law Clerk	Law Clerk	$ 200.00	9.8	$ 1,960.00
			Elizabeth Hyde	Law Clerk	Law Clerk	$ 95.00	4.0	$ 380.00
			Eric Coleman	Law Clerk	Law Clerk	$ 110.00	2.5	$ 275.00
			Jennifer Redmond	Law Clerk	Law Clerk	$ 200.00	47.4	$ 9,480.00
			Jonathon Welling	Law Clerk	Law Clerk	$ 200.00	1.7	$ 340.00
Cohen Milstein Sellers & Toll PLLC	16,350.9	$ 7,719,178.50	Beirne, Brian	Contract Attorney	2015	$ 245.00	803.9	$ 196,955.50
			Clarke, Michael	Contract Attorney	2010	$ 285.00	121.5	$ 34,627.50
			Coker, Ross F.	Contract Attorney	2001	$ 245.00	477.0	$ 116,865.00
			Craig, Shunita	Contract Attorney	2012	$ 275.00	795.0	$ 218,625.00
			Feldstein, David A.	Contract Attorney	2011	$ 280.00	442.5	$ 123,900.00
			Frias, Erik N.	Contract Attorney	2003	$ 385.00	494.2	$ 190,267.00
			Friedman, Andrew, N.	Partner	1983	$ 870.00	2,232.9	$ 1,942,623.00
			Graber, Geoffrey	Partner	2000	$ 720.00	1,681.9	$ 1,210,968.00
			Handmaker, Sally	Associate	2011	$ 490.00	1,871.0	$ 916,790.00
			Handorf, Karen, L.	Partner	1975	$ 855.00	65.2	$ 55,746.00
			Hart, Kendra	Contract Attorney	2012	$ 390.00	267.3	$ 104,247.00
			Hora, Derek	Contract Attorney	2012	$ 245.00	820.2	$ 200,949.00
			Kafka, Eric	Associate	2014	$ 425.00	1,884.6	$ 800,955.00
			Lanou, John H.	Contract Attorney	2000	$ 400.00	354.6	$ 141,840.00
			Malloy, Molly M.	Contract Attorney	2011	$ 275.00	40.0	$ 11,000.00
			McNamara, Douglas, J.	Of Counsel	1995	$ 700.00	52.8	$ 36,960.00
			Napier, Deborah L.	Contract Attorney	1990	$ 495.00	23.8	$ 11,781.00
			Riera-Seivane, Jaime A.	Contract Attorney	1993	$ 450.00	432.4	$ 194,580.00
			Smith, Pamela L.	Contract Attorney	1984	$ 495.00	462.2	$ 228,789.00
			Solen, Donna F.	Contract Attorney	1997	$ 420.00	152.8	$ 64,176.00
			Toll, Steven, J.	Partner	1975	$ 970.00	135.7	$ 131,629.00
			Tsighe, Ariam M.	Contract Attorney	2012	$ 245.00	41.5	$ 10,167.50
			Shea, Kelly Ann	Contract Paralegal	Contract Paralegal	$ 260.00	55.3	$ 14,378.00
			Bournazian, Thea	Investigator	Investigator	$ 440.00	154.2	$ 67,848.00
			Bushan, Anjali	Legal Clerk	Legal Clerk	$ 270.00	53.0	$ 14,310.00
			Lewis, Adam	Legal Clerk	Legal Clerk	$ 270.00	48.2	$ 13,014.00
			Meth, Madeline H.	Legal Clerk	Legal Clerk	$ 270.00	16.5	$ 4,455.00
			Conway, Charles	Paralegal	Paralegal	$ 270.00	306.3	$ 82,701.00
			Hamdan, Shireen	Paralegal	Paralegal	$ 280.00	1,430.4	$ 400,512.00
			Wozniak, Mariah	Paralegal	Paralegal	$ 280.00	634.0	$ 177,520.00
Consumer Law Practice of Dan LeBel	16.6	$ 8,531.00	Daniel T. LeBel	Partner	2006	$ 605.00	10.3	$ 6,231.50
			Zachary R. Scribner	Associate	2015	$ 365.00	6.3	$ 2,299.50
Cotchett, Pitre & McCarthy LLP	32.1	$ 12,840.00	Divya Rao	Associate	2013	$ 400.00	32.1	$ 12,840.00
Desai Law	8.1	$ 4,175.00	Aashish Desai	Partner	1996	$ 750.00	4.3	$ 3,225.00
			Sonia Nava	Paralegal	Paralegal	$ 250.00	3.8	$ 950.00
Emerson Scott LLP	113.5	$ 74,099.50	John G. Emerson	Partner	1980	$ 795.00	18.6	$ 14,787.00
			David G. Scott	Partner	2006	$ 625.00	94.9	$ 59,312.50
Fagan, Emert, & Davis, LLC	19.9	$ 7,960.00	Paul T. Davis	Partner	1997	$ 400.00	18.6	$ 7,440.00
			Brennan P. Fagan	Partner	2001	$ 400.00	1.3	$ 520.00
Farmer, Jaffe, Weissing LLP	31.6	$ 16,410.00	Steven R. Jaffe	Partner	1983	$ 650.00	19.8	$ 12,870.00
			Brittany Henderson	Associate	2015	$ 300.00	11.8	$ 3,540.00
Federman & Sherwood	316.1	$ 180,795.00	William B. Federman	Partner	1982	$ 850.00	97.8	$ 83,130.00
			Carin L. Marcussen	Associate	2003	$ 510.00	167.0	$ 85,170.00
			Kyle Eckman	Associate	2012	$ 350.00	0.3	$ 105.00
			Gregg Lytle	Associate	2008	$ 450.00	0.5	$ 225.00
			Allicia Bolton	Paralegal	Paralegal	$ 250.00	1.0	$ 250.00
			Traylor Frandelind	Paralegal	Paralegal	$ 135.00	4.0	$ 540.00
			Robin Hester	Paralegal	Paralegal	$ 250.00	45.5	$ 11,375.00
Finkelstein Thompson LLP	19.4	$ 13,530.00	Mila Bartos	Partner	1993	$ 850.00	4.3	$ 3,655.00
			Douglas Thompson	Partner	1969	$ 850.00	1.2	$ 1,020.00
			Rosemary Rivas	Partner	2000	$ 600.00	0.9	$ 540.00
			Alyssa Dang	Associate	2013	$ 300.00	1.7	$ 510.00
			Roseanne Mah	Of Counsel	2005	$ 475.00	4.8	$ 2,280.00
			Gordon Fauth	Of Counsel	1997	$ 850.00	6.5	$ 5,525.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Fitapelli & Schaffer LLP	17.9	$ 4,800.00	Joseph A. Fitapelli	Partner	2001	$ 500.00	1.3	$ 650.00
			Nicholas P. Melito	Associate	2013	$ 250.00	16.6	$ 4,150.00
Forbes Law Group	310.5	$ 116,405.00	Frankie Forbes	Partner	2001	$ 500.00	38.2	$ 19,100.00
			Keynen "KJ" Wall	Of Counsel/Partner	2001	$ 450 / $ 500	3.5	$ 1,605.00
			Mike Fleming	Of Counsel	2001	$ 450.00	13.9	$ 6,255.00
			Mark Van Blaricum	Of Counsel	2002	$ 450.00	2.3	$ 1,035.00
			Quentin Templeton	Associate	2014	$ 350.00	252.3	$ 88,305.00
			Melissa Ebling	Legal Clerk	Legal Clerk	$ 350.00	0.3	$ 105.00
Gibbs Law Group	10,844.2	$ 4,902,419.50	David Berger	Partner	2008	$ 575.00	2,759.2	$ 1,586,540.00
			Joshua Bloomfield	Associate	2000	$ 395.00	945.4	$ 373,433.00
			Aaron Blumenthal	Associate	2015	$ 350 / $ 365	1,957.0	$ 714,270.50
			Caroline Corbitt	Associate	2015	$ 365.00	292.9	$ 106,908.50
			AJ De Bartolomeo	Partner	1988	$ 740.00	175.5	$ 129,870.00
			Eric Gibbs	Partner	1995	$ 805.00	406.0	$ 326,830.00
			Scott Grzenczyk	Associate	2011	$ 525.00	12.6	$ 6,615.00
			Shane Howarter	Associate	2016	$ 340.00	10.7	$ 3,638.00
			Dylan Hughes	Partner	2000	$ 685.00	14.3	$ 9,795.50
			Amanda Karl	Associate	2014	$ 415.00	88.6	$ 36,769.00
			J. Mani Goehring (née Khamvongsa)	Associate	2008	$ 375.00	213.4	$ 80,025.00
			Linda Lam	Associate	2014	$ 415.00	40.7	$ 16,890.50
			Steve Lopez	Associate	2014	$ 415.00	31.4	$ 13,031.00
			Michael Marchese	Associate	2015	$ 350.00	859.9	$ 300,965.00
			Marcus McElhenney	Contract Attorney	2014	$ 350.00	1,656.7	$ 579,845.00
			Geoffrey Munroe	Partner	2003	$ 660.00	441.1	$ 291,126.00
			Andre Mura	Partner	2004	$ 635.00	46.5	$ 29,527.50
			Patrick Nagler	Contract Attorney	2011	$ 375.00	87.0	$ 32,625.00
			Dave Stein	Partner	2007	$ 605.00	39.0	$ 23,595.00
			Clay Stockton	Associate	2012	$ 400.00	197.3	$ 78,920.00
			Linh Vuong	Associate	2012	$ 450.00	190.2	$ 85,590.00
			Kristen Boffi	Paralegal	Paralegal	$ 220.00	10.7	$ 2,354.00
			Jason Gibbs	Paralegal	Paralegal	$ 190.00	36.4	$ 6,916.00
			Walter Murcia	Paralegal	Paralegal	$ 200.00	206.1	$ 41,220.00
			Monsura Sirajee	Paralegal	Paralegal	$ 200.00	125.6	$ 25,120.00
Goldman, Scarlato, Penny LLP	2,006.9	$ 1,295,152.50	Mark Goldman	Partner	1986	$ 725.00	1,264.6	$ 916,835.00
			Douglas Bench	Associate	2006	$ 475.00	150.3	$ 71,392.50
			Laura Mummert	Associate	2000	$ 595.00	592.0	$ 306,925.00
Harwood Feffer LLP	24.0	$ 18,600.00	Sam Rosen	Partner	1968	$ 775.00	24.0	$ 18,600.00
Heins, Mills, & Olson PLC	665.0	$ 254,815.00	Vincent J. Esades	Partner	1994	$ 700.00	8.9	$ 6,230.00
			David Woodward	Partner	1975	$ 700.00	8.3	$ 5,810.00
			Maureen E. Sandey	Associate	2011	$ 375.00	646.8	$ 242,550.00
			Irene M. Kovarik	Paralegal	Paralegal	$ 225.00	1.0	$ 225.00
Janet, Jenner & Suggs, LLC	20.3	$ 6,885.00	Lisa Lee	Associate	2012	$ 350.00	19.2	$ 6,720.00
			Ahleah Knapp	Paralegal	Paralegal	$ 150.00	0.4	$ 60.00
			Cameron Swanson	Paralegal	Paralegal	$ 150.00	0.2	$ 30.00
			Olivia Colonero	Paralegal	Paralegal	$ 150.00	0.5	$ 75.00
Kantrowitz, Goldhamer, Graifman, PC	182.6	$ 94,092.50	Gary Graifman	Partner	1981	$ 825.00	10.0	$ 8,250.00
			Sarah Haque	Associate	2014	$ 500.00	171.1	$ 85,550.00
			Margaret Hernandez	Paralegal	Paralegal	$ 195.00	1.5	$ 292.50
Kaplan Fox & Kilsheimer LLP	367.7	$ 184,459.50	Laurence D. King	Partner	1988	$ 500.00	0.4	$ 200.00
			Linda M. Fong	Of Counsel	1985	$ 625.00	3.7	$ 2,312.50
			Matthew George	Of Counsel	2005	$ 620.00	1.5	$ 930.00
			Mario M. Choi	Associate	2005	$ 500.00	359.9	$ 179,950.00
			Lauren Dubick	Associate	2007	$ 485.00	2.2	$ 1,067.00
Karon LLC	10.3	$ 6,508.50	Daniel Karon	Partner	1991	$ 695.00	7.8	$ 5,421.00
			Beau Hollowell	Associate	2006	$ 435.00	2.5	$ 1,087.50
Keller Rohrback Law Offices, LLP	3,607.0	$ 1,521,311.00	Cari Laufenberg	Partner	2003	$ 750.00	254.2	$ 190,650.00
			Amy Hanson	Associate	1998	$ 525.00	72.4	$ 38,010.00
			Chris Springer	Associate	2008	$ 400.00	23.0	$ 9,200.00
			Jeff Lewis	Partner	1975	$ 895.00	12.3	$ 11,008.50
			Jason Chukas	Associate	1995	$ 400.00	1,605.3	$ 642,120.00
			Tyrone Smith	Associate	2006	$ 400.00	1,466.2	$ 586,480.00
			Carly Eyler	Paralegal	Paralegal	$ 230.00	1.7	$ 391.00
			Cate Brewer	Paralegal	Paralegal	$ 225.00	3.9	$ 877.50
			Colleen Mold	Paralegal	Paralegal	$ 225.00	5.0	$ 1,125.00
			Jennifer Dallape	Paralegal	Paralegal	$ 215.00	3.5	$ 752.50
			Sandra Douglas	Paralegal	Paralegal	$ 225.00	22.1	$ 4,972.50
			Tana Daugherty	Paralegal	Paralegal	$ 260.00	137.4	$ 35,724.00
Law Office of Paul C. Whalen, P.C.	133.1	$ 106,480.00	Paul C. Whalen	Partner	1996	$ 800.00	133.1	$ 106,480.00
Law Office of Angela Edwards	191.0	$ 100,275.00	Angela Edwards	Partner	1993	$ 525.00	191.0	$ 100,275.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Levi & Korsinsky LLP	176.1	$ 97,039.50	Nancy A. Kulesa	Partner	2001	$ 765.00	33.1	$ 25,321.50
			Shannon L. Hopkins	Partner	2003	$ 850.00	1.0	$ 850.00
			Courtney Maccarone	Associate	2011	$ 525.00	119.3	$ 62,632.50
			Stephanie Bartone	Associate	2012	$ 450.00	12.0	$ 5,400.00
			Joanna Chlebus	Paralegal	Paralegal	$ 265.00	0.4	$ 106.00
			Judith Bennett	Paralegal	Paralegal	$ 265.00	2.4	$ 636.00
			Samantha Halliday	Paralegal	Paralegal	$ 265.00	7.9	$ 2,093.50
Lieff Cabraser (LCHB)	10,594.6	$ 5,097,053.00	Ashur, Tanya	Contract Attorney	2000	$ 415.00	48.0	$ 19,920.00
			Ballan, Evan	Contract Attorney	2017	$ 345.00	18.6	$ 6,417.00
			Bennett, Corey	Contract Attorney	2009	$ 415.00	19.0	$ 7,885.00
			Diamand, Nicholas	Partner	2002	$ 650.00	14.2	$ 9,230.00
			Dunlavey, Wilson	Asscociate	2015	$ 370.00	297.5	$ 110,075.00
			Gardner, Melissa	Associate	2011	$ 455.00	915.8	$ 416,689.00
			Gilyard, James	Contract Attorney	2002	$ 415.00	1,015.0	$ 421,225.00
			Guo, Eva	Contract Attorney	1994	$ 415.00	1,530.5	$ 635,157.50
			Heller, Roger	Partner	2001	$ 675.00	25.5	$ 17,212.50
			Leggett, James	Contract Attorney	2012	$ 415.00	32.0	$ 13,280.00
			Lichtman, Jason	Partner	2006	$ 565.00	622.5	$ 351,712.50
			Meltser, Jessica	Paralegal	2016	$ 345.00	19.9	$ 6,865.50
			Nguyen, Phi Anh	Contract Attorney	2008	$ 415.00	2,317.0	$ 961,555.00
			Rudolph, David	Partner	2004	$ 625.00	579.1	$ 361,937.50
			Sobol, Michael	Partner	1989	$ 900.00	638.2	$ 574,380.00
			Solen, Donna	Contract Attorney	1997	$ 415.00	486.5	$ 201,897.50
			Sugnet, Nicole Diane	Partner	2006	$ 510.00	1,708.8	$ 871,488.00
			Innes-Gawn, Siobhan	Paralegal	Paralegal	$ 360.00	16.6	$ 5,976.00
			Keenley, Elizabeth	Paralegal	Paralegal	$ 350.00	21.4	$ 7,490.00
			Carnam, Todd	Paralegal	Paralegal	$ 360.00	29.5	$ 10,620.00
			Rudnick, Jennifer	Paralegal	Paralegal	$ 360.00	179.8	$ 64,728.00
			Swenson, Yun	Paralegal	Paralegal	$ 360.00	59.2	$ 21,312.00
Litigation Law Group	8.6	$ 5,195.00	Gordon M. Fauth, Jr.	Principal	1997	$ 775.00	3.7	$ 2,867.50
			Rosanne L. Mah	Associate	2005	$ 475.00	4.9	$ 2,327.50
Lockridge, Grindal, Nauen, PLLP	410.4	$ 138,920.00	Karen H. Riebel	Partner	1991	$ 780.00	12.0	$ 9,360.00
			Kate M. Baxter-Kauf	Associate	2011	$ 475.00	4.2	$ 1,995.00
			Rachel A. Kitze Collins	Associate	2014	$ 450.00	1.3	$ 585.00
			Stacy Kabele	Contract Attorney	1996	$ 325.00	387.2	$ 125,840.00
			Carey R. Johnson	Paralegal	Paralegal	$ 200.00	5.7	$ 1,140.00
Milberg LLP	719.0	$ 302,157.50	Ariana Tadler	Partner	1992	$ 825.00	14.9	$ 12,292.50
			Henry Kelston	Partner	1978	$ 675.00	108.5	$ 73,237.50
			Andrei Rado	Partner	1999	$ 625.00	14.4	$ 9,000.00
			John Hughes	Associate	2012	$ 375.00	312.3	$ 117,112.50
			John Seredynski	Associate	2010	$ 350.00	60.1	$ 21,035.00
			Carey Alexander	Associate	2012	$ 350.00	63.8	$ 22,330.00
			Adam Bobkin	Associate	2010	$ 375.00	0.5	$ 187.50
			Cindy Bomzer	Paralegal	Paralegal	$ 325.00	6.0	$ 1,950.00
			Jason A. Joseph	Paralegal	Paralegal	$ 325.00	61.0	$ 19,825.00
			Chris Thompson	Investor Analysis	Investor Analysis	$ 325.00	77.5	$ 25,187.50
Morgan & Morgan	692.0	$ 353,080.00	Marisa Glassman	Partner	2009	$ 500.00	284.3	$ 142,150.00
			Angela Mirabole	Associate	2003	$ 500.00	330.1	$ 165,050.00
			John Yanchunis	Partner	1980	$ 950.00	42.8	$ 40,660.00
			Candice Clendenning	Paralegal	Paralegal	$ 150.00	5.1	$ 765.00
			Emily Lockwood	Paralegal	Paralegal	$ 150.00	29.7	$ 4,455.00
Murray Law Office	576.7	$ 203,745.00	Arthur M. Murray	Partner	2001	$ 600.00	3.0	$ 1,800.00
			Stephen B. Murray, Jr.	Partner	1995	$ 600.00	4.6	$ 2,760.00
			C. Joseph Murray	Associate	1980	$ 350.00	545.6	$ 190,960.00
			Caroline W. Thomas	Associate	2014	$ 350.00	0.4	$ 140.00
			D. Alex Onstott	Associate	2015	$ 350.00	23.1	$ 8,085.00
Pomerantz LLP	1,109.7	$ 528,869.00	Jayne Goldstein	Partner	1986	$ 820.00	1.0	$ 820.00
			Jessica Dell	Associate	2005	$ 500.00	869.6	$ 434,800.00
			Perry Gattegno	Associate	2013	$ 390.00	239.1	$ 93,249.00
Robinson Calcagnie Robinson Shapiro Davis, Inc.	370.5	$ 203,270.00	Daniel Robinson	Partner	2003	$ 700.00	37.8	$ 26,460.00
			Wesley Polishuk	Associate	2007	$ 550.00	313.7	$ 172,535.00
			Jennifer Rogers	Paralegal	Paralegal	$ 225.00	19.0	$ 4,275.00
Schubert Jonckheer & Kolbe LLP	3,808.3	$ 1,423,234.00	Noah Schubert	Partner	2011	$ 600.00	4.5	$ 2,700.00
			Greg Stuart	Contract Attorney	2005	$ 390.00	2,230.1	$ 869,739.00
			Elizabeth Newman	Contract Attorney	2007	$ 350.00	1,572.7	$ 550,445.00
			Andy Katz	Of Counsel	2009	$ 350.00	1.0	$ 350.00
Scott + Scott, LLP	547.9	$ 219,970.00	Joseph Guglielmo	Partner	1996	$ 875.00	0.6	$ 525.00
			Erin Comite	Partner	2002	$ 725.00	0.3	$ 217.50
			Hal Cunningham	Contract Attorney	2006	$ 625.00	1.9	$ 1,187.50
			Katie Shank	Contract Attorney	2015	$ 400.00	545.1	$ 218,040.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Skepnek Law Firm	107.4	$ 60,015.00	William J. Skepnek	Partner	1978	$ 600.00	89.7	$ 53,820.00
			Stephan Lindell Skepnek	Associate	2015	$ 350.00	17.7	$ 6,195.00
Strimatter Kessler Whelan Koehler Moore Kahler (Stritmatter Kessler)	175.8	$ 77,250.00	Catherine J. Fleming	Of Counsel	2007	$ 500.00	140.3	$ 70,150.00
			Jill Sullivan	Paralegal	Paralegal	$ 200.00	23.7	$ 4,740.00
			Jeanne Laird	Paralegal	Paralegal	$ 200.00	11.8	$ 2,360.00
Stueve, Siegel, Hanson LLP	2,244.1	$ 953,503.50	Jennifer Carter	Associate	2004	$ 475.00	10.4	$ 4,940.00
			Crystal Cook	Associate	2013	$ 425.00	4.7	$ 1,997.50
			Sean Cooper	Associate	2013	$ 425.00	13.2	$ 5,610.00
			Tanner Edwards	Associate	2015	$ 375.00	452.3	$ 169,612.50
			Jason Hartley	Partner	1997	$ 825.00	0.5	$ 412.50
			Lauren Luhrs	Associate	2013	$ 425.00	11.1	$ 4,717.50
			Abby McClellan	Associate	2013	$ 425.00	139.6	$ 59,330.00
			J. Austin Moore	Associate	2011	$ 475.00	700.6	$ 332,785.50
			Norman Siegel	Partner	1993	$ 865.00	139.0	$ 120,235.00
			Barrett Vahle	Partner	2004	$ 645.00	97.3	$ 62,758.50
			Brad Wilders	Partner	2007	$ 625.00	1.6	$ 1,000.00
			Michael Wise	Associate	2014	$ 350.00	8.9	$ 3,115.00
			Lauren Wolf	Associate	2010	$ 395.00	79.1	$ 31,244.50
			Michelle Campbell	Paralegal	Paralegal	$ 275.00	370.6	$ 101,915.00
			Katrina Cervantes	Paralegal	Paralegal	$ 245.00	5.9	$ 1,445.50
			Tina Glover	Paralegal	Paralegal	$ 245.00	0.2	$ 49.00
			Mary Rose Marquart	Paralegal	Paralegal	$ 275.00	21.2	$ 5,830.00
			Cheri Perez	Legal Assistant	Paralegal	$ 225.00	6.3	$ 1,417.50
			Erika Reyes	Paralegal	Paralegal	$ 245.00	124.2	$ 30,429.00
			Margaret Smith	Paralegal	Paralegal	$ 245.00	39.6	$ 9,702.00
			Melissa Warner	Legal Assistant	Paralegal	$ 225.00	2.0	$ 450.00
			Sheri Williams	Legal Assistant	Paralegal	$ 225.00	2.2	$ 495.00
			Peter Rupp	Systems Director	Systems Director	$ 295.00	13.6	$ 4,012.00
Stull, Stull, & Brody	1,537.9	$ 1,059,189.00	Howard Longman	Senior Attorney	1982	$ 925 / $ 950	92.1	$ 87,490.00
			Patrick Slyne	Senior Attorney	1988	$ 925.00	497.8	$ 460,465.00
			Melissa Emert	Senior Attorney	1988	$ 925.00	27.5	$ 25,437.50
			Patrice Bishop	Senior Attorney	1994	$ 500 / $ 850	133.8	$ 69,175.00
			Michael Klein	Associate	2004	$ 825.00	1.4	$ 1,155.00
			Jason D'Agnenica	Associate	1998	$ 500 / $ 765	785.3	$ 415,466.50
The Giatras Law Firm	28.3	$ 7,895.00	Matthew Stonestreet	Associate	2010	$ 300.00	14.5	$ 4,350.00
			Troy Giatras	Partner	1990	$ 450.00	5.6	$ 2,520.00
			Pam Hutton	Paralegal	Paralegal	$ 125.00	8.2	$ 1,025.00
Tousley, Brain, Stephens	10.7	$ 6,096.50	Chase C. Alvord	Partner	1996	$ 710.00	2.8	$ 1,988.00
			Kim D. Stephens	Partner	1981	$ 795.00	2.7	$ 2,146.50
			Jacob D. C. Humphreys	Associate	2009	$ 450.00	3.3	$ 1,485.00
			Jason T. Dennett	Partner	2000	$ 710.00	0.3	$ 213.00
			MWA	Paralegal	Paralegal	$ 165.00	1.6	$ 264.00
Webb, Klase, & Lemond, LLC	238.5	$ 127,192.50	E. Adam Webb	Partner	1996	$ 600.00	38.5	$ 23,100.00
			G. Franklin Lemond, Jr.	Partner	2004	$ 525.00	190.4	$ 99,960.00
			Kristina Ludwig	Associate	2016	$ 295.00	4.5	$ 1,327.50
			Matthew C. Klase	Partner	2002	$ 550.00	5.1	$ 2,805.00
Weitz & Luxenberg, P.C.	135.4	$ 61,435.00	James Bilsborrow	Associate	2008	$ 500.00	117.5	$ 58,750.00
			Corinne Sullivan	Paralegal	Paralegal	$ 150.00	17.9	$ 2,685.00
Zimmerman Reed, LLP	542.1	$ 217,643.50	Brian C. Gudmundson	Partner	2004	$ 695.00	10.8	$ 7,506.00
			Wm Dane DeKrey	Associate	2014	$ 375.00	53.2	$ 19,950.00
			Bryce D. Riddle	Associate	2014	$ 375.00	7.0	$ 2,625.00
			James P. Watts	Associate	1981	$ 450.00	308.3	$ 138,735.00
			Adam Almen	Contract Attorney	2013	$ 300.00	162.3	$ 48,690.00
			Leslie A. Harms	Paralegal	Paralegal	$ 275.00	0.5	$ 137.50
TOTAL	**78,553.0**	**$37,832,349.00**						

EXHIBIT 13

Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Master Docket No. 09-md-02063-JLK-KMT (MDL Docket No. 2063)

IN RE: OPPENHEIMER ROCHESTER FUNDS GROUP SECURITIES LITIGATION

This document relates to the following Actions:

In re AMT-Free Municipals Fund
09-cv-1243-JLK (*Prince*)
09-cv-1447-JLK (*Connel*)
09-cv-1510-JLK (*Amato*)
09-cv-1619-JLK (*Furman*)

In re AMT-Free New York Municipal Fund
09-cv-1621-JLK (*Isaac*)
09-cv-1781-JLK (*Kurz*)

In re Rochester National Municipal Fund
09-cv-550-JLK (*Bock*)
09-cv-706-JLK (*Stokar*)
09-cv-927-JLK (*Tackmann*)
09-cv-1042-JLK (*Krim*)
09-cv-1060-JLK (*Truman*)
09-cv-1482-JLK (*Laufer*)
09-cv-1908-JLK (*Lariviere*)

In re Rochester Fund Municipals
09-cv-703-JLK (*Begley*)
09-cv-1479-JLK (*Bernstein*)
09-cv-1481-JLK (*Mershon*)
09-cv-1622-JLK (*Stern*)
09-cv-1478-JLK (*Vladimir*)
09-cv-1480-JLK (*Weiner*)

In re New Jersey Municipal Fund
09-cv-1406-JLK (*Unanue*)
09-cv-1617-JLK (*Baladi*)
09-cv-1618-JLK (*Seybold*)
09-cv-1620-JLK (*Trooskin*)

In re Pennsylvania Municipal Fund
09-cv-1483-JLK (*Woods*)
09-cv-1368-JLK (*Egts*)
09-cv-1765-JLK (*Wunderly*)

DECLARATION OF KIP B. SHUMAN ON BEHALF OF THE SHUMAN LAW FIRM IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Kip B. Shuman, Esq., declares as follows pursuant to 28 U.S.C. § 1746:

1. I am the principal of The Shuman Law Firm. I submit this declaration in support of Lead Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses in the above-captioned actions (the "Actions") from inception through May 30, 2014 (the "Time Period").

2. The Shuman Law Firm is Court-appointed Liaison Counsel.

A. I, Kip B. Shuman, was primarily responsible for the activities of liaison counsel in these Actions, including ensuring that liaison counsel efforts were competently and efficiently performed. Having only three lawyers dedicated to these Actions resulted in the efficient prosecution of these Actions, and avoided any needless duplication of efforts. I participated in all material aspects of this litigation, except the review of documents produced by Defendants.

B. Rusty Glenn, partner. Mr. Glenn was all involved in all material aspects of this litigation. Mr. Glenn also reviewed and analyzed documents and was responsible for all logistical matters of all court filings.

C. Nancy Kulesa, attorney. Ms. Kulesa reviewed, analyzed and coded documents.

3. The lodestar schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney from my firm who was involved in the prosecution of the Actions during the Time Period. The lodestar calculation is based on my firm's current billing rates. For personnel who are no longer employed at my firm, the lodestar calculation is based on billing rates for such personnel in his or her final year of employment by my firm.

4. The lodestar schedules attached were prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the

Court. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this request.

5. The hourly rates for the attorneys in my firm included in the lodestar schedules are the same as the regular rates charged for their services in non-contingent matters and/or which have been accepted in other securities, shareholder, or class action litigation.

6. The total number of hours expended on this litigation by my firm during the Time Period is 3,031.93 hours. The total lodestar for my firm for those hours is $1,674,716.25.

7. My firm's lodestar figures are based upon the firm's current billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

8. As detailed in Exhibit B, my firm has incurred a total of $246,524.09 in unreimbursed expenses incurred in connection with the prosecution of the Actions during the Time Period.

9. The expenses incurred are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred. Third-party expenses are not marked up.

10. With respect to the standing of my firm, attached hereto as Exhibit C is a firm resume.

11. I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 2014.

s/ Kip Shuman
Kip B. Shuman

Exhibit A

LODESTAR REPORT

FIRM: The Shuman Law Firm
REPORTING PERIOD: INCEPTION THROUGH MAY 30, 2014

PROFESSIONAL	STATUS*	HOURLY RATE	TOTAL HOURS	TOTAL LODESTAR TO DATE
Kip B. Shuman	P	625.00	1,172.65	$732,906.25
Rusty E. Glenn	P	525.00	1,173.04	$615,846.00
Nancy Kulesa	CA	475.00	686.24	$325,964.00
TOTAL			**3,031.93**	**$1,674,716.25**[1]

*Partner (P)
Contract Attorney (CA)

[1] In order to arrive at the total lodestar, time records were divided into four separate categories and then aggregated. The first category separates time incurred by individual case. This first category is billed at 100% to the Actions. The second category includes time attributable to all the Oppenheimer-related actions. That time was previously billed 50% to the Champion and Core actions (i.e., the fixed-income cases). The remaining 50% is now billed to the Actions. That time is further reduced by 1/7 (.143) to account for the California action, which is not part of this settlement. The third category relates to time incurred in all the Actions. That time is reduced by 1/7 (.143) to, again, account for the California action. The fourth category represents time related to this Settlement and is billed at 100%. These divisions are made to ensure that time dedicated to the Fixed Income Cases is not double counted and to reduce the lodestar, on a percentage basis, to account for fact that only six of the seven Rochester cases have settled, but that a significant amount of time incurred benefited all the Actions.

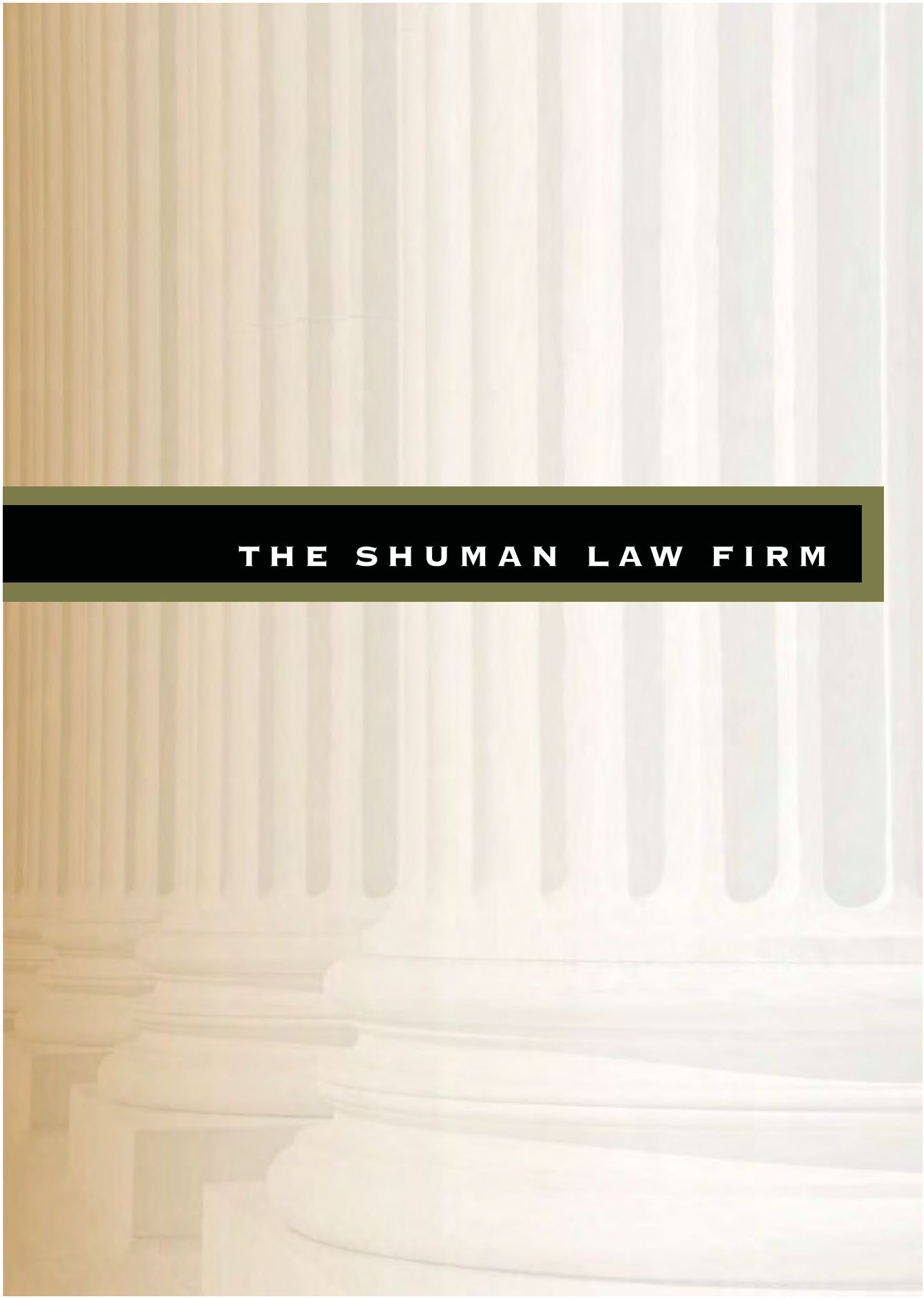
Exhibit B

DISBURSEMENT REPORT

FIRM: The Shuman Law Firm
REPORTING PERIOD: INCEPTION THROUGH May 30, 2014

DISBURSEMENT	TOTAL AMOUNT
Duplicating	0
Postage	14.26
Telephone / Fax	2,555.48
Messengers	351.44
Filing Fees	2,000.00
Transcripts	75.58
Computer Research	1,036.18
Federal Express	651.45
Travel/Meals/Hotels	14,686.36
Mediation Fees	1,250.00
Miscellaneous	751.03
Litigation Fund Contributions	223,152.31
TOTAL	**$246,524.09**[2]

[2] Expenses have been reduced to exclude costs already reimbursed from the Fixed Income Case and to reduce certain costs, proportionately, given that the California Action is not a part of this Settlement.


THE SHUMAN LAW FIRM

The Shuman Law Firm prides itself with its unwavering dedication to serving clients at the highest legal and ethical standards in the prosecution of corporate securities fraud throughout the United States. We are passionate about advancing the rights of defrauded shareholders and work steadfastly to

MISSION STATEMENT

redress damages suffered by our clients. We take great pleasure in our commitment to two fundamental principles – client communication and satisfaction. We view our size as an asset which facilitates communication and enables us to better serve our clients. We believe our success as a law firm cannot only be measured by the amount of money we recover, but also the trust we develop with our clients and their approval of our work done on their behalf.

We are proud to acknowledge that RiskMetrics Group's Securities Class Action Services division recognized the Shuman Law Firm as one of the top 50 plaintiffs' law firms in the United States, ranked by total dollar amount of final securities class action settlements in 2008 in which the law firm served as lead or co-lead counsel.

FIRM BACKGROUND

The Shuman Law Firm is a nationally recognized law firm located in majestic Boulder, Colorado. Our firm specializes in representing shareholders who have suffered financial losses from corporate securities fraud or other corporate malfeasance.

Since its inception in 1994, Kip B. Shuman, principal of The Shuman Law Firm, has worked to recover hundreds of millions of dollars on behalf of defrauded investors. The Shuman Law Firm has acted as class counsel for institutional investors, including public pension funds, labor unions, as well as thousands of individual investors in securities class actions and derivative litigation.

Most recently, The Shuman Law Firm served as counsel in over forty derivative lawsuits emanating from the well-publicized stock option backdating scandal that came to light in 2006. In these cases, corporate executives of publicly-traded companies manipulated company stock options in a manner that allowed the executives to enrich themselves to the tune of hundreds of millions of dollars at the expense of the companies and shareholders. The Shuman Law Firm has played a central role in causing many corporate executives who received manipulated stock options to return their ill-gotten profits to the companies they served.

continued on next page

In many instances, The Shuman Law Firm has caused the manipulated stock options to be either rescinded or re-priced to ensure that executives cannot profit from their wrong doing. In addition, The Shuman Law Firm has caused the boards of directors of these companies to adopt robust corporate governance changes that are specifically designed to create a system of checks and balances which ensure that stock option manipulation will not occur in the future. These cases provide one recent example of The Shuman Law Firm's commitment to protecting the rights of shareholders. See pages 6-8 for a partial list of stock option backdating derivative cases and the results achieved.

ACCOLADES

In comparison with the thousand-plus attorney mega-firms commonly seen today, The Shuman Law Firm and its predecessor firm, has been frequently recognized by the courts for the high quality of its work and results achieved.

- At a hearing to appoint lead plaintiffs, lead counsel, and liaison counsel in In Re Rhythms Securities Litigation, United States District Court Senior Judge John L. Kane complimented Mr. Shuman on having done an "excellent job" in all of the class action securities matters held in his court to date.

continued on next page

• In *In re Qwest Communications International, Inc., Securities Litigation,* which is believed to be the largest securities fraud case in the history of the State of Colorado, the Court in granting approval of the final settlement of the action stated: "I have for my duration as the presiding judge in this case respected and admired your competent counsel, because as I have commented and as my lead law clerk have commented repeatedly, the quality of your briefing and your argument and authority was exemplary and something that I would hope would be emulated by other counsel in the same or similar circumstances."

• In *Queen Uno v. Coeur D'Alene Mines Corporation,* the Court recognized the "skill and experience, reputation and ability" of plaintiffs' counsel, stating that counsel are "well respected litigators in the securities field," "highly skilled in class action litigation and federal securities law," and that " the substantial amount recovered is testament to their skill."

• Likewise, in approving the final settlement of another national securities fraud class action, *Schaffer v. Evolving Systems, Inc.,* the court recognized the effort and ability of plaintiffs' counsel, stating that "the $10 million settlement ... is a good recovery, in fact, almost extraordinarily good. And I commend counsel for having achieved that result."

Mr. Shuman, of The Shuman Law Firm, has exceptional success in prosecuting shareholder class actions and derivative actions. Below is a sample of his more notable cases.

NOTABLE CASES

- *Rasner v. FirstWorld Communications Inc.*, Case No. 00-K-1376 (D. Colo.) (co-lead counsel) ($25.925 million recovered).

- *In re Tele-Communications, Inc. Sec. Litig.*, Case No. 97CV421 (Colo.) (co-lead counsel) ($26.5 million recovered).

- *Muhr v. Transcrypt Int'l, Inc.*, Case No. CI98-333 (Neb.) (co-lead counsel) (approximately $25 million recovered).

- *In re Samsonite Corp. Sec. Litig.*, Case No. 98-K-1878 (D. Colo.) (co-lead counsel) ($24 million recovered).

- *Queen Uno Ltd. Partnership. v. Coeur D'Alene Mines Corp.*, Case No. 97-WY-1431 (D. Colo.) (co-lead counsel) ($13 million recovered).

- *In re Secure Computing Corp. Sec. Litig.*, Case No. C-99-1927 (N.D. Cal.) (co-lead counsel) ($10.1 million recovered).

continued on next page

• *Angres v. Smallworldwide PLC,* Case No. 99-K-1254 (D. Colo.) (co-lead counsel) ($9.85 million recovered).

• *In re Qwest Comms. Int'l Sec. Litig.,* Case No. 01-cv-1451 (D. Colo.) (liaison counsel) ($450 million recovered).

• *In re First American Corporation Shareholder Derivative Litigation,* Case No. SACV-06-1230 (C.D. Cal.) (corporate reforms obtained included, separating roles of the Chairman of the Board and CEO, enhanced Chairman of the Board duties, the creation of lead independent director, and revised compensation guidelines).

• *In re Quest Software, Inc. Derivative Litigation,* Case No. SACV-06-751 (C.D. Cal.) (corporate reforms obtained included, separating roles for Chairman of Board and CEO, enhanced Chairman of the Board duties, amendments to stock option plans, revisions to compensation committee and audit committee charters, and revised compensation guidelines).

• *In re NVIDIA Corp. Derivative Litigation,* Case No. C-06-06110 (N.D. Cal.) (payments, re-pricing and other benefits to the company for mispriced stock options valued at over $15 million; corporate reforms obtained included, enhanced board of director duties and independence requirements, creation of lead independent director with specified duties, and revised compensation and stock option policies).

continued on next page

• *In re Newpark Resources, Inc. Derivative Litigation,* Case No. 06-7340 (E.D. La.) (payment of $8.3 million to the company for mispriced stock options; creation and implementation of code of ethics for senior officers and directors, creation and implementation of policy on reporting, cooperating with investigation and discipline in connection with policy violations, modifications to company policy regarding remediation actions related to material weaknesses in internal controls over financial reporting).

• *In re Meade Instruments Corp. Derivative Litigation,* Case No. 06CC00205 (Cal. Super. Ct., Orange County) (corporate reforms included, enhanced timing, disclosures, and doc-umentation of company equity compensation awards of awards, the creation of a compliance officer and enhanced duties for compensation and audit committees).

• *In re Cheesecake Factory Incorporated Derivative Litigation,* Case No. CV-06-6234 (C.D. Cal.) (repayment to the company by certain directors and officers for mispriced exercised stock options; corporate reforms included, the addition of an independent director, maintenance of a lead independent director with specified duties, enhanced board of director duties and independence requirements, and revised compensation and stock option policies).

Kip B. Shuman kip@shumanlawfirm.com

Kip B. Shuman, founding member of the firm, has prosecuted class actions and derivative actions in Colorado and throughout the United States for more than fifteen years. Mr. Shuman concentrates his practice on representing injured shareholders through securities class actions and derivative litigation.

Mr. Shuman graduated from U.C.L.A. in 1984 and the University of San Francisco School of Law in 1989.

OUR SECURITIES LITIGATION TEAM

Mr. Shuman has materially participated in or has had primary responsibility for more than fifty class action lawsuits, including actions that were the subject of the following opinions: *Queen Uno Ltd. P'ship. v. Coeur d'Alene Mines Corp., 2 F. Supp. 2d 1345 (D. Colo. 1998); Queen Uno Ltd. P'ship. v. Coeur D'Alene Mines Corp., 183 F.R.D. 687 (D. Colo. 1998); Schaffer v. Evolving Sys. Inc., 29 F. Supp. 2d 1213 (D. Colo. 1998); In re Intelcom Group, Inc., Sec. Litig., 169 F.R.D. 142 (D. Colo. 1996); In re Hirsch, 984 P.2d 629 (Colo. 1999); Leonard v. McMorris, 272 F.3d 1295 (10th Cir. 2001); In re Secure Computing Sec. Litig., 2001 U.S. Dist. LEXIS 13563 (N.D. Cal. 2001); Angres v. Smallworldwide, 94 F. Supp. 2d 1167 (D. Colo. 2000); In re Ribozyme Pharm., Inc. Sec. Litig., 192 F.R.D. 656 (D. Colo. 2000); Kerns v. SpectraLink Corp., 2003 U.S. Dist. LEXIS 6194 (D. Colo. 2003); Kerns v. SpectraLink Corp.,*

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2003 U.S. Dist. LEXIS 11711 (D. Colo. 2003); Gregg v. Sport-Haley, Inc., 2003 U.S. Dist. LEXIS 6195 (D. Colo. 2003); and In re Rhythms Sec. Litig., 300 F. Supp. 2d 1081 (D. Colo. 2004).

Mr. Shuman has lectured in the area of class actions, teaching a continuing legal education course entitled, *Litigating the Class Action Lawsuit in Colorado.* He was also a panelist at the 35th Rocky Mountain Securities Conference and presented on the topic of *Pleading Requirements in the Tenth Circuit after the Private Securities Litigation Reform Act of 1995.*

Mr. Shuman is a member of both the Colorado and California State Bars, and is admitted to practice before the United States District Courts for the Northern District and Central District of California, the United States District Court for Colorado, and the United States Ninth and Tenth Circuit Courts of Appeals.

RUSTY E. GLENN rusty@shumanlawfirm.com

Rusty E. Glenn, an associate of the firm, concentrates his practice on representing injured shareholders through securities class actions and derivative litigation.

Mr. Glenn received his B.S., summa cum laude, from Baker University, an M.A. in Economics from the University of Kansas Graduate School of Economics and his law degree from the University of Kansas School of Law where he was awarded the

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Hinkle Elkouri Tax Procedure Award for his scholastic achievement and community service in providing volunteer income tax assistance to low-income individuals. He also studied at Bahceshir University in Istanbul, Turkey under U.S. Supreme Court Justice Antonin Scalia.

Mr. Glenn's professional experience includes two years as Constituent Director for Kansas Senate Democratic Leader Anthony Hensley. In addition, Mr. Glenn gained experience in the investigation and prosecution of financial crimes and corporate fraud while working for the Federal Bureau of Investigation in Washington, D.C. and Kansas City, Missouri. Upon graduation from law school, Mr. Glenn joined The Shuman Law Firm and has prosecuted numerous class actions and derivative actions.

Mr. Glenn is a member of the Colorado State Bar, and is admitted to practice before the United States District Court for the District of Colorado, and the United States Tenth Circuit Court of Appeals.

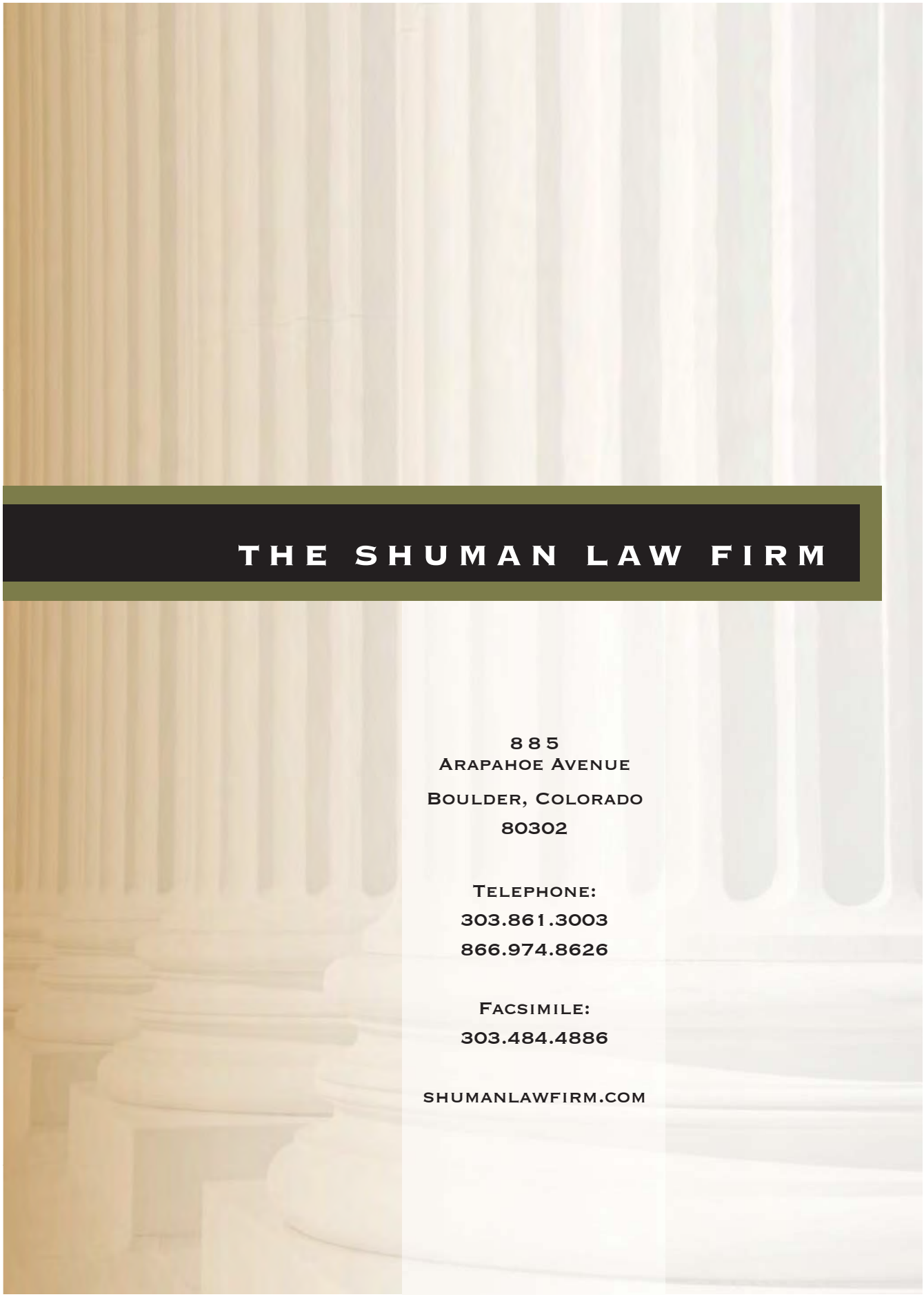

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EXHIBIT 14

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, *et al.*, 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, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LABATON SUCHAROW LLP'S RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES TO LABATON SUCHAROW LLP – JULY 10 RESPONSE

INTERROGATORY 47:

Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY 47:

The Firm incorporates the General Objections set forth above. We note that most contingency fee arrangements with clients provide for payment on a percentage of total award basis, subject to the approval of the Court and a lodestar cross-check. Subject to and without waiving the foregoing objections, the Firm references the following documents previously produced: LBS005407-LBS005416.

INTERROGATORY 48:

Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY 48:

The Firm incorporates the General Objections set forth above. Subject to and without waiving the foregoing objections, the Firm provides the following information:

Case Name	Role	Status	Labaton Compensation	Notes
In re Barrick Gold Securities Litigation, No. 13-cv-3851 (S.D.N.Y.)	Liaison Counsel	Settled	2016 Fee Motion	Rates are set forth below.
In re Britannia Bulk Holdings Inc. Securities Litigation, No. 08-cv-9554 (S.D.N.Y.)	Liaison Counsel	Dismissed	None	

Case Name	Role	Status	Labaton Compensation	Notes
International Assoc. of Heat and Frost Insulators and Asbestos Workers Local #6 Pension Fund, et al. v. International Business Machines Corp., No. 15-cv-2492 (S.D.N.Y.)	Liaison Counsel	Dismissed	None	
In re Banco Bradesco S.A. Sec. Litig., No. 16-cv-4155 (S.D.N.Y.)	Liaison Counsel	Pending	None	
In re Icagen, Inc. Shareholder Litigation, C.A. No. 6692 (Del. Ch.)	Local Counsel (Counsel for Plaintiff)	Settled	2012 Fee Motion	Fee motion was not made on the basis of lodestar and rates were not reported.
Oklahoma Firefighters Pension and Retirement System v. Xerox Corporation, No. 16-cv-8260 (S.D.N.Y.)	Liaison Counsel to the Class	Pending	None	

BARRICK GOLD – Labaton Rates

PROFESSIONAL	STATUS	HOURLY RATE	JD Year
Keller, C.	(P)	$950	1997
Gardner, J.	(P)	$925	1990
Gottlieb, L.	(P)	$925	1990
Stocker, M.	(P)	$875	1995
Belfi, E.	(P)	$875	1995
Zeiss, N.	(P)	$850	1995
Hallowell, S.	(P)	$800	2003
Fonti, J.	(P)	$800	1999
Hoffman, T.	(P)	$800	2004
Tountas, S.	(P)	$775	2003
Fox, C.	(OC)	$750	1994
Wierzbowski, E.	(A)	$725	2001
Erroll, D.	(A)	$675	2001
Avan, R.	(A)	$600	2006
Buell, G.	(A)	$550	2009
Stampley, D.	(A)	$460	2009
Coquin, A.	(A)	$425	2014
Hane, C.	(A)	$390	2013

PROFESSIONAL	STATUS	HOURLY RATE	JD Year
Jouvin, Z.	(SA)	$500	2003
Wharff, W.	(SA)	$500	2001
Hurtado, S.	(SA)	$500	2002
Kramer, D.	(SA)	$500	2001
Torrez, F.	(SA)	$500	2003
Figueroa, Y.	(SA)	$500	1999
Lugo Melendez, K.	(SA)	$500	2013
Horlacher, S.	(SA)	$500	2000
Assefa, M.	(SA)	$500	2003
Salzman, E.	(SA)	$500	2003
Flanigan, M.	(SA)	$435	1998
Hirsh, J.	(SA)	$410	2001
Davis, O.	(SA)	$390	2000
Stinaroff, D.	(SA)	$360	2007
Korode, J.	(SA)	$360	2005
Schervish, W.	(LA)	$550	2007
Pontrelli, J.	(I)	$495	N/A
Greenbaum, A.	(I)	$455	N/A
Crowley, M.	(I)	$435	N/A
Polk, T.	(I)	$430	N/A
Wroblewski, R.	(I)	$425	N/A
Malonzo, F.	(PL)	$340	N/A
Carpio, A.	(PL)	$325	2005
Rogers, D.	(PL)	$325	N/A
Mehringer, L.	(PL)	$325	N/A
Russo, M.	(PL)	$300	N/A
Farber, E.	(PL)	$205	N/A

Partner	(P)	Of Counsel	(OC)
Associate	(A)	Staff Attorney	(SA)
Legal Analyst	(LA)	Investigator	(I)
Paralegal	(PL)		

Dated: July 10, 2017

Joan A. Lukey (BBO No. 307340)
Justin J. Wolosz (BBO No. 643543)
CHOATE, HALL & STEWART LLP
Two International Place
Boston, MA 02110
Tel: (617) 248-5000
joan.lukey@choate.com
jwolosz@choate.com

Attorneys for Labaton Sucharow LLP

VERIFICATION

On behalf of Labaton Sucharow LLP, I have read Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response. The Response was prepared with the assistance of the employees, representatives, and counsel of Labaton Sucharow LLP, and the information provided is not fully within my personal knowledge. I reserve the right to make changes or additions to these responses if it appears at any time that errors or omissions have been made or if more accurate or complete information becomes available. To the extent that these responses are within my personal knowledge, I certify them to be true. To the extent that these responses are not within my personal knowledge, I have no reason to believe that they are not true.

Signed under oath under the penalties of perjury this 11th day of July, 2017.

Lawrence A. Sucharow, Chairman

CERTIFICATE OF SERVICE

I, Justin J. Wolosz, hereby certify that on this Tenth day of July I have caused a copy of the foregoing Labaton Sucharow LLP's Response To Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response to be served via email and overnight mail upon William F. Sinnott, Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, MA 02108.

Justin J. Wolosz

8186704

EXHIBIT 15

United States Court of Appeals
For the First Circuit

No. 12-1520

ANGEL RUIZ-RIVERA,

Plaintiff, Appellant,

v.

DOW LOHNES, PLLC, a/k/a Dow Lohnes and Albertson, PLLC,

Defendant, Appellee,

BENNY F. CEREZO, ET AL.,

Defendants.

Before

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

JUDGMENT

Entered: January 8, 2014

Appellant Angel Ruiz-Rivera filed a complaint against various law firms and lawyers, and the complaint contained state-law claims of breach of contract and malpractice. After appellee Dow Lohnes, PLLC filed a motion to dismiss based on the fact that complete diversity was lacking, appellant requested voluntary dismissal without prejudice. See Fed. R. Civ. P. 41(a)(1)(A)(i). The district court granted appellant's request, noting that it had no subject matter jurisdiction over the case; the court also, sua sponte, sanctioned appellant under Fed. R. Civ. P. 11 by directing him to pay appellee's attorneys' fees.

Appellee then filed a motion for reconsideration, arguing that the dismissal should have been with prejudice based upon either (1) the "two dismissal rule," see Rule 41(a)(1)(B), or (2) the court's inherent power. The district court granted appellee's motion, and the judgment was amended to reflect a with-prejudice dismissal. For the following reasons, the dismissal with prejudice cannot be affirmed.

I. Dismissal of the Complaint

Rule 41(a)(1)(A)(i) provides, in relevant part, that a plaintiff may obtain a voluntary dismissal, without a court order, by filing a "notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." As for the effect of such a notice, Rule 41(a)(1)(B) states as follows:

> Unless the notice . . . states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal -- or state -- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(emphasis added). We also have held that the "two dismissal" rule does not apply "unless the defendants are the same or substantially the same or in privity in both actions." American Cyanamid Co. v. Capuano, 381 F.3d 6, 17 (1st Cir. 2004) (internal quotation marks and citation omitted).

The problem with the district court's application of the "two dismissal" rule is that neither of the prior Puerto Rico cases relied upon by that court to invoke the rule -- (1) Instituto de Educacion Universal v. United States Dept. of Educ., No. 98–cv-2225, and (2) Instituto de Educacion Universal v. United States Dept. of Educ., No. 96-cv-1893 -- had been voluntarily dismissed by appellant. Thus, these cases cannot count for purposes of Rule 41(a)(1)(B). And, while appellant had, in fact, voluntarily dismissed the case cited by appellee, see Ruiz-Rivera v. Wolff, No. 09-cv-1873, that case also provides no basis for invoking the "two dismissal" rule.

In this regard, appellee's only argument in support of a finding of privity is based on the district court's cryptic statement that "both plaintiff and Dow Lohnes are privy in prior civil actions which were adjudicated on the merits." Appellee's Brief, at 24 (internal quotation marks and citation omitted). Of course, and leaving aside exactly what the district court meant by the above statement, the fact that a plaintiff and a defendant may have been in privity in a past case is irrelevant for purposes of the "two dismissal" rule. Rather, in order for this rule to apply, it is "the defendants [who must be] the same or substantially the same or in privity in both actions." See American Cyanamid Co., 381 F.3d at 17 (emphasis added). Given the lack of any effort on appellee's part to explain how it is in privity with the Wolff defendants, Rule 41(a)(1)(B) simply is not available as a basis for a with-prejudice dismissal.

If more were needed, and it is not, we note that the claims in the two cases are not the same. Not only do the two cases present different bases for relief -- now, legal malpractice/breach of contract claims and, in Wolff, claims of violation of constitutional, statutory, and regulatory law, as well as fraud on the courts -- but the claims also do not arise from the same series of events. That is, the claims in the case at hand arise from appellee's conduct in representing IEU in the administrative proceedings, while the claims in Wolff arise from the conduct of the defendants in that case -- DOE officials and a private corporation -- during these proceedings and during the related judicial proceedings.

Appellee's alternative argument that the district court could have used its inherent authority

to order a with-prejudice dismissal also is unavailing. That is, such a dismissal ordinarily operates as an adjudication on the merits, and, where, as here, a district court is without subject matter jurisdiction over the case, it usually is barred from making any merits-related rulings. In re Orthopedic "Bone Screw" Products Liability Litig., 132 F.3d 152, 156-57 (3rd Cir. 1997) (so holding and distinguishing the sanction of attorneys' fees which is a matter collateral to the merits); Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 122 (2d Cir. 1999) ("where federal subject matter jurisdiction does not exist, federal courts do not have the power to dismiss with prejudice, even as a procedural sanction"). See also Christopher v. Stanley-Bostitch, Inc., 240 F.3d 95, 100 (1st Cir. 2001) (per curiam) (citing the above cases and holding that "orders relating to the merits of the underlying action are void if issued without subject matter jurisdiction"). While appellee relies on In re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996), that case is distinguishable, and we are not persuaded by appellee's argument.

Given the above, then, the district court, under Rule 41(a)(1)(A), had no discretion to enter anything other than a without-prejudice dismissal. See Universidad Cent. del Caribe, Inc. v. Liaison Comm. on Med. Educ., 760 F.2d 14, 19 (1st Cir. 1985) (if neither an answer or a motion for summary judgment has been filed before the submission of a notice of dismissal, "Rule 41(a)(1) is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discretion"; internal quotation marks and citation omitted). Therefore, the judgment of the district court must be vacated, and the matter remanded for a judgment of dismissal without prejudice.

II. Rule 11 Sanctions

Ordinarily, "an order imposing Rule 11 sanctions is not appealable until the particular sanction is chosen and ordered by the district court." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1337.4, at 765 (3d ed. 2004) (citing cases). See also Century 21 Real Estate Corp. v. Century 21 Real Estate, Inc., 929 F.2d 827, 830 (1st Cir. 1991) (concluding that an appeal from a grant of attorneys' fees that had not been quantified was premature). Here, the district court never set the amount of attorneys' fees that appellant would be required to pay, and the sanction order therefore is not final. However, in the interests of judicial efficiency, we note that the district court failed to comply with the procedural requirements of the rule.

In particular, Rule 11(c)(3), which authorizes a district court to impose sanctions sua sponte, as here, provides that "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." As we have held, this language means that when a district court is considering sua sponte sanctions, Rule 11 requires the court "to first issue an order to show cause why the challenged conduct had not violated Rule 11." Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 244 n.27 (1st Cir. 2010) (emphasis added). Here, the district court failed to issue the required show cause order. We also add that because of this omission, the court was without authority to impose attorneys' fees as a sanction. See Rule 11(c)(5) (stating that, unless a district court issues the Rule 11(c)(3) show-cause order before a voluntary dismissal, the court "must not impose a monetary sanction"; emphasis added). Thus, even if the sanction order were before this court, we could not affirm it.

III. Conclusion

The judgment of the district court is vacated, and the matter is remanded for further proceedings in accordance with this opinion. All pending motions are denied. No costs will be awarded under Fed. R. App. P. 39.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Daniel Dominguez, Judge, US District Court of Puerto Rico
Frances Rios de Moran, Clerk, US District Court of Puerto Rico
Angel Ruiz-Rivera
Salvador Antonetti-Stutts
Nashely Pagan-Isona
Ruben Cerezo-Hernandez

EXHIBIT 16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SHIRE LLC and SHIRE US INC., Plaintiffs, v. ABHAI, LLC, Defendant.	Civil Action No. 1:15-cv-13909 (WGY) Bench Trial

PLAINTIFFS' APPLICATION FOR REASONABLE ATTORNEYS FEES AND EXPENSES IN ACCORDANCE WITH THE COURT'S MARCH 22, 2018 ORDER

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I. INTRODUCTION

On March 22, 2018, the Court issued its Findings of Fact, Rulings of Law, and Order for Judgment, which awarded attorneys' fees and costs to Plaintiffs Shire LLC and Shire US Inc. (collectively, "Shire") as sanctions due to the litigation misconduct of Defendant Abhai, LLC and its parent, KVK Tech, Inc. ("KVK" or, collectively, "Abhai")[1]. D.I. 377 at 77. The Court directed Shire to "submit a revised claim for attorneys' fees and costs limited to (a) recovering for the time wasted dealing with Abhai's inaccurate stability and dissolution data, (b) discovering the litigation misconduct discussed immediately above, and (c) dealing with Abhai's revised stability and dissolution data." *Id.* Shire hereby submits this detailed account of its attorneys' fees and costs that fall within the Court's enumerated categories and respectfully requests the Court award Shire accordingly.

II. BACKGROUND FACTS

Due to Abhai's misconduct, this litigation was extended by five months—with Shire forced to conduct its own dissolution testing, reconsider Abhai's repudiated dissolution data, analyze Abhai's new dissolution data, and investigate why Abhai did not timely produce its dissolution data. *See* D.I. 377 at 64–81. With the Court having already determined that Shire is eligible for an award of the fees and costs stemming from Abhai's misconduct, this submission is intended solely to document those fees and costs.

[1] Both Abhai and KVK are fully responsible for the litigation misconduct in this case. D.I. 337 at 70 ("The conduct of Abhai and KVK reflects an appalling lack of awareness of a litigant's responsibility to our justice system . . . ."). Abhai, a shell with limited assets, has eschewed any reliance on a distinction between Abhai and KVK. D.I. 189 at 9–10. For these reasons, both Abhai and KVK should be ordered to pay the sanctions award.

A. Category (a): "time wasted dealing with Abhai's inaccurate stability and dissolution data"

For category (a), the relevant time frame is September 2016 through April 2017. This time frame begins when the parties started preparing for corporate depositions, analyzing the dissolution data, and preparing for expert reports and ends when the Court and Shire were first made aware of Abhai's use of erroneous data. Shire took the deposition of Dr. Ranga Namburi, Abhai's corporate 30(b)(6) witness and the person who discovered the inaccurate data, on October 14, 2016. D.I. 277 at 65–66. In November 2016, in response to Dr. Namburi's deposition, Shire undertook additional discovery regarding Abhai's dissolution data, including a request for all versions of its dissolution test protocols. D.I. 332 (Shire's Post Trial FFCL) ¶ 749. Abhai produced most of its dissolution test protocols on November 23, 2016—all except the newest version, from October 2016. D.I. 332 ¶ 755.

During this same timeframe, Shire's counsel analyzed and reviewed Abhai's documents and laboratory notebooks, worked with its experts, and prepared expert reports regarding Abhai's dissolution testing. Shire worked with Shen Luk of Juniper Pharma Services ("Juniper")—Shire's expert on coating thickness and dissolution testing—to analyze Abhai's dissolution protocols and perform dissolution testing of Abhai samples. D.I. 332 ¶¶ 38–41. Additionally, Shire worked with Jennifer Dressman, Shire's principal infringement expert, in analyzing Abhai's dissolution testing data for her rebuttal expert report and trial testimony. D.I. 332 ¶¶ 24–27. In reaching their initial conclusions about the release of Abhai's ANDA Product, Shire's experts relied not only on the documents produced by Abhai during the course of discovery, but also on representations made by Dr. Namburi. D.I. 332 ¶ 726.

The opening expert reports for Dr. Luk and Dr. Dressman were served on October 21, 2016. On December 16, 2016, Shire served the rebuttal expert report of Dr. Dressman in

response to the expert report of Diane Burgess, Abhai's expert. In her rebuttal report, Dr. Dressman explained that Abhai's own dissolution testing, including the later-repudiated test data, confirmed that Abhai's ANDA product infringed. *See* D.I. 145 (Shire's Pre-Trial FFCL) ¶¶ 140–66. Shire began preparing for Dr. Dressman's and Dr. Burgess' depositions in early January 2017, and Shire took and defended their depositions on January 20, 2017 and January 27, 2017, respectively. Beginning in early March 2017, Shire began to prepare its pretrial motions and briefing and to prepare for trial itself; this included preparing to cross-examine Dr. Burgess and to conduct the direct examinations of Dr. Dressman and Dr. Luk. Trial began on March 27, 2017, Dr. Burgess testified on March 28, 2017, and Dr. Dressman and Dr. Luk were about to take the stand when, on April 3, Abhai revealed that much of its dissolution data was, in fact, incorrect.

B. Category (b): "discovering the litigation misconduct"

For category (b), the relevant time frame is April 2017 through August 2017, during which Shire was diligently investigating the facts surrounding Abhai's withholding of relevant information. On April 3, 2017, Abhai produced its "corrected" dissolution data and, on the next day, moved to amend the trial order to include the just-produced data. *See* D.I. 152–155. As instructed by this Court, Shire conducted a thorough investigation of these developments. Throughout April 2017, Shire poured through Abhai's newly produced documents and—faced with more obstructive conduct from Abhai—moved to compel discovery on May 5, 2017. D.I. 183. On May 15, 2017, this Court ordered Abhai to produce Mr. Tabasso's call logs and text messages. D.I. 195. With Shire pushing hard for more document production relating to "who knew what when" about the repudiated and corrected data, Abhai coughed up a vast number of documents. As Abhai admitted, Shire "collected over 60,000 pages of documents from Abhai since April 4." D.I. 264 (Joint Add. Pre-Trial Mem.) ¶ 237. These documents were not only

relevant to this investigation, but also relied on at trial and included in the Court's opinion. *See*, *e.g.*, D.I. 377 at 66–70, 73.

In June and July 2017, Shire deposed numerous Abhai officers and employees—Benjamin Roembke, Sameer Late, Kevin O'Loughlin, Todd Leo, Murty Vepuri, Frank Nekoranik, Ashvin Panchal, Jordan Rees, and Anthony Tabasso—regarding Abhai's ownership structure, company practices and testing procedures, document retention policies, and knowledge of the erroneous and allegedly corrected dissolution testing. Shire requested that Abhai call its fact witnesses at trial, and Shire prepared to cross-examine them. But Abhai refused to produce these witnesses at trial. D.I. 337 at 64, n. 6. Shire was forced instead to prepare and submit proffers of what each of these witnesses would have testified to had Abhai cooperated. Shire submitted their proffers on September 15, 2017. D.I. 287–290.

C. Category (c): "dealing with Abhai's revised stability and dissolution data"

For category (c), the relevant time frame is April 2017 through September 2017. When Abhai produced its allegedly corrected dissolution data in April 2017, Shire had to review and analyze each corrected data point and determine its impact on Shire's existing analysis and corresponding infringement arguments. Starting in May 2017, Shire worked with its experts, Dr. Luk and Dr. Dressman, to review and amend each of their expert reports in light of the new "corrected" dissolution testing. In addition, as Abhai could no longer be relied upon to produce accurate dissolution data, Shire—through Dr. Luk—needed to conduct its own dissolution testing of each strength of Abhai's ANDA product. The supplemental expert reports were served in late June 2017, and reply reports were served in early August 2017 along with a corresponding motion for leave. Abhai deposed Dr. Dressman on August 4, 2017 and Dr. Luk on August 18, 2017. Shire deposed Dr. Burgess on August 24, 2017. At trial, Dr. Luk testified on September 5,

2017, Dr. Burgess testified on September 5, 6, and 8, 2017, and Dr. Dressman testified on September 14, 2017.

III. SHIRE'S REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE

Sanctions, under federal law and procedure, are appropriate in these circumstances through three different avenues: (1) Federal Rules of Civil Procedure 37; (2) the Court's inherent authority; and (3) 35 U.S.C. § 285, which provides a court with authority "in exceptional cases [to] award reasonable attorney fees to the prevailing party."[2] Under Rule 37, a court must order reasonable expenses, including attorneys' fees, if a party "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2). Additionally, federal courts possess "inherent powers," not conferred by rule or statute, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). That authority includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).

A "permissible sanction is an assessment of attorney's fees . . . instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (internal quotations omitted). According to a "but-for causation standard," "[t]he award is then the sum total of the fees that, except for the misbehavior, would not have accrued." *Id.* at 1187. "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838

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[2] Shire is the prevailing party and, given the extent of Abhai's litigation misconduct, this case qualifies as "exceptional." *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 726 F.3d 1359, 1366–67 (Fed. Cir. 2013) (noting the "well-established rule that litigation misconduct and unprofessional behavior may suffice, by themselves, to make a case exceptional under § 285.") As the Court has already awarded Shire its attorneys' fees and costs due to Abhai's litigation misconduct, Shire will not separately discuss Section 285, which provides a separate statutory basis for the fees and costs Shires seeks.

(2011). Accordingly, this Court determined it was appropriate to award attorneys' fees and costs as sanctions due to Abhai's litigation misconduct "limited to (a) recovering for the time wasted dealing with Abhai's inaccurate stability and dissolution data, (b) discovering the litigation misconduct discussed immediately above, and (c) dealing with Abhai's revised stability and dissolution data." D.I. 377 at 77.

The Federal Circuit and the District of Massachusetts generally follow the "lodestar" method for determining the amount of reasonable attorneys' fees: the number of hours reasonably expended multiplied by a reasonable hourly rate. *Bywaters v. United States*, 670 F.3d 1221, 1228 (Fed. Cir. 2012); *Jin Hai Li v. Foolun, Inc.*, 273 F. Supp. 3d 289, 292 (D. Mass. 2017). The starting point for this calculation is determining the number of adequately documented hours. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar calculation then requires a determination of a reasonable hourly rate that is benchmarked to the "prevailing rates in the community" for lawyers of like "qualifications, experience, and specialized competence." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295 (1st Cir. 2001). Adjustments to the lodestar calculation upward or downward may be made in "rare" and "exceptional" circumstances, if based on specific findings of factors not subsumed within the loadstar calculation. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010).

A. Shire Spent a Reasonable Number of Hours Responding to Abhai's Misconduct

The first step in following the lodestar method is to calculate the number of hours reasonably expended by the attorneys for the prevailing party, excluding those hours that are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434; *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). Evidence supporting the reasonableness of the hours expended and hourly rates, including contemporaneous time records, invoices, and other

documentation is provided along with a declaration of Shire's counsel. *See* Collins Decl., Ex. A. While billing for a litigation of this size is complicated, and Abhai may try to pick at the bills, Shire believes the hours and amount spent were necessary to protect its rights in this situation and therefore reasonable, especially given that it was Abhai's own obstructive conduct that warranted such measures. In total, Shire identified at least 3,230.3 attorney hours, resulting in a total of $2,087,889 in attorneys' fees fitting the Court's three enumerated categories. A detailed description of the work performed by Shire's attorneys is outlined below and supported by the attached documentation.

1. Category (a): "time wasted dealing with Abhai's inaccurate stability and dissolution data"

For category (a), the time entries included in the calculation from September 2016 to April 2017 include:

- time spent analyzing Abhai's ANDA containing dissolution and stability data;
- time spent reviewing Abhai's lab notebooks containing dissolution and stability data;
- time spent working with Juniper on dissolution testing;
- time spent working on Dr. Luk's opening expert report related to dissolution testing (including the four pages in his 37-page opening report plus the short description in Appendix E of his dissolution testing methodology);
- time spent working with Dr. Dressman on her reply report addressing dissolution data;
- time spent preparing Dr. Dressman for deposition;
- time spent reviewing Dr. Burgess's expert report on inaccurate dissolution data;
- time spent deposing Dr. Burgess on inaccurate dissolution data;
- time spent preparing Dr. Luk for deposition;
- time spent deposing Abhai/KVK employees on inaccurate dissolution data;

- time spent preparing Dr. Dressman and Dr. Luk for trial on inaccurate dissolution data; and

- time spent preparing to cross examine Dr. Burgess on inaccurate dissolution data.

2. Category (b): "discovering the litigation misconduct"

For category (b), the time entries included in the calculation from April 2017 to August 2017 include:

- time spent during first trial reviewing newly disclosed dissolution and stability data;

- time spent opposing Abhai's attempt to amend the pretrial order and introduce evidence at the first trial not produced during fact discovery;

- time spent at the court hearing convened to determine the best path forward;

- time spent drafting discovery requests;

- time spent reviewing Abhai's responses to interrogatories and request for production;

- time spent reviewing Abhai documents produced after the first trial in April 2017;

- time spent pressing Abhai for more information and additional documents;

- time spent moving to compel production of documents and additional information, including related legal research;

- time spent researching the relationship between KVK and Abhai;

- time spent collecting dissolution testing for third parties to show issues with Abhai's testing; and

- time spent preparing for and taking the depositions of Anthony Tabasso, Jordan Rees, Ashvin Pancheal, Frank Nekovanik, Murty Vepuri, Ranga Namburi, Todd Leo, Benjamin Roembke, Sameer Late, and Kevin O'Loughlin.

3. Category (c): "dealing with Abhai's revised stability and dissolution data"

For category (c), the time entries included in the calculation from April 2017 to September 2017 include:

- time spent developing a response to the revised stability and dissolution data;

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- time spent analyzing Abhai's document productions in light of revised stability and dissolution data;
- time spent with Dr. Luk and Juniper regarding new dissolution studies being conducted;
- time spent with Dr. Dressman on a supplemental expert report addressing Abhai's revised stability and dissolution data;
- time spent working with consulting experts to understand issues raised by the revised dissolution data;
- time spent collecting information about other dissolution studies for Adderall XR, including those in Shire's NDA;
- time spent moving to compel Abhai to produce more documents and provide additional information relevant to understanding the revised stability and dissolution data; and
- time spent preparing Dr. Dressman for the second trial.

4. Requested Attorney Fees Were Carefully Reviewed

Counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" *Hensley*, 461 U.S. at 434. That has been done here. Before any invoices are sent to a client, Covington reviews all time records for inefficiency and redundancy. Additionally, any fees or costs not clearly falling within the three enumerated categories have been eliminated.

For example, Shire's counsel surrendered any time entries where the entries were vague—even if the entry otherwise indicated the work was likely to be related to the categories. *See* Collins Decl. ¶ 5. Additionally, time entries that included tasks unrelated to the Court's categories were not included. *See id.* Moreover, Shire has not included fees for its paralegals or other legal staff. *See id.* at ¶ 6. And Shire's counsel were efficient in allocating work. *See id.* at ¶ 3. Experience levels were carefully matched to the demands of a particular project to contain

costs without sacrificing the odds of success. *See id.* Shire's counsel have reviewed the bills carefully and do not believe there is any duplication of effort. *See id.* at ¶ 4–5.

These fees and costs are in line with contemporary patent litigation. Based on the widely accepted American Intellectual Property Law Association ("AIPLA") 2017 Report of the Economy Survey, the average litigation costs for a patent infringement case under the Hatch Waxman Act with more than $25 million at risk is $1.15 million through discovery and $2.654 million through trial. Collins Decl., Ex. F at I-128; *see also id.* at I-116 (average cost in Boston is $3.714 million); *id.* at I-122 (average cost with a firm having 60+ attorneys is $4.992 million). The 90% percentile for Hatch Waxman litigation—presumably regular cases, not those involving essentially two trials—is $7.75 million. *Id.* at I-128. Moreover, Adderall XR® is a blockbuster, and a variety of complex issues, including intricate non-infringement analysis and contentious discovery into Abhai's litigation misconduct, resulted in essentially two separate trials. This level of complexity required a higher skill set, and more time, labor, and experience to handle.

To put the above further into perspective, the total litigation expenses for Shire in this one particular matter were over $8.6 million. Collins Decl. ¶ 8. The amount of fees and costs requested as sanctions due to Abhai's litigation misconduct is approximately a quarter of the total for this case. Furthermore, the litigation costs actually incurred by Shire since discovering Abhai's misconduct in April 3, 2017 through the second trial in September 15, 2017 is over $4.8 million. *Id.* Shire is, however, submitting less than half of these fees and costs to the Court for consideration. Because these hours were genuine worked hours, and were not duplicative or unnecessary, they are included in Shire's lodestar calculation.

5. Local Representation Fees

Choate Hall & Stewart LLP ("Choate"), acting primarily as local counsel, billed a total of $33,128 representing Shire in connection with this matter related to the Courts identified

categories. Shire has specifically limited its requested recovery to just the five-day period Choate attended and prepared for the second trial. Marandett Decl. ¶ 8. In an attempt to streamline its request, Shire is not submitting other fees and costs expended on local representation that are arguably related to Abhai's misconduct. For comparison, Choate's total fees for the period from April 2017 through December 2017 is over $157,000. Marandett Decl. ¶ 7. These hours were specific to work needed for local representation, non-duplicative of Covington's work and necessary to the representation.

B. Shire's Reasonable Hourly Rate Is Comparable to Prevailing Rates in the Community for Patent Litigation

A court's second step in calculating the lodestar requires a determination of a reasonable hourly rate—a determination benchmarked to the "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895–96 (1984). The "community" is generally the forum state. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Evidence of the attorneys' customary rates and the actual fee arrangement in the case may further be considered in determining reasonableness. *See Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("The presence of a pre-existing fee agreement may aid in determining reasonableness.")). A district court may also rely on its own knowledge of prevailing market rates. *See, e.g.*, *Warnock v. Archer*, 397 F.3d 1024, 1027 (8th Cir. 2005).

The hourly rates and biographies for Shire's counsel are provided in the attached declarations. Collins Decl. ¶ 9, Ex. E; Marandett Decl. ¶ 7, Ex. A. The rates billed to Shire in this case were consistent with each attorneys' customary, market-driven rate at the time the service was rendered, and are appropriate for the level of skill and experience of each attorney or

paralegal. These rates are consistent with the rates of similarly situated attorneys. In Boston, litigation rates have been reported as follows[3]:

	2016 Rates			2017 Rates		
Rank	High	Low	Average	High	Low	Average
Associate 1	$335	$325	$330	$495	$295	$350
Associate 2	$495	$360	$455	$730	$350	$435
Associate 3	695	350	$520	N/A	N/A	N/A
Associate 3	$625	$540	$555	$670	$380	$580
Associate 4	N/A	N/A	N/A	N/A	N/A	N/A
Associate 5	N/A	N/A	N/A	$815	$425	$555
Associate 6	$765	$695	$755	$730	$340	$570
Associate 7	N/A	N/A	N/A	$865	$350	$615
Associate 8	$930	$400	$710	$730	$540	$665
Counsel	$895	$695	$840	$970	$350	$810
Junior Partner	$925	$550	$715	$895	$580	$715
Senior Partner	$1,450	$405	$870	$1,450	$485	$855

The American Lawyer also reported the following billing average billing rates for top national practices: $1,000/hour for partners; $745/hour for senior associates; $630 for mid-level associates, and $485/hour for junior associates.[4] While the rates here are on the higher end of the reported surveys, this case warranted such rates: not only was the suit complex, but patent litigation is also a specialty in which practitioners largely reside in larger cities where rates are much higher.

[3] Original search results attached as Exhibit G, which were retrieved from Valeo Partners Rates Database on 3/28/2018, available at http://reports.valeopartners.com/rates/report.

[4] The American Lawyer article is available at https://www.law.com/americanlawyer/almID/1202799338640/Read-This-Before-You-Set-Your-2018-Billing-Rates/

In sum, under the lodestar methodology, the number of attorney hours worked fitting the Court's categories totaled approximately 3,230.3 hours. Multiplied by reasonable hourly rates, these hours yield a total of $2,087,889.

C. Shire Expended Reasonable Costs in Response to Abhai's Misconduct

"[R]easonable expenses, necessary for the prosecution of a case, are ancillary to and may be incorporated as part of a fee award under a prototypical federal fee-shifting statute." *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 17 (1st Cir. 2011). A party seeking to recover costs and expense need not document its request with "page-by-page precision, [however] a bill of costs must represent a calculation that is reasonably accurate under the circumstances." *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1380 (Fed. Cir. 2006).

Here, Shire seeks compensation for a total of $292,150.72 in costs. The major categories of these expenses are discussed below, and a chart summarizing expenses along with supporting documentation of expenses is provided. Collins Decl. ¶ 7, Exs. A–D.

A large category of costs are expert fees. A "district court may invoke its inherent power to impose sanctions in the form of reasonable expert fees in excess of what is provided for by statute." *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008); *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 378–79 (Fed. Cir. 1994). Recovering fees for Dr. Dressman and Dr. Luk post-April 2017 is appropriate because the experts were prepared to testify at trial in April, and would have testified then but for Abhai's delayed disclosure of its erroneous dissolution data. Dr. Dressman and Dr. Luk had to re-analyze Abhai's new, corrected dissolution data and revise their expert reports in addition to being prepared to give testimony at the second trial.

Another category of costs is vendor fees. This category includes deposition costs related to taking the fact and expert witnesses' testimony regarding the erroneous and allegedly

corrected dissolution data. All of the submitted expenses are reasonable and appropriate expenses under the Court's inherent power. *See, e.g.*, *Mathis v. Spears*, 857 F.2d 749, 757, 759 (Fed. Cir. 1988).

Finally, post-judgment interest is appropriate from the date of this Court's judgment awarding attorney fees pursuant to 28 U.S.C. § 1961, *see id.* at 759–60 (citations omitted), and Shire asks the Court to award post-judgment interest.[5]

IV. CONCLUSION

For the foregoing reasons, Shire respectfully requests the Court to award its reasonable attorneys' fees and costs.

Dated: April 18, 2018

[5] Awarding post-judgment interest here is particularly appropriate in light of the fact that it is now approximately one entire year from the date on which this trial would have concluded if not for Abhai's misconduct.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served upon all counsel of record by electronic mail.

Dated: April 18, 2018

By: */s/ Eric J. Marandett*

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MR. JORGE FRANCISCO SÁNCHEZ AND DOLORES SERVICE STATION AND AUTO PARTS, INC., Plaintiffs, v. ESSO STANDARD OIL COMPANY (PUERTO RICO), Defendant.	CIVIL NO. 08-2151(JAF) INJUNCTION FOR VIOLATIONS OF THE SOLID WASTE DISPOSAL ACT, CIVIL PENALTIES
ESSO STANDARD OIL COMPANY (PUERTO RICO), Third-Party Plaintiff, v. JORGE LUIS SÁNCHEZ-SÁNCHEZ; ET AL., Third-Party Defendants.	

AGREED FINAL JUDGMENT

Upon the Court having considered all pleadings, statements and evidence submitted during the bench trial held from August 16, 2010 to August 19, 2010, at which trial Plaintiffs, Jorge Francisco Sanchez and Dolores Service Station and Auto Parts, Inc. ("Plaintiffs"), defendant Esso Standard Oil Company (Puerto Rico) ("Esso"), and Third-Party Defendants Jorge Luis Sanchez-Sanchez and Alicia Solano-Diaz ("Sanchez Parents") and Angel Manuel Sanchez-Gomez and Hector Benito Sanchez-Gomez ("Property Owners") appeared through their respective counsel, and had the opportunity to submit their positions thereto, and

having determined that it had jurisdiction over the subject matter and the parties in this case, it is hereby FOUND, DETERMINED, ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Court heard evidence and arguments of counsel and renders judgment for Esso.

2. The Court entered written findings of fact and conclusions of law after the trial of this matter. (Docket No. 477.) Except as contradicted in this judgment, these findings of fact and conclusions of law shall be given preclusive effect.

3. Based on those findings of fact and conclusions of law, the Court ordered the Plaintiffs take nothing by their suit and that Esso recover $128,871.93 from Plaintiffs, Sanchez Parents, and Property Owners under Esso's CERCLA claim, and that Esso recover $512,823.98 from Plaintiffs for the combined costs of the court-ordered Comprehensive Site Assessment ("CSA") and expert services related to the CSA.

4. On February 22, 2011, the parties agreed to compromise their claims. Plaintiffs and Property Owners agreed to pay Esso a total amount of $315,000 to settle all claims between the parties. Plaintiffs and Property Owners agreed to pay the stated total amount via payments in the amount of $31,500 every six months beginning August 31, 2011. Final payment will be made on or before February 22, 2016.

5. Based on the Court's orders and agreement between the parties, the Court finds that the agreement between the parties is supported by the pleadings and findings and accepts and incorporates the settlement agreement into this judgment.

6. The Court orders that Esso shall recover $315,000 pursuant to the terms of the settlement agreement. The Court orders execution to issue in the event of a failure on the

part of the Plaintiffs to make any of the payments outlined above. In the event of a failure to make any payment, Esso may execute on the outstanding amount due on an accelerated basis.

7. The Court shall retain jurisdiction to enforce the terms of the settlement agreements submitted by the parties, the terms of which are incorporated into this Judgment.

8. Esso and Mr. Cabrera have resolved the issue of Mr. Cabrera's sanction. Mr. Cabrera will pay Esso $10,000 in lieu of sanctions to be imposed by this Court, to be paid in equal $2,500 payments every six months, beginning August 31, 2011. Final payment will be made on or before February 28, 2013. The Court orders execution to issue in the event of a failure on the part of Mr. Cabrera to make any of the payments outlined above. In the event of a failure to make any payment, Esso may execute on the outstanding amount due on an accelerated basis.

9. The Court denies all relief not expressly granted in this judgment.

10. Esso relinquishes all rights to the bond and does not object to release of same.

11. FINAL JUDGMENT is hereby entered accordingly, and without the imposition of costs to any party.

SO ORDERED.

In San Juan, Puerto Rico this 13th day of April, 2011.

S/JOSE ANTONIO FUSTE
José Antonio Fusté
Chief U.S. District Judge

EXHIBIT 18

From: Rogers, Michael H. <MRogers@labaton.com>
Sent: Tuesday, July 14, 2015 12:37 PM
To: Michael Lesser; Daniel P. Chiplock; Evan Hoffman; Dugar, Kirti
Cc: Kussin, Todd
Subject: State Street Topic Memos
Attachments: Topic Memo [redacted] (Bolano).docx; Topic Memo [redacted] (Griffin 1).docx; Topic Memo [redacted] (Vaidya 1).DOCX; Topic Memo [redacted] (Saad).doc; Topic Memo [redacted] (Bishop).DOCX; Topic Memo [redacted] (Pospischil).DOC; Topic Memo [redacted] (Griffin 2).doc; Topic Memo [redacted] (Grant).DOCX; Topic Memo [redacted] (Kaplan).DOC; Topic Memo [redacted] (Powell).DOC; Topic Memo [redacted] (Packman).DOC; Topic Memo [redacted] (Packman).XLSX; Topic Memo [redacted] (Vaidya 2).docx; Topic Memo [redacted] (Pietrofesa).DOC; Topic Memo [redacted] (Greene).DOC; Topic Memo [redacted] (Fouchong).DOC; Topic Memo [redacted] (George).doc; Topic Memo [redacted] (Watson).DOC; Topic Memo [redacted] (Herrick).DOC; Topic Memo [redacted] (Schulman).DOC; Topic Memo [redacted] (Orji).doc; Topic Memo [redacted] (Hong).DOCX; Topic Memo [redacted] (Flanigan).DOC; Topic Memo [redacted] (Gianturco).doc; Topic Memo [redacted] (Daniels).DOC; Topic Memo [redacted] (Alper).DOC; Topic Memo [redacted] (Cameron and Hirsh).docx

Remaining topic review memos from State Street.& All of these were in work/pending when the case settled.& As I mentioned in an email a couple weeks ago, I asked Todd and his folks to wrap them up as soon as possible in the subsequent days.
&
This is the output of that effort (which was actually completed before the 4th, but I've been out of office on vacation and work-related travel on other matters).
&
Enjoy!& (That's direccted at you, Mike)

&

EXHIBIT 19

From: Michael Lesser
Sent: Tuesday, June 23, 2015 3:45 PM
To: Garrett Bradley
Cc: Michael Thornton; Evan Hoffman
Subject: FW: State Street Memo Topics
Attachments: Reviewer detail projects MAL 62315.docx

FYI: For the last two months we've been using the reviewers on the specific projects I've generated. I've added some from time-to-time.

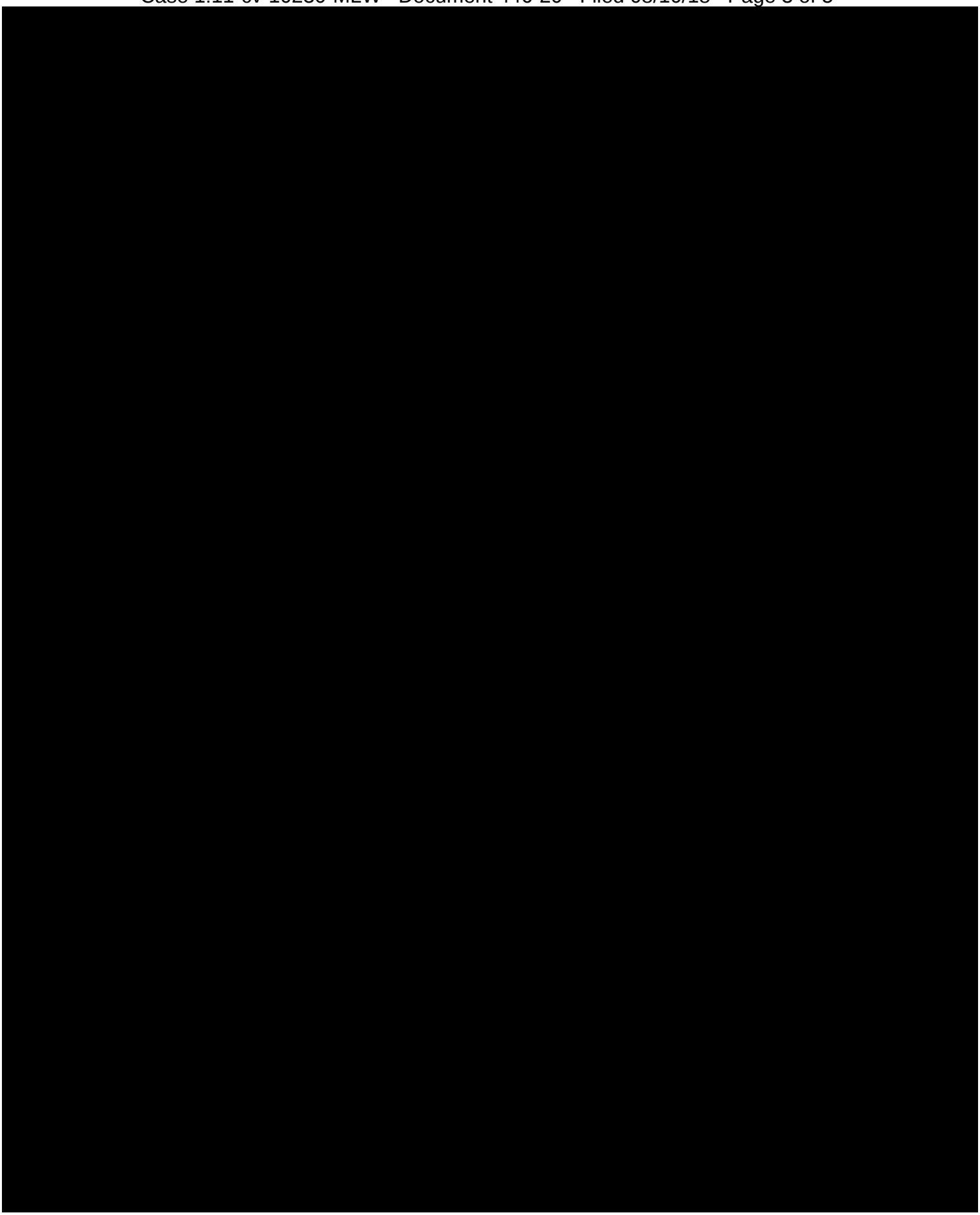
M

From: Michael Lesser
Sent: Tuesday, June 23, 2015 3:41 PM
To: 'Kussin, Todd'; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

Here's four more topics for today. Some are related to areas already covered, so I'll leave it to you to pass on to the people responsible for those areas (or not). I'll have more tomorrow. Pasting the four in but also including the source document with all additions.

6/23/15 Additions

[redacted]



[redacted]

From: Kussin, Todd [mailto:TKussin@labaton.com]
Sent: Tuesday, June 23, 2015 12:16 PM
To: Michael Lesser; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

Great, thanks Mike.

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Tuesday, June 23, 2015 11:52 AM
To: Kussin, Todd; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

No objection here.

From: Kussin, Todd [mailto:TKussin@labaton.com]
Sent: Tuesday, June 23, 2015 11:51 AM
To: Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock; Michael Lesser
Subject: State Street Memo Topics

Good Morning,

Unless anybody is opposed, I am going to assign the topic below to one of my reviewers. From my records, it looks like it is still available. Thanks.

Todd

[redacted]

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EXHIBIT 20

From: Michael Lesser <MLesser@tenlaw.com>
Sent: Thursday, June 11, 2015 4:02 PM
To: Brian McTigue; Regina Markey; Lynn Sarko; Kravitz, Carl S.
Subject: FW: ERISA
Attachments: U.S. Custody ERISA Funds 2015.06.11.pdf

FYI

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Thursday, June 11, 2015 4:00 PM
To: Michael Lesser
Subject: RE: ERISA

Settlement Communication

Mike

Here you go. Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Wednesday, June 10, 2015 12:20 PM
To: Halston, Daniel
Subject: RE: ERISA

Dan: Can you break the below numbers down into amounts by year? Just the ERISA SSH and AIR numbers, by year. I regret not asking for this earlier.

Thanks,

Mike

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Monday, March 09, 2015 3:48 PM
To: Michael Lesser
Cc: Lynn Sarko; Paine, William
Subject: RE: ERISA

Confidential Settlement Communication

Mike

The breakdown is as follows:

$74,891,109,811 (SSH) and $5,007,845,178 (AIR). Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Monday, March 09, 2015 11:39 AM

To: Halston, Daniel
Subject: RE: ERISA

Dan: Sorry, just for the sake of consistency, can I also have that breakdown between SSH and AIR? I should have asked that specifically before.

Thanks,

Mike

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Thursday, March 05, 2015 2:45 PM
To: Michael Lesser
Cc: Lynn Sarko; Paine, William
Subject: RE: ERISA

Mike

It changed just slightly to $79,898,954,988. Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Wednesday, March 04, 2015 12:35 PM
To: Halston, Daniel
Subject: ERISA

Dan: The last ERISA volume number I had (SSH + AIR) was $79,901,150,487

Have there been any updates to the ERISA volumes?

Thanks,

Mike

Michael A. Lesser, Esq.
Thornton Law Firm LLP
100 Summer St., 30th Floor
Boston, MA 02110
617-720-1333
800-431-4600
mlesser@tenlaw.com

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State Street FX Trading with U.S. Custody ERISA Plans
Number of Trades and Total Value of Trades by Type and Year
January 1, 1998 – December 31, 2009

	SSH		AIR		Total	
Year	**Number of Trades**	**Total Value of Trades ($USD)**	**Number of Trades**	**Total Value of Trades ($USD)**	**Number of Trades**	**Total Value of Trades ($USD)**
1998	33,104	$7,479,466,489	-	-	33,104	$7,479,466,489
1999	32,697	10,554,771,451	3,808	77,739,325	36,505	10,632,510,775
2000	32,007	10,331,622,491	9,697	253,840,004	41,704	10,585,462,495
2001	39,638	8,453,345,452	11,494	282,590,409	51,132	8,735,935,861
2002	45,201	6,582,198,525	11,542	287,460,655	56,743	6,869,659,180
2003	29,317	2,886,419,977	12,653	364,322,705	41,970	3,250,742,681
2004	33,580	4,632,364,474	15,344	452,829,875	48,924	5,085,194,349
2005	30,594	4,347,183,219	16,603	550,235,161	47,197	4,897,418,381
2006	32,625	4,643,423,210	15,568	622,331,978	48,193	5,265,755,188
2007	38,709	5,210,651,802	16,316	701,631,876	55,025	5,912,283,678
2008	54,932	5,344,849,383	17,146	818,090,214	72,078	6,162,939,597
2009	56,434	4,424,813,337	15,882	596,772,978	72,316	5,021,586,315
Total	**458,838**	**$74,891,109,811**	**146,053**	**$5,007,845,178**	**604,891**	**$79,898,954,988**

Notes:

[1] Includes all trade data for funds with a U.S. tax address, with the exception of KRW and TWD subcustodian trading.

Sources:

[A] Trade data provided by State Street via counsel.

EXHIBIT 21

From: Lynn Sarko <lsarko@KellerRohrback.com>
Sent: Sunday, August 9, 2015 3:51 PM
To: Garrett Bradley; Chiplock, Daniel P.; Sucharow, Lawrence; Lieff, Robert L.; Michael Thornton; Goldsmith, David; Lynn Sarko
Cc: ckravitz@zuckerman.com; Brian McTigue (bmctigue@mctiguelaw.com); Lynn Sarko
Subject: RE: State Street FX-- CONFIDENTIAL-- CLASS COUNSEL ONLY

Dear all

I wanted to share a few thoughts prior to Tuesday's call with the DOL.

1. The DOL wants to talk about the amount of Atty Fees in the ERISA portion of the case only. They don't want to discuss the rest of the recovery.
2. They view the ERISA portion of the case as being $60 million--- they don't care what Atty Fee percentage we request on the other $240 million.
3. When I refer to the DOL—I'm referring to the Boston DOL folks who were at the final afternoon mediation session in Boston. They are also the DOL folks that State Street had been talking to. Paine confirmed to me that he has never had any discussions with the WDC DOL folks. Similarly- as we discussed- I have not spoken with the WDC DOL folks about the attorney fee issues in the case—so the only discussions have been with the Boston DOL folks.
4. Suzanne and Nate are the DOL lawyers who handled the Boston investigation. Marjorie Butler is their boss in the Boston office. When they will talk about their client—this will mean Marjorie in Boston—and her superiors at EBSA (the DOL's Employee Benefits Security Administration)—that is the division that handles ERISA,
5. As we had discussed—we had told the DOL that no firm decisions had been made as to what attorney fees we were going to request—but we floated the potential number 30 percent as a starting number.
6. Nate told me that the DOL would never agree to 30%-- and wouldn't even agree to 27 or 28%---- and on a later conversation he suggested that they would even find 25% too high. He mentioned that the Boston DOL folks thought the Madoff case was a good comparator where the requested/awarded atty fees was something like 18%.
7. I have pointed out to Nate that in the Madoff case the DOL had been involved in the heavy lifting of litigating the case—unlike in this case where the DOL has acted more like a Vulture- waiting until the prey was captured before they swooped in and tried to steal the credit. I've spent some time beating him up about this and he keeps telling me that the DOL doesn't want to fight with us.
8. I've also plainly said that in my opinion that State Street would have paid $300 million without the DOL's involvement—and I didn't think the DOL contributed anything to that result. Their only involvement was in the plan of allocation issue- and the bottom line was that it was a $300 million class settlement (with or without the DOL's involvement)— I've also pointed out that the class lawyers have collectively spent years working on this case and that it was the DOL who chose not to share anything with us—so it is hard for them to claim that they contributed anything to the end result- other than being a pain in the rear. The last few calls with Nate- he has been more careful not to push back too hard.
9. At first the DOL seemed to want to argue that they were responsible for the last $10 million--- but they seem to have walked that back and are not only trying to influence the atty fee request on the $60 million. I don't know what position they will take on Tuesday's call. My thought is that they are a little worried what the

mediator will say as to what he told them—as they have heard from both Paine and us- that it was clear that the entire $300 million was subject to class atty fees.
10. There are many ERISA cases where courts have awarded atty fees of between 25% and 30%. Some even 33%. As you would expect- there are also many other cases where the fee percentage is between 20 and 25%. It usually depends on the court, the judge, the lodestar multiplier—just as in other class cases—so the statistics are all over the board. I do think we should be ready to argue why the Madoff case is not an appropriate case for comparison.
11. We also need to consider whether we are going to request the same fee across the whole $300 million—or is it feasible to request a different percentage in the $60 million than the other $240 million--

I do think a call Tuesday with Class counsel—prior to the DOL call would be helpful.

Expect the DOL to ask:
1. Are the attorneys planning on filing one fee application – or separate application son the $240 million and the $60 million. (I've suggested one fee application)
2. Are there deals/arrangements on how to divide the fees between the class lawyers—and are we willing to tell the DOL what those arrangements are (I have stayed away from commenting on this- and have always changed the subject or ignored their question—as I feel it is none of their business).
3. Do we know what the total lodestar is of the firms working on the case.
4. what credit do we think the DOL should have for the result—I have suggested zero.
5. would we agree to limit our fee request to some number.

Brian and Carl, is there anything that I have missed.

Lynn

From: Goldstein, Nathan - SOL [mailto:Goldstein.Nathan@dol.gov]
Sent: Friday, August 07, 2015 9:12 AM
To: Lynn Sarko; Brian McTigue (bmctigue@mctiguelaw.com);ckravitz@zuckerman.com
Cc: Butler, Marjorie - SOL; Reilly, Suzanne - SOL
Subject: State Street FX

Lynn, next Tuesday at 3:00 would work for us for a call with the various class counsels regarding attorneys' fees. Since you're probably in a better position on who should attend, would you mind circulating a dial-in and list of participants? We're also available to discuss any further logistics at your convenience.

Thanks,

Nathan P. Goldstein
Trial Attorney
U.S. Department of Labor, Office of the Solicitor
JFK Federal Building, Suite E-375
Boston, MA 02203
W (617) 565-2500
F (617) 565-2142

EXHIBIT 22

EXECUTION VERSION

TERM SHEET FOR CUSTOMER AND ERISA CLASS ACTIONS

Customer Class and ERISA Actions (the "Class Actions"):
Arkansas Teacher Retirement System v. State Street Corporation, et al.,
No. 11-cv-10230 MLW (D. Mass.);
Arnold Henriquez, et al. v. State Street Bank and Trust Company, et al.,
No. 11-cv-12049 MLW (D. Mass.);
The Andover Companies Employee Savings and Profit Sharing Plan, et al. v. State Street Bank and Trust Company,
No. 12-cv-11698 MLW (D. Mass.)

1. **Settling Parties**. The Settling Parties include Plaintiffs Arkansas Teacher Retirement System ("ARTRS"), Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland on behalf of themselves and all others similarly situated (collectively, "Plaintiffs") and State Street Bank and Trust Company ("Settling Defendant" or "SSBT," and collectively with Plaintiffs, the "Parties" or "Settling Parties").

2. **Settlement Class**. For purposes of this settlement ("Class Settlement") only, the Settlement Class shall be defined as all custody and trust customers of SSBT, including ERISA Plans, reflected in SSBT's records as having a United States tax address, that executed one or more Indirect FX transactions with SSBT and/or its subcustodians between January 2, 1998 and December 31, 2009, inclusive (the "Class Period"). The Settlement Class does not include CalPERS, CalSTRS and the State of Washington Investment Board. For the avoidance of doubt it is agreed that this definition of the Settlement Class is intended to supersede the class definitions in the complaints described above.

3. **Settlement Amount**. Three Hundred Million United States Dollars ($300,000,000.00) (the "Class Settlement Amount") paid in cash by SSBT into a Class Escrow Account no more than ten (10) calendar days after Preliminary Approval of the Class Settlement.

The Class Escrow Account shall be at a money center bank agreed upon by Labaton Sucharow LLP ("Interim Lead Counsel") and SSBT.

4. **Qualified Settlement Fund**. The Parties agree that the Class Settlement Amount, plus any interest accrued thereon, is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation §1.468B-1.

5. **Confidentiality**. Until such time as an executed Stipulation of Settlement is submitted to the Court for approval, or such earlier date determined by SSBT, the Parties shall use their best efforts to keep the existence and terms of this Term Sheet confidential.

6. **Class Certification**: Defendants will stipulate for settlement purposes only to certification of the Settlement Class defined above.

7. **Dismissal with Prejudice and Releases**: Upon the Effective Date of the Settlement: (i) the Class Actions shall be dismissed with prejudice and Plaintiffs and the Settlement Class, including their past, present, and future heirs, executors, administrators, trustees, predecessors, successors and assigns ("Released Plaintiff Parties"), shall remise, release and forever discharge the Released Defendant Parties of and from the Released Class Claims, except for claims relating to the enforcement of the Class Settlement; and (ii) SSBT, on behalf of the Released Defendant Parties, shall release as against all Released Plaintiff Parties and their respective attorneys, all claims and causes of action of every nature and description, whether known or unknown, whether arising under federal, state, common or foreign law, that arise out of or relate in any way to the institution, prosecution, or settlement of the claims against Released Defendant Parties, except for claims relating to the enforcement of the Class Settlement ("Released Prosecution Claims").

8. **Certain Definitions:**

a. **Class Judgment**. A final judgment of dismissal of the Class Actions, which shall contain customary provisions including: (i) certification of the Settlement Class for settlement purposes only; (ii) a finding that the notice was disseminated consistent with the preliminary approval order, constituted the best notice practicable under the circumstances, and that the form of the notice and the manner of its dissemination was adequate, sufficient, and complied with the requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act, due process and all other applicable laws and rules; (iii) final approval of the Class Settlement, including the Plan of Allocation; (iv) dismissal of the Class Actions with prejudice; (v) the releases described above; (vi) a list of those persons and entities who are excluded from the Settlement Class pursuant to request; (vii) enjoining Plaintiffs, and the other members of the Settlement Class, from pursuing the Released Class Claims against the Released Defendant Parties in any forum, and enjoining the Defendant and Released Defendant Parties from pursuing the Released Prosecution Claims against the Released Plaintiff Parties in any forum; and (viii) providing that the judgment shall be vacated in the event that the SEC Settlement, DOJ Settlement and DOL Settlement do not become final and effective, and that the Court shall retain jurisdiction to do so.

b. **Court.** United States District Court for the District of Massachusetts.

c. **Direct FX Methods.** Methods for submitting, processing, aggregating and/or executing foreign exchange transactions in which the counterparty or its investment manager approves the exchange rate, or a spread from a benchmark, before execution of the trade (including StreetFX Methods and methods used with respect to any other method of execution offered by State Street that are not Indirect FX Methods).

d. **Direct FX Transactions.** Foreign exchange transactions executed with SSBT or SSBT's subcustodians using Direct FX Methods, including all StreetFX Transactions.

e. **DOJ Settlement.** The related settlement being negotiated with the United States Department of Justice concerning Indirect FX.

f. **DOL Settlement.** The related settlement being negotiated with the United States Department of Labor concerning Indirect FX.

g. **Effective Date.** The first date upon which all of the following have occurred: (a) the Court orders preliminary approval of the Class Settlement and directs that a form of notice of the proposed settlement describing the Plan of Allocation shall be provided to the Class in the manner specified in the order of preliminary approval; (b) the Class Settlement Amount has been paid consistent with paragraph 3 above; (c) the Court has entered the Class Judgment; and (d) the DOJ Settlement, DOL Settlement and SEC Settlement are final and effective and either the time for appeal from the Class Judgment has expired and no appeal has been filed, or all appeals from the Class Judgment have been dismissed or resolved, such that the Class Judgment has not been and cannot be altered (provided, that alteration of the amount to be paid to counsel for the Class shall not prevent the Effective Date from occurring).

h. **ERISA**. The Employee Retirement Income Security Act of 1974, as amended.

i. **ERISA Plans.** The employee benefit plans as defined in 29 U.S.C. Section 1002(3) (also referred to as Section 3(3) of ERISA), that are subject to Part 4 of Subtitle B of Title I of ERISA (including master trusts with respect to multiple such plans within the meaning of Department of Labor Regulation Section 2520.103-1(e)), and that were custody or trust customers of SSBT during any part of the Class Period; and group trusts that are exempt from tax pursuant to Internal Revenue Service Revenue Ruling 81-100, as amended ("Group Trusts"), that were custody or trust customers of SSBT during any part of the Class Period.

j. **Indirect FX Methods.** Methods at any time for submitting, processing, pricing, aggregating and/or executing foreign exchange transaction requests pursuant to instructions of custody or trust customers of SSBT (or their investment managers) instructing SSBT or SSBT's subcustodians to execute such transactions at rates or

spreads, which rates or spreads prior to December 2009 were not widely disclosed to the customer or investment manager prior to execution, including, but not limited to, the methods of executing foreign exchange transactions that are or were at any time known as indirect FX, standing instruction foreign exchange, custody FX, Automatic Income Repatriation, Automated Dividend and Interest Income Repatriation Service, Security Settlements and Holdings Foreign Exchange Service or Hourly Pricing Foreign Exchange Service.

k. **Indirect FX Transactions.** Foreign exchange transactions executed with SSBT or SSBT's subcustodians at any time using Indirect FX Methods, including all foreign exchange transactions submitted using Indirect Methods. A transaction submitted or processed using an Indirect Method is an Indirect FX Transaction regardless whether the rate at which the transaction was executed differed from the rates at which other transactions submitted using Indirect Methods were executed.

l. **Investment Company.** A mutual fund, closed-end fund, unit investment trust or other entity that is registered with the SEC as and investment company under the Investment Company Act.

m. **Rate Comparisons**. Comparison of rates at which foreign exchange transactions were executed with rates of any other foreign exchange transaction or transactions (whether executed by SSBT, a subcustodian, or a party unrelated to SSBT), including comparison of rates of Indirect FX Transactions or Direct FX Transactions with rates of any other Indirect FX Transactions, Direct FX Transactions, indicative rate, market rate or benchmark rate.

n. **Plan of Allocation.** The description to be contained in the Notice to the Class of the manner in which the Class Settlement Amount, plus any interest and less all costs (including costs of notice and administration) or expenses (including taxes) and any fees and expenses of Plaintiffs' Counsel, shall be allocated to members of the Class. The Plan of Allocation shall provide for, and contain sufficient flexibility to permit, among other things, the allocation of a portion of the Class Settlement Amount: (i) to ERISA Plans in a manner sufficient to obviate payment by SSBT of $60 million, as contemplated by the DOL Settlement; and (ii) to Investment Companies in a manner sufficient to obviate

payment by SSBT of $75 million in disgorgement, and $15,019,370.68 in interest on disgorgement, as contemplated by the SEC Settlement. Except with respect to notice and administration expenses solely attributable to Group Trusts as provided for below, and with respect to the amount of Plaintiffs' Counsel's attorneys' fees chargeable to the ERISA Plans, as more specifically provided for in paragraph 12, the amount allocated to the ERISA Plans and Investment Companies and other Settlement Class Members shall be increased or decreased, as the case may be, by their proportional share (with respect to the Class Settlement Amount) of any interest, costs (including costs of notice and administration), expenses (including taxes), and fees and expenses of Plaintiffs' Counsel obtained or paid pursuant to permission of the Court. However, notice and administration expenses attributable solely to the claims of Settlement Class Members categorized as Group Trusts shall be paid solely out of the ERISA allocation, and the cost of any ERISA Independent Fiduciary shall be borne solely by SSBT and shall not be paid out of the Class Settlement Amount.

o. **Released Class Claims.** Any and all claims, demands, losses, costs, interest, penalties, fees, attorneys' fees, expenses, rights, rights of recovery, causes of action, duties, obligations, judgments, actions, debts, sums of money, suits, contracts, agreements, promises, damages, and liabilities of every nature and description, whether known or unknown, direct, representative, class, individual or indirect, asserted or unasserted, matured or unmatured, accrued or unaccrued, foreseen or unforeseen, disclosed or undisclosed, contingent or fixed or vested, accrued or not accrued, at law or equity, whether arising under federal, state, local, foreign, statutory, common, administrative or any other law, statute, rule or regulation that Plaintiffs or any other member of the Settlement Class: (i) asserted in the Class Actions; (ii) could have asserted in the Class Actions or any other action or in any forum, that arise from or out of, relate to, or are in connection with the claims, allegations, transactions, alleged or actual prohibited transactions or breaches of duty (including fiduciary duty), facts, events, acts, disclosures, matters or occurrences, statements, representations or omissions or failures to act involved, described, set forth, or referred to in the complaints filed in the Class Actions or that arise from or out of, relate to, or are in connection with Indirect FX

Methods, Indirect FX Transactions, Street FX Methods, StreetFX Transactions, or Rate Comparisons; (iii) or that arise from or out of, relate to, or are in connection with the defense or settlement of the Class Actions, except for claims relating to enforcement of the Settlement.

p. **Released Defendant Parties.** SSBT; its past, present and future parents, subsidiaries, divisions, and affiliates (including State Street Global Markets LLC); the respective past and present officers, directors, trustees, employees, agents, trustees, managers, servants, attorneys, accountants, auditors, underwriters, financial and investment advisors, consultants, representatives, insurers, co-insurers and reinsurers of each of them; and the heirs, successors and assigns of the foregoing.

q. **SEC Settlement.** The related settlement being negotiated with the United States Securities and Exchange Commission concerning Indirect FX.

r. **StreetFX Methods.** Methods for submitting, processing, aggregating and/or executing foreign exchange transactions which were or ultimately became known as StreetFX methods.

s. **StreetFX Transactions.** Foreign exchange transactions submitted at any time to SSBT using StreetFX Methods.

9. **Not a Claims-Made Settlement**. This is not a claims-made settlement; there will be no reversion.

10. **Claims Administration and Plan of Allocation**. The Claims Administrator will be of Plaintiffs' choosing and acceptable to SSBT, subject to Court approval. Defendants will cooperate with and provide the Claims Administrator and/or Interim Lead Counsel with address information, and information about the U.S. dollar-equivalent volume of Indirect FX Transactions executed by members of the Settlement Class, sufficient to provide Notice to the Settlement Class, to administer the Plan of Allocation, and to allow for Plaintiffs' Counsel to develop the Plan of Allocation.

11. **Costs of Notice and Settlement Administration**. Prior to the Effective Date, Plaintiffs' Counsel may pay from the Class Escrow Account the actual costs of notice and settlement administration without further order of the Court. In the event that the Settlement is not consummated, money paid or incurred for this purpose shall not be returned or repaid to Defendants.

12. **Plaintiffs' Counsel's Attorneys' Fees and Expenses**. Plaintiffs' Counsel's attorneys' fees and expenses, as awarded by the Court, shall be paid from the Class Escrow Account immediately upon award by the Court into an escrow account governed by an escrow agreement between Interim Lead Counsel, SSBT and a bank or other institution agreed upon by SSBT and Interim Lead Counsel (the "Interim Lead Counsel Escrow Account"), notwithstanding any appeals of the Settlement or the fee and expense award. Plaintiffs' Counsel may apply for their fees and expenses and any service awards for Plaintiffs against the entire Class Settlement Amount, but in no event shall more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in fees be paid out of the $60 million portion of the Class Settlement Amount allocated to ERISA Plans, as referenced in paragraph 8(n) above. In the event that the Effective Date does not occur or SSBT promptly provides written notice representing in good faith that the Effective Date has not and cannot occur due to developments with the DOJ Settlement, DOL Settlement, and/or SEC Settlement and explaining the grounds for the notice, Plaintiffs' Counsel severally shall be obliged to pay to SSBT all amounts paid to them from the Interim Lead Counsel Escrow Account within fourteen (14) business days. The prevailing party in any action to collect any amount due under this paragraph shall be entitled to recover interest and all of its costs of collection, including attorneys' fees. Should the fee and expense award be reduced by the Court or on appeal, all such fees and expenses received by Plaintiffs' Counsel in excess of

those that are ultimately approved shall be repaid to the Class Escrow Account, along with interest at the Class Escrow Account rate of interest.

13. **Stay of Proceedings**. Upon the execution of this Term Sheet, the Parties shall jointly request that the current proceedings and any litigation deadlines in the Class Actions identified above be suspended and provide the Court with a proposed schedule for effectuating the Settlement.

14. **Rule 11 Compliance**. Defendants and Plaintiffs agree that each has complied fully with the Rule 11 of the Federal Rules of Civil Procedure in connection with the commencement, prosecution, defense, and settlement of these Class Actions, and that the proposed final judgment will contain a statement to reflect this compliance.

15. **Preparation of Final Settlement Documentation**. The Stipulation of Settlement shall contain such additional terms and conditions as are customary in a federal class action settlement, or as may be necessary or appropriate to effectuate the intentions of the Parties with respect to this Term Sheet; and such additional or amended terms and conditions as may be necessary or appropriate to conclude the DOL Settlement, SEC Settlement, and/or DOJ Settlement and acceptable to the Parties. To the extent there is any inconsistency between this Term Sheet and the Stipulation of Settlement, the Stipulation of Settlement shall control. The Parties shall negotiate in good faith to agree upon and execute a final Stipulation of Settlement within fourteen (14) calendar days of executing this Term Sheet (recognizing that formalization of settlements between SSBT and each of the DOJ, DOL and SEC will be necessary before the Stipulation of Settlement can be executed by SSBT). Plaintiffs shall file the final Stipulation of Settlement and motion for preliminary approval with the Court within two (2) business days after execution. The Claims Administrator shall cause the required notice under the Class Action

Fairness Act of 2005 to be served, not later than ten (10) calendar days after the Stipulation of Settlement is filed with the Court.

16. **Termination Provision**. The termination provision of the Stipulation of Settlement shall provide that SSBT and the Plaintiffs shall have the right to terminate the Settlement by providing written notice of their election to do so ("Termination Notice"), through counsel, to counsel for all other Parties to the Settlement within fourteen (14) calendar days of: (i) the District Court's final refusal to provide preliminary approval of the Settlement in any material respect; (ii) the District Court's refusal to enter the Class Judgment or an alternative judgment acceptable to SSBT with respect to the Settlement; (iii) the date upon which the judgment or alternative judgment is modified or reversed in any material respect by a final order of the United States Court of Appeals, or the Supreme Court of the United States; or (iv) SSBT's failure to fund the Class Settlement Amount. For the avoidance of doubt, Plaintiffs shall not have the right to terminate the Settlement due to any decision, ruling, or order respecting the attorney's fees or expenses of counsel for the Class, or terms of the Plan of Allocation not specifically addressed in the Stipulation of Settlement. The Termination Provision shall also provide that SSBT shall also have the right to terminate the Settlement in the event the Settlement Class Termination Threshold (defined below) has been reached. Simultaneously with the execution of the Stipulation of Settlement, SSBT and Interim Lead Counsel will execute a confidential Supplemental Agreement Regarding Requests for Exclusion (the "Supplemental Agreement"). The Supplemental Agreement shall set forth that SSBT shall have the sole option to terminate the Settlement and render it null and void in the event that requests for exclusion from the Settlement Class are submitted by or with respect to custody or trust customers of SSBT whose Indirect FX Transactions together represent more than an agreed percentage of the total

volume of Indirect FX Transactions executed by members of the Settlement Class between January 2, 1998 and December 31, 2009 ("Settlement Class Termination Threshold"). The Parties agree that the District Court's order granting preliminary approval of the Settlement shall require any person or entity requesting exclusion from the Settlement Class to also provide information showing membership in the Settlement Class, and any such request for exclusion that does not provide this information shall be deemed invalid unless State Street (based on its records) informs the Court that such person or entity is a member of the Settlement Class. The Parties agree to maintain the confidentiality of the Termination Threshold as stated in this Term Sheet and the Supplemental Agreement, which, unless otherwise ordered by the District Court, shall not be filed with the District Court, but may be examined in camera, if so requested by the District Court (unless otherwise required by court rule). The Termination Provision shall also provide that SSBT shall also have the right to terminate the Settlement in the event that settlements with the DOJ, DOL, or SEC, or any of them, on terms disclosed in confidence to counsel for the Class prior to execution of the Settlement Agreement, have not become final and effective. After the Effective Date, SSBT shall have no right to terminate the Class Settlement.

17. **Consequences of Termination**. If the Settlement referred to in this Term Sheet is not approved by the Court, or the Settlement is terminated for any reason, the Term Sheet and/or Stipulation of Settlement shall be a nullity, and none of their terms shall be effective or enforceable, and the Class Settlement Amount, plus any accrued interest and less any taxes and notice-related expenses incurred, shall be returned to the persons or entities paying the same. Additionally, the Parties shall revert to their litigation positions immediately prior to the execution of the Term Sheet and the fact and terms of the Settlement, including this Term Sheet

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

20. **Signing in Counterpart**. This Term Sheet may be signed in counterpart, with scanned or emailed signatures carrying the same force as originals.

September 9, 2013

By: _____
Lawrence A. Sucharow
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Tel.: (212) 907-0700

For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: _____
Michael P. Thornton
THORNTON LAW FIRM LLP
100 Summer Street, 30th Floor
Boston, MA 02110
Tel.: (617) 720-1333

For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
Daniel P. Chiplock
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel.: (212) 355-9500

By: _____
Lynn Lincoln Sarko
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

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By: _____
Lawrence A. Sucharow
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Tel.: (212) 907-0700

For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: Michael P. Thornton
Michael P. Thornton
THORNTON LAW FIRM LLP
100 Summer Street, 30th Floor
Boston, MA 02110
Tel.: (617) 720-1333

For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
Daniel P. Chiplock
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel.: (212) 355-9500

By: _____
Lynn Lincoln Sarko
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

20. **Signing in Counterpart**. This Term Sheet may be signed in counterpart, with scanned or emailed signatures carrying the same force as originals.

By: _____
Lawrence A. Sucharow
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Tel.: (212) 907-0700

For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: _____
Daniel P. Chiplock
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel.: (212) 355-9500

By: _____
Michael P. Thornton
THORNTON LAW FIRM LLP
100 Summer Street, 30th Floor
Boston, MA 02110
Tel.: (617) 720-1333

For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
Lynn Lincoln Sarko
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900

For Plaintiff ARTRS, and as additional Counsel for the Proposed Class

By: _____
J. Brian McTigue
MCTIGUE LAW LLP
4530 Wisconsin Ave, NW
Suite 300
Washington, DC 20016
Tel.: (202) 364-6900

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

By: _____
William H. Paine
WILMER CUTLER PICKERING HALE and DORR LLP
60 State Street
Boston, MA 02109
Tel.: (617) 526-6000

For State Street Bank and Trust Company

For Plaintiffs The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland, and as Counsel for ERISA Plaintiffs

By: _____
Carl S. Kravitz
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036-5807
Tel.: (202) 778-1800

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

For Plaintiff ARTRS, and as additional Counsel for the Proposed Class

By: _____
J. Brian McTigue
MCTIGUE LAW LLP
4530 Wisconsin Ave, NW
Suite 300
Washington, DC 20016
Tel.: (202) 364-6900

For Plaintiffs The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland, and as Counsel for ERISA Plaintiffs

By: Carl S. Kravitz
Carl S. Kravitz
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036-5807
Tel.: (202) 778-1800

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

By: William H Paine 9/11/15
William H. Paine
WILMER CUTLER PICKERING HALE and DORR LLP
60 State Street
Boston, MA 02109
Tel.: (617) 526-6000

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

For State Street Bank and Trust Company

EXHIBIT 23

From: Halston, Daniel <Daniel.Halston@wilmerhale.com>
Sent: Friday, February 1, 2013 6:16 PM
To: Michael Lesser; Goldsmith, David (dgoldsmith@labaton.com)
Cc: Mitchell, Nolan J; Hornstine, Adam
Subject: FW: Henriquez v. State Street¸ No. 11-cv-12049; Andover Cos. v. State Street, No. 12-cv-11698
Attachments: 02.01.2013 Ltr to Mr. Bostwick.PDF

From: Mitchell, Nolan J
Sent: Friday, February 01, 2013 2:51 PM
To: Bostwick, Dwight P.
Cc: 'Laura Gerber' (lgerber@KellerRohrback.com); lsarko@kellerrohrback; Brian McTigue (bmctigue@mctiguelaw.com); Halston, Daniel
Subject: Henriquez v. State Street¸ No. 11-cv-12049; Andover Cos. v. State Street, No. 12-cv-11698

Dwight,

Attached please find correspondence in the matters referenced above, which was sent to you today along with a production disk. The password for the disk is: **gh&$T!cv**.

Have a great weekend. Best,

Nolan

Nolan Mitchell | WilmerHale
60 State Street
Boston, MA 02109 USA
+1 617 526 6088 (t)
+1 617 526 5000 (f)
nolan.mitchell@wilmerhale.com

Please consider the environment before printing this email.

WILMERHALE

Nolan Mitchell

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nolan.mitchell@wilmerhale.com

February 1, 2013

By E-mail and Federal Express

Dwight Bostwick, Esq.
Zuckerman Spaeder LLP
1800 M Street, NW
Suite 1000
Washington DC 20036-5802

Re: *Henriquez v. State Street Bank and Trust Co.*, No. 11-cv-12049 (D. Mass.); *Andover Cos. Emp. Sav. & Profit Sharing Plan v. State Street Bank & Trust Co.*, No. 12-cv-11698 (D. Mass.)

Dear Dwight:

Enclosed please find a disk containing documents responsive to certain requests made by the ERISA plaintiffs, which State Street Bank & Trust Co. ("State Street") has agreed to provide as set forth in the parties' exchange of emails on January 29, 2013 (the "Agreed-Upon Requests"). As we agreed, State Street is providing, on a rolling basis, documents that are responsive to the Agreed-Upon Requests to the extent such documents are readily-identifiable in the materials produced to the ERISA plaintiffs on December 21, 2012 (the "California Production").

Today's production includes the following:

- A sample of Investment Manager Guides ("IM Guides") published during the putative class periods that State Street has identified in the California Production. *See* StateSt_CA_LIT 00336552 – 003366681, StateSt_CA_LIT 00488530 – 00488696, StateSt_CA_LIT 00962678 – 00962807, StateSt_CA_LIT 00989428 – 00989632, StateSt_CA_LIT 01940172 – 01940434, StateSt_CA_LIT 02175580 – 02175715, StateSt_CA_LIT 05073727 – 05073934. The California Production contains other IM Guides, in addition to the sample provided on the enclosed disk, including, but not limited to, documents Bates numbered SST_LIT 5186 – 5317, SST_LIT 5449 – 5710, SST_LIT 5842 – 5972, SST_LIT 7752 – 11405, and SS_CAL_E 38038 – 45142.

- Documents reflecting State Street's policies and procedures regarding foreign exchange trading that State Street has identified in the California Production. *See* SS_CAL 00005 – 00532, SS_CAL 06210 – 06247, SS_CAL 06210 – 06247, SS_CAL 06691 – 07007. There may be additional documents reflecting State Street's foreign exchange policies

and procedures, including emails, in the California Production that State Street has been unable to readily identify.

- Organizational charts for the State Street Global Markets division of State Street ("SSGM") covering the period 2006 through 2012. *See* SS_MA_LIT 00000232 – 00000288. We are producing these separately as an accommodation to the plaintiffs because State Street was unable to readily locate SSGM organizational charts in the California Production.[1]

State Street's efforts to respond to the Agreed-Upon Requests are ongoing. Please let me know if you have any questions.

Sincerely,

Nolan Mitchell

Cc: Laura R. Gerber, Esq. (w/encls.)
Lynn Sarko (via email; w/o encls.)
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA98101-3052

Brian McTigue, Esq. (via email; w/o encls.)
McTigue Law LLP
4530 Wisconsin Ave., NW
Suite 300
Washington, DC 20016

[1] These materials are being produced subject to the protective order entered on November 19, 2012 in the matters captioned above.

EXHIBIT 24

From: Michael Lesser
Sent: Sunday, August 30, 2015 1:17 PM
To: Michael Thornton
Cc: Garrett Bradley; Evan Hoffman
Subject: Re: State Street

I think that 14 would have been our share of the fee, making some assumptions, and not the actual size of our lodestar.

> On Aug 30, 2015, at 12:44 PM, Michael Thornton <MThornton@tenlaw.com> wrote:
>
> Thank you for the tip Dan. I did say something like that on the call, but preceded it by saying it was a guess and that I would have to ask Mike Lesser for the actual figure at that point which of course is not complete as with the other firms. I appreciate your concern and I guess I can only assure you that it generally our policy to truthful and accurate hour claims.
>
> Original Message
> From: Chiplock, Daniel P.
> Sent: Sunday, August 30, 2015 12:24 PM
> To: Garrett Bradley
> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com
> Subject: RE: State Street
>
> No problem. It may be tomorrow since I have to go back to archives.
>
> In the meantime, while we're on the subject of credibility, I want to point out that we need to be consistent and credible with our lodestar reporting in State Street. We are gathering final lodestar reports now, but I heard third-hand that Mike recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million. That number does not comport with the hours Mike Lesser told me for Thornton as of June 29 (around 12,750), which make more sense given what we know about the work that was done. I am hopeful Mike T. simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf. I would expect that you would object if LCHB or Labaton tried something like that, and ERISA counsel certainly will (and tie up this process as long as possible) if they suspect anything remotely amiss on that front. Let's not make problems for ourselves that we don't need. Also recognize that your reviewers were all housed outside of your firm and their respective overhead and facilities expenses were paid for by others, which we were happy to do as a courtesy. Thanks.
>
> -----Original Message-----
> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
> Sent: Sunday, August 30, 2015 10:43 AM
> To: Chiplock, Daniel P.
> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com
> Subject: Re: State Street
>
> That would be helpful thank you.
>
> Garrett
>
>> On Aug 30, 2015, at 10:30 AM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com> wrote:

>>
>> I don't look past that point, Garrett. But you need to also recognize that you are only in the BNYM class case because of us.
>>
>> I guess I'll gather the emails etc concerning the assignments that were given to your firm. As if that's going to change your position.
>>
>> Sent from my iPhone
>>
>> On Aug 30, 2015, at 10:19 AM, Garrett Bradley <GBradley@tenlaw.com<mailto:GBradley@tenlaw.com>> wrote:
>>
>> Dan,
>>
>> Thanks for the email. I think we will have to agree to disagree as you keep looking past the fact that but for Mike Thornton you would not be in the state street case just like Labaton is not in BONY.
>>
>> Can you clarify what you mean by we did not "get the work done" as you indicated. That has never been specified and really should be to be deemed credible. Thanks.
>>
>> Garrett
>>
>> On Aug 30, 2015, at 9:04 AM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com<mailto:DCHIPLOCK@lchb.com>> wrote:
>>
>> Garrett,
>>
>> Thanks for your email and I actually think it's useful so that Mike and Bob can participate in this.
>>
>> This idea of "protection" in BNYM is where I think we keep talking past each other. The bottom line is that LCHB is the least protected of all in that case. This is the fact that has kept me up at night for 2.5 years while we've continued pouring lodestar into that case (because we had to). We invested the most in order to try to get a class certified there and to sufficiently man 110 depositions, defend counterclaims, etc., but if Judge Kaplan takes a negative view of the value of document review/analysis (our arguments to the contrary notwithstanding), then LCHB will get hit the hardest. You are totally shielded from this because you didn't invest in document review. In other words, LCHB has a real risk of actually losing money in BNYM. You have virtually no risk of that. If Thornton is not treated "fairly" in BNYM by the Court it will be because nobody (least of all LCHB) was treated "fairly." It's not clear to me what it is you expect in that circumstance.
>>
>> The $10 million in State Street that you mention below also does not make up for LCHB's investment in that case. And we've certainly contributed our share to the result in State Street, having litigated BNYM (thus substantially increasing the value of State Street) and developed the ch. 93A theory (the most readily certifiable claim in State Street, and by far the most valuable).
>>
>> Dan
>>
>> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
>> Sent: Friday, August 28, 2015 3:01 PM
>> To: Chiplock, Daniel P.
>> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com<mailto:rlieff@lieff.com>
>> Subject: Re: State Street
>>
>> Dan,
>>

>> I tried to call you but you are out. I think these things are best discussed rather than emailed so please call my cell when you can 6174134892 as I do not have yours.
>>
>> However a few points. I do not dismiss your efforts in Mellon but your guaranteed percentage was established years prior to a Mellon result. What I am pointing out is the inequities of our different positions. In Mellon, when we had created that case by developing the fx case all that we got was some work that resulted in $1.5 million in time. Also please elaborate on your statement that "the work was not getting done".
>>
>> Now contrast that to state street where you had no client and no concept (and Mellon was years from setting) and Mike Thornton demands that you get a floor of 20% which is probably worth about $10 million.
>>
>> You must agree you are in a much better position in state street than we are in Mellon. As I have said to Bob, we are only looking for a fair outcome in these matters. I think you would agree we have protected you better in state street than we are protected in Mellon. Once we have an idea of what our Mellon number looks like then we can discuss how to approach the balance of the 40% with Labaton .
>>
>> Garrett
>>
>> On Aug 28, 2015, at 2:34 PM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com<mailto:DCHIPLOCK@lchb.com>> wrote:
>> Garrett,
>>
>> I know you didn't really mean to diminish LCHB's role in creating the result in BNY Mellon, at extraordinary risk to itself, which in turn doubled the value of State Street. You need to know that we advocated for you guys too, getting you a role in the BNYM class case (and pushing back against several co-counsel in the process) when you weren't actually owed one. I also gave your firm more assignments than others at the outset in BNYM, until it became clear that the work simply wasn't getting done. In other words, we've each tried to look out for the other in the past. This has been far from a one-way street.
>>
>> As you know, Judge Kaplan controls everyone's fate in BNYM and LCHB has the most risk before him, having invested the most. We asked for a multiplier for your firm that is much larger than anyone else's, and I really, truly hope that he grants that request.
>>
>> Thanks,
>>
>> Dan
>>
>> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
>> Sent: Friday, August 28, 2015 2:18 PM
>> To: Lieff, Robert L.
>> Cc: Michael Thornton; Chiplock, Daniel P.; rlieff@lieff.com<mailto:rlieff@lieff.com>
>> Subject: Re: State Street
>>
>> Bob,
>> I am driving but took a quick look at your email and pulled over to type this. I think you are misunderstood. I have not agreed that it would be equitable to split the balance of the forty percent the way you described below. What I have said is that may be a fair approach depending on the outcome of our fee in the Mellon matter. If we are treated fairly there, then we will do all we can to treat you fairly in the state street matter. As I have said before, because of Mike Thornton's advocacy, you are guaranteed at least 20% of the State Street case in which you have no client and did not develop the concept. Yet, we have no corresponding protection in the Mellon matter. Happy to discuss further at any time.
>>
>> Garrett

>>
>> On Aug 28, 2015, at 2:05 PM, Lieff, Robert L. <RLIEFF@lchb.com<mailto:RLIEFF@lchb.com>> wrote:
>> Garrett,
>>
>> I called and suggested that we have a meeting together with the Labaton people to talk about putting in writing an understanding of the fee division in this case.
>>
>> You, Mike and I have discussed the State Street fee division and have focused on the existing verbal understanding that was reached on November 9, 2010, with Chris Keller. We agreed that among the three firms we will each have a 20% interest in the fee with the balance to be divided later. Of course, we also have to factor in the 9% that ERISA counsel get pursuant to written agreement and a provision for Arkansas local counsel.
>>
>> You and I have agreed that it would be equitable to divide the balance of the fee with Labaton getting 50% and each of our firms 25%. This would result in a fee division as follows:
>>
>> Labaton 33.0 (20 + 13)
>> Thornton 26.5 (20 + 6.5)
>> Lieff Cabraser 26.5 (20 + 6.5)
>> ERISA 9.0
>> Arkansas Local 5.0
>> 100.0%
>>
>> If we put the above into an agreement among the three firms, that would certainly provide protection for everyone.
>>
>> Bob
>>
>> <image001.gif>
>>
>> Robert L. Lieff
>> Of Counsel
>> rlieff@lchb.com<mailto:rlieff@lchb.com>
>> t 415.956.1000
>> f 415.956.1008
>> Lieff Cabraser Heimann & Bernstein, LLP
>> 275 Battery Street, 29th Floor
>> San Francisco, CA 94111-3339
>> www.lieffcabraser.com<http://www.lieffcabraser.com>
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>>
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>
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EXHIBIT 25

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF MICHAEL LESSER IN SUPPORT OF THORNTON LAW FIRM LLP'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Michael Lesser, hereby declare as follows:

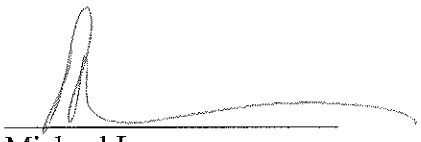
1. I am a partner at the Thornton Law Firm.

2. I submit this declaration in support of the Thornton Law Firm LLP's Objections to the Special Master's Report and Recommendations. I have personal knowledge of the facts set forth in this declaration.

3. Attached as exhibit 20 is a true and correct copy of an email I sent on June 11, 2015.

4. Attached as exhibit 23 is a true and accurate copy of an email I received on February 1, 2013.

Signed under the penalties of perjury this 18 day of June, 2018.



Michael Lesser

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
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THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM AMENDING ITS MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS* (DKT. 126)

In accord with the Court's Order dated July 31, 2018 (Dkt. 410), as extended by the Court (Dkt. 432), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") supplements its initial motion to participate (Dkt. 126) to address the current circumstances of the case, nearly 18 months after CCAF filed its motion. CCAF also addresses objections raised by the parties in their filings and orally at the hearing on August 9, 2018.

EXECUTIVE SUMMARY

CCAF agrees that a settlement between the Special Master and Class Counsel (Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff"), and the Thornton Law Firm ("TLF")) *may* be in the best interest of the class, although that of course depends on the substance of such settlement. If such a settlement is reached, CCAF's motion for appointment as guardian *ad litem* may not be necessary—but only if the terms of the deal sufficiently protect the class and the named plaintiffs and Class Counsel agree to waive collateral attacks on the settlement on any ground. If such a settlement is proposed, CCAF recommends that its terms, which will certainly include a reconstituted request for attorneys' fees, be noticed to the class, with an opportunity for objection pursuant to Rule 23(h). In such event, CCAF will respectfully request leave to file an *amicus* brief in advance of the hearing on such a settlement. Just as the Court was not bound by the plaintiffs' initial request, it will not be bound by the proposed settlement reached now. Additionally, the Court should consider non-monetary sanctions to regulate the conduct of counsel before it, even if the parties stipulate to a report devoid of such recommendation.

In the event that counsel does not settle with the Special Master, or if material disagreements remain concerning his Report and Recommendations (Dkt. 357, "Report"), then CCAF and its co-counsel Burch, Porter & Johnson PLLC should be appointed guardian *ad litem* on behalf of the class. As previously described in CCAF's Response to the Court's Order of July 31, 2018 (Dkt. 420, "CCAF Response"), the guardian *ad litem* ought to be paid on an hourly basis. CCAF's proposed rates follow

its co-counsel's Memphis, Tennessee market rates, which represents a significant discount to CCAF attorneys' lodestar rates awarded in other cases, which in turn are lower than the rates most CCAF attorneys billed in previous law-firm practice. CCAF's proposed rates for attorneys in this case range from $200 to $500 per hour, which compares favorably to the staff attorney rates up to $515/hour that Class Counsel charged and that the Special Master did not recommend reducing in his Report, and is, of course, substantially lower than what the partners and associates for class counsel charged the class.

ARGUMENT

I. Regarding Potential Settlement

CCAF has no interest in hindering a settlement that provides class members significant benefits without the uncertainty and additional cost of appeal. But the Court should ensure that any settlement binds the parties to prevent collateral attack. The settlement should also provide at least as much recovery to absent class members as the Report recommends. This is because the Report already balances the interests of class members and Class Counsel; a less favorable departure from these recommendations would suggest that Class Counsel has been able to ratchet up fees because no advocate like CCAF negotiated from the position that the Report does not go far enough.

Presuming the Special Master mediates a thorough and favorable settlement for the class, the Court should treat it as a new fee application and notice absent class members just as it notified them of the appointment of the Special Master. The notice should advise class members of their right to object at a Rule 23(h) hearing. As *amicus*, CCAF would ask for leave to express its views of the settlement should this occur.

Finally, the Court should exercise its inherent authority to govern the conduct of attorneys appearing before it and to deter any similar behavior in future cases. Following final approval of the settlement, if appropriate, the Court should order relevant counsel to show cause why remedial

measures for apparent misconduct should not issue. Although the parties can stipulate that disciplinary findings not appear in an amended Report, the parties cannot waive the Court's inherent authority.

A. Settlement terms needed to protect the class.

Based on their discussion Thursday, the parties and Special Master anticipate that they can negotiate revisions to the Report that will "obviate some or all of" Class Counsel's 300 pages' worth of objections. Tr. 8/9/2018 at 14. Counsel for the Special Master suggested that the Court defer action on CCAF's motion for about three weeks for this process (*id.* at 40), and the parties will file a proposed schedule on August 16. *See* Dkt. 445 at 4.

CCAF agrees that a settlement mediated by the Special Master may lessen the need for a guardian *ad litem*, but the Court should ensure that such settlement includes terms to protect the class. Any settlement should (1) include waiver of counsel's rights to collaterally challenge it and (2) provide the class at least as much relief as the Report recommends.

First, the settlement must be completely airtight given Class Counsel's extraordinary litigation tactics to date—retaining a phalanx of seven experts to rebut one, filing frivolous motions, and lodging an absurd and certain-to-fail mandamus petition. *See* CCAF Response at 17-18. Unless the parties waive all rights to collaterally challenge the settlement and the underlying proceedings, the settlement provides no true peace and must be rejected. To date, it seems as if parties have only agreed that "*discussions relating to settlement* . . . today and in the future will not be a basis for any party to seek the master's disqualification as well as not being a basis to seek my disqualification." Tr. 8/9/2018 at 15 (emphasis added); *see also id.* at 23-24 ("They waived any right to object . . . based on his participation in discussion to try to resolve things as between the master and the lawyers."). From this it seems that plaintiffs and their counsel remain free to seek the Special Master's disqualification provided they do not cite the settlement discussions themselves, which are subject to FRE 408. Without a much broader release, CCAF should be appointed as guardian *ad litem* to protect the class from later collateral attack.

Such appointment is necessary because neither an ordinary *amicus* like CCAF nor the Special Master has the right to submit party briefs and argue on appeal without another order authorizing such participation or the right to engage in motion practice on the class's behalf.[1] That said, CCAF is confident that the Special Master will not agree to a settlement that contains such loopholes.

Second, the terms of the settlement should be at least as favorable to absent class members as the Report recommends. Thus, the Court should expect that the settlement reallocates $7.4 to 8.1 million more to the class relative to the now-vacated original fee order (Dkt. 111), less fees for the Special Master.[2]

Even if the settlement provides the class $8.1 million as recommended, the Court should weigh whether vigorous opposition from a guardian *ad litem* could provide the class even more value. While the class certainly benefits greatly from a final resolution of the fee dispute, the Special Master recognized that his advocacy for the class was constrained by the detailed—and scrupulously balanced—report that he produced. "[W]e are not sure that we are in a position to independently represent and advocate for the class, as at numerous junctures in our Report, we mitigated findings and recommendations as to Labaton's conduct, including in our recommended remedies, leaving

[1] Among the arguments Class Counsel could make: (1) that the Special Master lacks authority to negotiate a settlement because no such power is implied by the orders appointing him, Dkt. 173, (2) that the Special Master's conclusions are tainted as demonstrated by him negotiating as an adversary, (3) that the Special Master could not possibly negotiate on behalf of the class without either a client or appointment, (4) that the Court must recuse due to its alleged bias, and so forth. If Class Counsel does appeal, the class will need representation at the First Circuit to avoid an *ex parte* presentation of the issues.

[2] The $3.4 million inter-firm reallocation of fees is of less interest to class members provided that the settlement provides rough justice to, for example, ERISA counsel (innocent of misconduct) relative to Labaton (which the Special Master found especially culpable). An advocate for the class might well argue that all sums disgorged from Class Counsel revert to class members (rather than ERISA co-counsel) as they were most clearly owed a fiduciary duty from Labaton.

Labaton in a position in which it would, despite its conduct, still retain a multiplier above even its adjusted (post-double-counting and Chargois) lodestar." Dkt. 345-1 at 6.[3] In fact, each of "the Labaton, Lieff and Thornton law firms will still be left with not only their base lodestar claim, but a substantial multiplier." Report at 367. The Report's suggested lodestar multiplier for Class Counsel strikes CCAF as especially astonishing given the above-market leverage that Special Master allowed. The Report declines to adjust staff attorney rates of up to $515/hour even though such attorneys are paid a fraction of what partnership-track associates make. *See* Report at 169 n.134; Dkt. 104-17 at 8 (five staff attorneys with rates of $515/hour billed for over $2 million combined lodestar). The Special Master's failure to accurately price the fair market rate of staff attorneys is among the most conspicuous oversights of his report.[4] In short, the Report already credits Class Counsel's interests—excessively so—and should not be further watered down.

A settlement that materially deviates downward from the Report's recommendations suggests that the Special Master may have negotiated against himself, so to speak, allowing Class Counsel to dilute his carefully considered recommendations. That is exactly the cause for concern of an *ex parte* presentation. A settlement that provides significantly less than the Report, which itself is already a

[3] In their opposition to CCAF's Response, Labaton continues to argue that the Report does not constitute an "impartial opinion," and that the Special Master acted as a partisan for the class. Dkt. 427 at 4. The record shows otherwise, including an unedited version of the quote Labaton cites, which shows the Special Master sought to "balance the interests of the class," *with* "**the law firms**, the legal profession, the public and the institutional needs of the Judiciary." Report at 327 (emphasis added). Labaton does not address CCAF's argument that, in the Special Master's own words, he "mitigated findings and recommendations" whereas an advocate would argue the Report does not go far enough. CCAF Response at 9 (quoting Dkt. 345-1 at 5).

[4] Staff attorneys are paid a fraction of what partnership-track attorneys make, and the market for legal services recognizes this difference with lower rates. While law firms may be entitled to leverage on their permanent attorneys, the market rate for staff attorney time is much lower than the senior associate-level rates approved here. *See*, *e.g.*, Hildebrant Consulting LLC & Citi Private Bank, *2017 Client Advisory* (noting permanent non-partner track attorneys' "rates are lower than associates"), available online at: http://amlawdaily.typepad.com/2017CitiReport.pdf.

compromise, does not adequately protect the class, and should be rejected by the Court in favor of a *de novo* review of the Report where CCAF can act as a full-throated advocate on behalf of the class as guardian *ad litem*.

B. Further notice and a Rule 23(h) hearing is required for any new settlement.

Presuming counsel reaches an adequate settlement with the Special Master, the Court should require class members to be notified of this new settlement and heard pursuant to Rule 23(h).

While the contours of the potential settlement are unclear to CCAF, the result would be some stipulation as to the Special Master's Report on attorneys' fees. Like all attorneys' fee requests following a class action settlement, the parties' forthcoming stipulation falls under Rule 23(h), so requires all of the process of this rule including: (1) reasonable notice to class members, (2) the opportunity for class members to object to the fee award, and (3) a hearing on the fee motion. *See In re Southwest Airlines Voucher Litig.*, 2016 WL 3418565, at *5 (N.D. Ill. Jun 22, 2016); *Jacobson v. Persolve*, 2016 WL 7230873, at *16-17 (N.D. Cal. Dec. 14, 2016).

The Court long ago determined that it would allow class members to object following the release of the Special Master's Report, and for good reason.

> [T]he court will order that class members be sent an additional notice after the Special Master issues his Report and Recommendation, and that any objections or comments by class members be filed in response to that notice. The form of that notice and the procedure for making such objections will be addressed in connection with the submission of the Special Master's Report and Recommendation.

Order dated March 31, 2017, Dkt. 192 at 4. As a general matter, whenever a court is contemplating "material alterations to the settlement," "[c]lass members should be notified." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 176 n.10 (3d Cir. 2013). This principle applies to matters of class counsel's fees as well, because under Rule 23(h), class members are entitled to accurate, complete notice and a fair opportunity to object to counsel's fee requests. *See, e.g., In re Mercury Interactive Secs. Litig.*, 618 F.3d

988, 994 (9th Cir. 2010); *accord Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). Notice allows unopposed fee requests to receive "the closest and most systematic scrutiny before gaining judicial approval." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). "[P]rivate fee agreements cannot substitute for the conscientious application of the court's informed judgment to the lawyers' detailed billing records." *Id.* at 527.

To date, it appears that the Special Master and class counsel have not addressed the form of notice to class members, so it seems efficient for them to stipulate to notice in their settlement. CCAF has some guidance below, which will hopefully assist the parties.

First, direct notice by first-class mail *and* email should be employed. The Court previously determined that mailing to 1300 or so addresses was "reasonable" notice under these circumstances. Dkt. 192 at 4. While Labaton opposed providing email notice and represented to the Court that it "does not have email addresses for class members" (Dkt. 190 at 4), the Court observed that email notice was appropriately provided to 115 email addresses by the settlement administrator pursuant to its order.[5] Such notice should be provided again, supplementing the prior email addresses with additional addresses the administrator may have received through inquiries over the intervening 15 months. *See* Eric Miller (Settlement Administrator) Decl., Dkt. 205-2 at 4. The expense of this supplemental notice to about 1300 addresses should be deducted from class funds, and the Court can decide at a later date exactly which costs should be ultimately borne by Class Counsel. At least some of the additional costs should be deducted from Class Counsel's eventual fee award. "Those who made the misstatements should bear the costs of a notice to correct misstatements." Manual for

[5] The Court ordered Labaton to explain why its representation was not false or misleading. Dkt. 203. Labaton characteristically responded that "[n]either Labaton Sucharow nor its counsel intended or anticipated that the language would be construed to suggest that the Firm had no email addresses for any Class Members." Dkt. 205 at 5.

Complex Litigation (Fourth) § 21.313 (2004). Moreover, by default, plaintiffs generally bear the costs of notifying the class. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974).[6]

Second, the notice should succinctly describe the conclusions and proposed remedies under the settlement, including any material differences between the original Report and the report as modified by the settlement.

Finally, notice should apprise class members of their right to object.

C. CCAF intends to participate as an *amicus* if a settlement is reached that resolves Class Counsel's objections and the Court concludes a guardian *ad litem* is unnecessary.

Even if CCAF's motion to defend class interests as guardian *ad litem* is denied, CCAF intends to assist the Court concerning any settlement between counsel and the Special Master. As the Court outlined (Tr. 8/9/2018 at 41), CCAF may be invited to file an *amicus* brief, or it may file a short motion to file an attached proposed *amicus* brief. If the Court finds CCAF's filings helpful, as it has "several times, last year and recently" (*id.* at 9), the Court can grant CCAF's motion as to the particular *amicus* filing. *Cf.* Dkt. 172.

D. Regardless of any settlement, the Court should sanction misconduct before it.

While the contours of the potential settlement are obscure to CCAF, we anticipate that Class Counsel will agree to return funds to the class in exchange for softening the language of the Special Master's report regarding apparent misconduct. This may be the best solution for the class, as it avoids

[6] Lieff argues that the American Rule means Class Counsel cannot be made to pay for their adversary—i.e. the Special Master following issuance of his Report. Dkt. 418 at 3. Lieff does not say who *should* pay, and the Court need not decide the issue now because at this moment the entire recovery consists of class funds. However, it would be inequitable to make the class bear the full cost of the Special Master's negotiation because Class Counsel's conduct necessitated the expense. *See* CCAF Response, Dkt. 420 at 25-26; *see also Belleville Catering Co. v. Champaign Mkt. Place, LLC,* 350 F.3d 691, 694 (7th Cir. 2003) ("Clients should pay just once for the litigation and should not pay for lawyers' time that has been wasted for reasons beyond the clients' control.") (cleaned up).

the uncertainty and delay of appeal. However, while the Special Master may adeptly mediate the best result for the class, the Court has an independent obligation to sanction misconduct before it.

Therefore, following a decision on any fee request, the Court should make an independent evaluation of whether the non-monetary sanctions originally recommended by the Special Master should be implemented. Regardless of settlement, the Court retains jurisdiction to sanction misconduct that occurred before it. *See Cooter v. Gell & Hartmarx*, 496 U.S. 384, 395 (1990) (district court retains jurisdiction to issue Rule 11 sanctions with respect to misconduct occurring before dismissal); *see also Mellott v. MSN Communications, Inc.*, 492 Fed. Appx. 887, 890 (10th Cir. 2012) (court retains jurisdiction to vindicate its inherent authority). The non-monetary remedies in the original Report include "that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings," Report at 365, and that Labaton and TLF "establish a consulting process that will ensure consistent ethical compliance." *Id.* at 373.

The Court should also consider further remedies regarding the Chargois arrangement, which the Special Master declined to recommend in spite of Labaton erecting "a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." *Id.* at 362. The Special Master declined to make such a recommendation because "formal disciplinary proceedings could spell the end of the firm." *Id.* While sanctions should be proportional, the *de facto* "too big to sanction" approach seems unhelpful to the profession, and more importantly, unhelpful to future absent shareholders at the mercy of their representatives. Labaton has been particularly evasive, and continues to defend its mind-boggling refusal to initially provide any hint of the Chargois arrangement that it orchestrated. Dkt. 359 at 17. Had TLF not appropriately produced emails concerning Chargois, Labaton's dubious referral arrangement would have been completely hidden from the Special Master. One wonders what other facts Labaton has hidden from courts which have not asked, in Labaton's view, sufficiently specific questions. Referral for attorney discipline may be the only way to find out.

Discovery from the investigation further suggests the possible need for law enforcement follow-up, even though the Special Master purposely did not inquire to the ultimate disposition of the millions of dollars paid to Chargois over the years. The Court should consider ordering that certain discovery from this this case be provided to at least the United States Attorney's Offices in the District of Massachusetts, which previously expressed interest in the dealings in this case (Dkt. Dkt. 358 at 39), and the Eastern District of Arkansas, where FBI agents not so long ago interviewed Tim Herron of Chargois & Herron about his free-rent tenant circa 2008, convicted former Arkansas Treasurer and ATRS Trustee Martha Shoffner. *See* Dkt. 420-1, Bednarz Decl. Ex. D (Chad Day, ARK. DEMOCRAT-GAZETTE (May 22, 2013), *Shoffner lived rent-free near the Capitol for most of her first term, landlord says*). Veteran investigators and United States Attorneys are best-positioned to determine whether the facts of Labaton's referral arrangement require further investigation.

II. The Court Should Appoint a Guardian *Ad Litem* to Protect the Class

Several prior filings explain why the Court should appoint a guardian *ad litem* if further advocacy for the class is needed. CCAF Response at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12. In short, "[e]ven the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977). This is especially true during fee setting, where an "acute conflict of interest" exists. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). An independent advocate is even more necessary given the issues that the Special Master uncovered, which would put Class Counsel in the untenable position of vindicating their own questionable conduct while purporting to represent the class. The appointment of a guardian *ad litem* enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

As previously explained, CCAF does not currently have the capacity to serve as guardian *ad litem* alone, nor can it serve *pro bono* at this time. CCAF Response at 23. That said, CCAF could assist

the Court in this capacity with the assistance of Burch, Porter & Johnson, PLLC, and it would do so at comparatively modest rates. Both firms have excellent qualifications, and the costs of such representation "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte*, 376 P.3d at 691 (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)). And if the Court is somehow troubled by the *ad hominems* aimed at CCAF, CCAF would not oppose the Court inviting Burch, Porter & Johnson to serve as GAL alone, independent of CCAF.

A. CCAF and Burch, Porter & Johnson are experienced in efficiently litigating complex cases and have extensive knowledge of the applicable law

1. CCAF

CCAF was founded in 2009 as a 501(c)(3) non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute ("CEI") and became a division within their law and litigation unit. *See generally* Dkt. 125-1 (2017 Frank Declaration), at 2-3.

The Center for Class Action Fairness currently consists of five attorneys who specialize in litigating on behalf of class members against unfair class action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification.)

CCAF has won more than a hundred million dollars for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016). *See also, e.g., McDonough v. Toys "R" Us*,

80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million). CCAF does not object to simply "r[un] up a tab with minimal value added." *See In re Southwest Airline Voucher Litig.*, --F.3d--, 2018 WL 3651028, at *4 (7th Cir. Aug. 2, 2018).

CCAF has received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 (calling CCAF director "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 (calling CCAF director "the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL, including by lead class counsel Lieff).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in sixteen federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees.[7] Several of these appeals centered around excessive fee awards. *E.g., Redman*; *Pearson*; *Bluetooth.*

[7] *In re Southwest Airlines Voucher Litig.*, --- F.3d ----, 2018 WL 3651028 (7th Cir. Aug. 2, 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In*

CCAF currently employs five attorneys including the undersigned. *See* Declaration of Theodore H. Frank ("Frank Decl."), filed with this memorandum, at ¶¶ 7-16. Each of the CCAF attorneys has years of experience representing objectors to class action settlements, and most have years of prior experience in civil litigation. *Id.*.

2. Burch Porter

Burch, Porter & Johnson, PLLC ("Burch Porter") is well-equipped to assist CCAF as guardian *ad litem*. Burch Porter is a leading firm in Memphis, Tennessee, with forty attorneys, about half of whom are litigators. *See* Peeples Decl. (filed contemporaneously with this memorandum). Senior Burch Porter associate Gary S. Peeples would undertake day-to-day responsibility for the case. Mr. Peeples has been following the case for months and has a head-start in the major issues raised by Class Counsel's objections. CCAF and Burch Porter expect that the legal team for this matter will consist of Mr. Peeples, Jef Feibelman, Jennifer S. Hagerman, and William D. Irvine. *See generally*, Declaration of Gary S. Peeples ("Peeples Decl."), filed with this memorandum.

Each attorney on this proposed team has stellar credentials and a background in commercial civil litigation. For example, all four attorneys clerked for federal district court judges. Mr. Peeples and Ms. Hagerman also clerked for Sixth Circuit judges. Additionally, Joseph (Jef) Feibelman, has nearly fifty years of complex business litigation experience. Peeples Decl. at ¶¶ 5-8.

B. CCAF and Burch would litigate on especially efficient terms.

Because of Burch Porter's location in Memphis, Tennessee, its standard billing rates are much lower that the rates sought by Class Counsel in this case, and this benefits the class. In order to undertake the role of guardian *ad litem*, CCAF proposes that Burch attorney time be compensated at

re HP Inkjet Printer Litigation, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

their ordinary billing rates, while CCAF attorney time is substantially discounted to mirror the prevailing rates of its affiliate attorneys in Memphis, Tennessee. The proposed rates are as follows:

Attorney	Position (class year)	Proposed Rate	
Jef Feibelman	Burch Porter member (1969)	**$475/hr**	
Jennifer S. Hagerman	Burch Porter member (1999)	**$375/hr**	
Gary S. Peeples	Burch Porter associate (2010)	**$275/hr**	**Standard CCAF Rates**
William D. Irvine, Jr.	Burch Porter associate (2016)	**$200/hr**	
Theodore H. Frank	CEI director of litigation (1994)	**$475/hr**	$900/hr
Melissa A. Holyoak	CEI senior attorney (2003)	**$365/hr**	$525/hr
Anna St. John	CEI attorney (2006)	**$325/hr**	$475/hr
M. Frank Bednarz	CEI attorney (2009)	**$275/hr**	$375/hr
Adam E. Schulman	CEI attorney (2010)	**$275/hr**	$375/hr

CCAF proposes to set these modest rates to preempt accusations that it is overbilling the class or Class Counsel. By adopting a similar pay scale as its affiliated counsel, neither the Court nor the class would need to worry about the allocation of time among the attorneys, as might otherwise result from the large disparity between Memphis and major metropolitan billing rates; that said, CCAF anticipates that the majority of time will be billed by Burch Porter.

As shown above, CCAF is asking for significantly lower rates than it typically requests—and has been approved—in other cases. CCAF has been awarded attorneys' fees for time at or near the "standard" rates indicated in the table above. *See* Frank Decl. ¶¶ 8, 10, 12, 14, 16. Moreover, the "standard" rates listed above likely already understate CCAF attorneys' market value. For example, Mr. Frank recently turned down work as an expert witness, which would have paid $1800/hr. *See* Frank Decl. ¶ 8. Additionally, attorneys Holyoak, St. John, and Bednarz previously worked at law firms when they were less experienced attorneys than they are today, but where paying clients were billed at *higher* hourly rates than the "standard" rates listed above. (Holyoak as an associate at O'Melveny & Myers LLP, St. John as an associate at Covington & Burling LLP, and Bednarz as an associate at Goodwin Procter LLP. *See* Frank Decl. ¶¶ 9-14.)

Additional guidelines will further control the costs of guardian *ad litem*.

- Midlevel attorneys for CCAF and Burch Porter—Messrs. Bednarz and Peeples, respectively—will spend more time on this matter than more senior attorneys.
- Travel time not spent on substantive legal work will be billed at only one half the proposed hourly rate.
- CCAF and Burch Porter attorneys will bill only for the price of economy flights and reasonable hotel accommodations in connection with their work.

As guardian *ad litem*, CCAF will also avoid pitfalls it criticizes in this and other class action settlements. CCAF discloses that no fee sharing or referral arrangement exists between CCAF, Burch Porter, or any other party concerning this litigation. Should CCAF be appointed guardian *ad litem*, the fee and reimbursement requests it submits for CCAF and Burch time shall be remitted to CCAF and Burch Porter precisely as requested—there is no undisclosed fee split between CCAF and Burch Porter.

Thus, CCAF and Burch Porter would efficiently represent the interests of absent class members due to their familiarity with the case and proposed rates dramatically less extravagant than Class Counsel's.

C. Proposed payment process.

CCAF proposes that attorneys' fees for guardian *ad litem* should be paid in a similar fashion as fees for the Special Master have been paid.

Specifically, the Court should require Labaton to deposit $1,000,000 with the Clerk of the United States District Court for the District of Massachusetts. *Cf.* Dkt. 173 at 6. (Because the fee order was vacated, Dkt. 331, all funds held by Labaton are properly considered class funds, and their transfer to the Clerk obviously does not prejudice counsel's right to contest which party or parties should ultimately bear the cost of the guardian *ad litem*.) The guardian *ad litem* will submit monthly detailed

billing invoices documenting both hours and expenses for reimbursement along with supporting documentation for any expenses to be reimbursed, and the Court will award properly justified hours and costs from the fund. *Cf.* Dkt. 173 at 7. Assuming appeals are taken, the Court retains jurisdiction over these collateral fee awards, so the guardian *ad litem* will have resources necessary to defend the Court's decision on appeal and cross-appeal issues for the benefit of the class.

When the guardian *ad litem* concludes his task defending the interests of absent class members, a final accounting of fees should be filed. Hours spent and reimbursements should also be filed on the public docket with only minimal redactions if absolutely necessary to protect, for example, credit card numbers, and the substance of privileged communication. CCAF expects that any redactions will be minimal. The Court should retain jurisdiction over collateral litigation, including disputes over the guardian *ad litem*'s fees.

Because guardian *ad litem* cannot ethically bill the class for time spent defending its own attorneys' fees, CCAF retains its right to seek a lodestar multiplier under limited circumstances to deter frivolous or harassing challenges to the guardian *ad litem*'s billing. Without such a reservation, Class Counsel would be free to use their superior resources to bully attorneys' fees away from the guardian *ad litem* through collateral attacks on its fees. CCAF reserves the right to seek a lodestar multiplier for its time billed as guardian *ad litem* from any party who unsuccessfully challenges the guardian's fees. Such motion would compensate the guardian *ad litem* for its self-evident risk, and CCAF's reservation to seek a multiplier in this limited situation hopefully deters spiteful multiplication of the proceedings.

CCAF anticipates billing and staffing efficiently; in the event of a challenge by class counsel to claims of overbilling, the guardian ad *litem* intends to subpoena counsels' contemporaneous time records. The guardian would ask the court to Court presume that time submitted by the guardian *ad litem* is reasonable to the extent Class Counsel spends similar amounts of time in opposition.

III. Counsel's Arguments Provide No Reason to Disqualify CCAF as Either Amicus or Guardian *Ad Litem*.

Plaintiffs' counsel advance a large number of arguments that CCAF should not serve as a guardian *ad litem* or even as an *amicus*, but none of these arguments carry weight. First, contrary to Lieff's belief, the silence of absent class members does not indicate that they are adequately represented, much less that they support Class Counsel's bloated fee petition. Dkt. 127 at 9. Second, certain ERISA counsel misunderstand the purpose of appointing guardian *ad litem*: while Rule 53 may indeed permit the Special Master to transform into a zealous advocate on behalf of the class, the lack of controlling authority on the subject suggests this course exposes the Court's ultimate decision to unnecessary risk on appeal should a settlement not fully resolve the matter. Third, CCAF does not have an ideological agenda that should preclude it from representing the class—in fact, CCAF's alleged interest in reducing attorneys' fees is exactly the sort of advocacy the class now needs. Fourth, counsel articulates no reason to disclose CEI's donors given the First Amendment rights of non-profits like CEI, and donors have never influenced CCAF litigation anyway. Fifth, Labaton identifies no intentional misrepresentations by CCAF, and indeed Labaton misrepresented the state of the record in the course of its accusations. Sixth, CCAF's public commentary on the case—including Mr. Frank's use of social media like Twitter—is the ordinary sort of commentary that attorneys engage in, including Labaton. Finally, the Court should disregard the incendiary and false misconduct accusations that Lieff casually hurls. The Court previously indicated that it did not find *ad hominem* attacks persuasive, so CCAF will not waste the Court's time rebutting every speck of mud thrown, but will happily supplement the record if the Court found any of the accusations troubling or in need of detailed refutation. The Court can also skip (or just quickly skim) the remainder of this section if it is has indeed already rejected the abuse thrown at CCAF, as it suggested it had.

Therefore, if Class Counsel and the Special Master cannot reach a settlement resolving the objections, the Court should appoint a guardian *ad litem*, and no good reason exists to reject CCAF's appointment.

A. Silence does not imply adequate representation of the class.

At the August 9 hearing, counsel for Lieff suggested that "not a single class member has come forward to object" because the class of "sophisticated individuals and entities" has "sat silent." Tr. 8/9/2018 at 35. Contrary to Lieff, silence cannot be read as support because individual class members lack the incentive to intervene simply in hopes of a "miniscule *pro rata* gain." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)). It is "naïve" to assume class acquiescence to class-action abuse from the lack of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Only 23% of securities settlements engender any fee objectors at all (Lynn A. Baker, et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class* Actions, 115 COLUM. L. REV. 1371, 1389 (2015)), though, as class counsel's own experts indicate, virtually every fee request in large-scale securities actions engages in abuses similar to the ones the special master identified here. The class members in this case—or rather, the class member funds' directors and trustees—are understandably reluctant to respond to notice at all given that the cost of obtaining an attorney opinion on the 374-page Report and 300+ pages of objections could easily dwarf whatever *pro rata* increase an objector might achieve. "Class members have no real incentive to mount a challenge that would result in only a minuscule pro rata gain from a fee reduction." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

Moreover, class silence does not excuse—in fact it emphasizes the need for—compliance with Rule 23(a) and (b)(3). Neither ATRS nor Class Counsel can be regarded as adequate representatives of the class when their own conduct is at issue. CCAF Response at 14-16; *see also* Dkt. 345-1 (letter from Special Master).

Labaton argues that the conflict of interest between Class Counsel and the class is present in every common fund class action settlement (Dkt. 427 at 1), but the conflict is much more severe in this case where the dispute will have repercussions on Class Counsel's other cases. CCAF agrees that the relationship between class and counsel "turns adversarial" in fee setting, and it discussed this precise phenomenon in its first filing with this Court. Dkt. 127 at 6. The conflict of interest in this case is extraordinary, however, because a decision on the propriety of the Chargois arrangement and bare referral fees, determination of acceptable rates for staff and contract attorneys, and the specific apparent misconduct by certain Class Counsel extend far beyond the boundaries of this case. This is what Labaton in particular has invested so thoroughly in the litigation. *See* CCAF Response at 16-17.

B. The Special Master's authority to act as an advocate is uncertain.

Keller Rohrback L.L.P. ("Keller") and Zuckerman Spaeder LLP ("Zuckerman") argue that the parties need not consent for the Special Master to act as an advocate under Rule 53. Dkt. 430 at 3-4. Perhaps attributing Labaton's argument to CCAF, Keller and Zuckerman misunderstand CCAF's suggestion that consent of the parties is necessary to prevent the uncertain outcome of a later challenge by class counsel. CCAF agrees that Class Counsel's objections are properly resubmitted to the Special Master (CCAF Response at 6), and the Court has since ordered the Special Master to prepare a supplemental report (to the extent that settlement does not moot it). Dkt. 445.

Other activity by the Special Master is much less certain under the thin case law. For example, case law provides no firm answer as to whether the Special Master may appropriately defend the district court's decision on appeal, or move for substitution of lead counsel or the named representative. The Court should only rely on the Special Master to act in this way if the parties agree to waive arguments challenging his neutrality in writing the Report or his authority to act as a *de facto* guardian *ad litem*. If the Court can avoid it, class members' rights should not be wagered on future First Circuit decisions on matters of first impression.

C. CCAF's alleged ideological agenda perfectly aligns with the class's interest.

Labaton rehashes argument it briefed in 2017, that partisan *amici* are allegedly forbidden (Dkt. 427 at 11), but CCAF anticipated this argument in its very first filing. There are two approaches to *amicus* filings, one that disfavors such filings, and the majority rule which tends to permit them. Dkt. 127 at 4-7. Even under the restrictive minority rule, which Labaton cites, CCAF's *amici* filings are properly allowed. The suitability of amicus briefs turns on "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.) (cited by Labaton at Dkt. 427 at 11). The Court discussed this precedent Thursday. Tr. 8/9/2018 at 41. Here, CCAF's briefs offer unique arguments, insights, and facts—in fact, Labaton *criticizes* CCAF for bringing up topics not addressed prior to its filing on August 6. Dkt. 427 at 7.

Labaton, Keller, and Zuckerman further argue that CCAF should be barred from participating in this case due to CEI's alleged bias against class action firms. Dkt. 427 at 11-12; 430 at 5; Tr. 8/9/2018 at 30, 36. Plaintiffs' counsel dramatically overstate their argument because neither Mr. Frank nor CCAF is biased against class actions or class action firms. In fact, Mr. Frank is lead plaintiff in a TCPA class action being litigated by a prolific plaintiffs' frim. *See* Frank Decl. ¶ 4. In any event, the First Amendment protects cause-driven litigation, including that brought by an organization serving as litigation counsel. *E.g., NAACP v. Button*, 371 U.S. 415, 420, 429-31 (1963). Even if, *arguendo*, CCAF did endeavor to eliminate class action litigation, such advocacy is protected expressive activity, particularly where there is no allegation that the litigation positions are unsupported by law.

Even if such anti-class action attorney prejudice existed, which it does not, the alleged prejudice perfectly align with class interests at the fee-setting stage. CCAF seeks to trim excessive attorneys' fees, which returns millions of dollars to class members. CCAF's interest in the case better

serves the class than Class Counsel's overriding interest to avoid sanctions and secure attorneys' fees they applied for in 2016 with incomplete and inaccurate declarations.

D. CEI need not disclose its donors, who in any event had no role in CCAF's selection and participation in this case.

Keller and Zuckerman further argue that CEI should be compelled to disclose its donors "so that Court can consider whether CEI's impartiality would be compromised as a result of any of those major funding relationships." Dkt. 430 at 6; Tr. 8/9/2018 at 30.

Counsel fail to provide any precedent for the proposition that a donor's identity would be remotely relevant to a non-profit's ability to advocate on behalf of a class. After all, CCAF seeks to be appointed guardian *ad litem*, an expressly partisan appointment—not a neutral special master or court-appointed expert. Do Keller and Zuckerman submit full rosters of past clients whenever they move to be appointed class counsel for the purpose of verifying that it is not compromised to act on the class's behalf? We think not.

Moreover, counsel failed to identify any grounds for relevance that offset the core First Amendment associational rights implicated by this harassing request. *NAACP v. Alabama*, 357 U.S. 449 (1958) ("overriding valid interest of the State" is required for compelled disclosure of membership lists). At the hearing Thursday, counsel had no response to this well-known precedent taught in law school, except to suggest that CEI's tax forms were somehow unusual for not disclosing its donors. They're not; after all, the NAACP litigated for the right not to disclose donor information on government forms, and the NAACP Legal Defense Fund's tax forms are exactly like CEI's—with donor identities left blank. *See* Frank Decl. ¶ 26 and Ex. B.

This is not the first time Keller in particular has attempted to harass CCAF by seeking to discover donors to CCAF's relatively shoe-string operation. Apparently a six-digit sanction for serving harassing subpoenas on CCAF was insufficient to stem Keller's curiosity. *See In re Classmates.com Consol.*

Litig., No. C09-45RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012) (reducing attorneys' fees by $100,000 or 10% of the total fee request).

In any event, CEI's donors had no role in CCAF's effort to defend the class in this case, and Mr. Frank has no idea whether any donor even has a position in the underlying litigation. *See* Frank Decl. ¶ 25. CCAF retains independence from its donors and is indeed litigating multiple appeals directly adverse to corporate donors. *Id.* ¶ 24.

E. CCAF did not mislead the Court.

Finally, Labaton argues that CCAF's Response attempted to mislead the Court. Dkt. 427 at 14-17. In fact, CCAF accurately characterized the facts available to it, and Labaton's attempt to shoot the messenger provides no reason to deny CCAF's motion.

First, CCAF accurately characterized the Court's vacatur of the initial fee award. Dkt. 331. While the Court's grant of Rule 60 relief did not itself disgorge money from Class Counsel, CCAF accurately stated that the original fee order has been vacated, as the Court itself has now confirmed. Dkt. 455 at 3 n.2. Labaton, of course, prefers not to be called out for "baldly misrepresent[ing] the procedural state of affairs to the First Circuit" (Dkt. 420 at 4 n.2), but attacking CCAF for its accurate statement does not rehabilitate Labaton's candor. Even if it were credible for Labaton to have believed the fee award was not "vacated," the omission of the order granting Labaton's own Rule 60 motion created an incomplete and misleading picture of the procedural posture before the First Circuit. CCAF contends that a guardian *ad litem* would be especially helpful given what the Special Master called a "troubling disdain for candor and transparency that at times crossed the line into outright concealment of important material facts, including the payment of an enormous amount of money from class funds to a lawyer who never appeared in the case, did no work on the case, and whose identity was intentionally hidden from the clients, the class, co-counsel and the Court." Report at 7.

Second, Labaton attacks CCAF's presentation of its connections to convicted former Arkansas Treasurer Martha Shoffner. Labaton does not deny that Shoffner, as a trustee of ATRS, was a member of the only body empowered to approve or terminate Labaton's role as monitoring counsel. It simply quibbles that the campaign contributions from Labaton partners, including Eric Belfi and Thomas Dubbs, were made "a full year *after* the ATRS Board of Trustees approved Labaton's application to become monitoring counsel." Dkt. 427 at 15. Labaton does not address the free rent that their referral affiliate Chargois & Herron provided to Shoffner continuously throughout the time that Labaton and Chargois' submitted a joint application to ATRS (SM Ex. 128)[8] until the application was approved by the Board of Trustees. While trustees do not direct the day-to-day operation of ATRS, their ability to *rescind* agreements is potent, so Labaton's New Yorker partners' otherwise inexplicable interest in the Arkansas Treasurer election is suggestive. Labaton claims that "CCAF does not attempt to connect these contributions to anything related to issues in this case," but in fact they show that Labaton yet again attempted to mislead the Court by falsely stating it had given no such contributions. CCAF Response at 19. Labaton's candor (or stunning lack thereof) is a central issue in this case in so far as it bears on their ability to represent the class and the ultimate fee they should receive.[9]

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[8] "SM Ex." refers to exhibits to the Special Master's Report and Recommendations, the public versions of which are available at Dkt. 401. CCAF does not currently have access to unredacted versions of any documents that remain under seal, and its response here is limited by what is publicly available.

[9] Labaton also takes exception to CCAF's argument that George Hopkins' ostrich-like supervision of attorneys' fees makes him ill-suited to represent the class in deciding the propriety of attorneys' fees. CCAF does not suggest that Hopkins was an unsuitable representative for the merits of the underlying suit, but the underlying suit is resolved and the class now needs assistance resolving attorneys' fees, which is the exact topic Mr. Hopkins has abdicated and on which further investigation might cause embarrassment or political controversy to Mr. Hopkins or ATRS. Similarly, CCAF does not object to Labaton's administration of the settlement. Dkt. 427 at 9. Instead, Labaton inadequately represents the class *with respect to Labaton's fee request*. CCAF Response at 14-15.

Finally, Labaton expresses umbrage that CCAF suggested it failed to disclose the Chargois arrangement to *Facebook IPO* class members. Dkt. 427 at 17. If in fact Labaton never intended to pay Chargois from the *Facebook IPO* fee award, a fact on which their declaration (Dkt. 428) is conspicuously silent, then CCAF regrets the error. But Labaton's assertion that no "factual basis" existed to believe Chargois would be paid from the *Facebook IPO* settlement is wrong. Both Mr. Chargois and counterparties at Labaton testified their arrangement applied to any case where Labaton was "selected to represent any institutional investor that I [Chargois] facilitated an introduction." SM Ex. 125, at 50. Labaton partner Eric Belfi did not disagree that this obligation applied "[e]ven if Chargois was not involved specifically as a referring attorney and even if Chargois did no work on the case[.]" SM Ex. 122, at 19. In fact, evidence suggest that *Facebook IPO* was consciously covered by the Chargois arrangement because Labaton partners sent Mr. Chargois updates on the case. SM Exhs. 134 & 135. Thus, the Special Master surmised that *Facebook IPO* was among the cases falling under the Chargois arrangement. Report at 102. Labaton points to nothing in the record showing a reasonable observer should have believed otherwise, and instead James Johnson filed a declaration that says only "no referral fee has been paid or will be paid to Damon Chargois in the Facebook case." Dkt. 428 at 1. The declaration does not say that *Facebook IPO* was *never* covered by the Chargois arrangement, and it raises questions about the arrangement that the Court should ask. When and why was it decided to not pay referral fees in *Facebook IPO*? Is the Chargois arrangement no longer in effect, or was the decision made only for *Facebook IPO*? Why?

In any event, CCAF has not attempted to mislead the Court, and Labaton instead accuses others of behavior it engages in itself.

F. CCAF's public commentary on the case is unremarkable.

Labaton contends that CCAF's participation in the case should be rejected because it is "self-serving," "self-promoting," and "self-aggrandizing." Dkt. 427 at 12-14. As evidence of this, Labaton cited Mr. Frank's correspondence with the *Boston Globe* reporter whose story inspired the appointment of a special master. Feb. 6, 2017 Order, Dkt. 117, Exhibit B. Labaton condemns the

Boston Globe correspondence as part of a "pattern of interjecting new facts." Dkt. 427 at 13. Apparently, Labaton believes illuminating relevant facts is a bad thing—or that Frank was supposed to hang up when the *Boston Globe* called him first to ask him to help interpret the fee application in this case. *See* Frank Decl. ¶ 22.

Labaton also cites two tweets (Twitter social-media messages) made by Theodore H. Frank regarding the case. The complaint—and the fact that Labaton paid for attorneys to research and write it—is absurd, as is the false characterization by Labaton's counsel that Frank ridiculed a Choate associate, and CCAF will not waste the Court's time with it, but to the extent the Court cares, a detailed, if similarly absurd, explanation of the social-media commentary is provided in Frank Decl. ¶¶ 27-34 & Ex. C.

Labaton does not cite any other examples of supposed self-promotion. Class counsel's narrative under which CCAF inserted itself into this case in an effort to seek fees and self-promotion is belied by the course of proceedings, not to mention CCAF's busy schedule. CCAF Response at 23. Indeed, Frank recently turned down an offer to act as a consulting expert witness in his private practice for $1800/hour. Because Frank realizes no personal profit from any fees CCAF receives, he would have been much better off financially if CCAF's August 5 filing simply stated "We are too busy to serve as guardian *ad litem*" and he used the time to instead accept the offer to consult on another case. Frank Decl. ¶ 8.

While CEI highlights the work of its attorneys with press highlights and news releases, and social-media commentary, other firms do the same, including Labaton. In fact, the legal profession virtually *requires* some degree of self-promotion. Attorneys necessarily describe their past experience when seeking new clients, and CCAF admits it does this. And of course, so does Class Counsel. While counsel for Lieff complained that "the press picks up on" CCAF filings, it certainly picks up on Class Counsel's filings and statements as well. Labaton maintains an entire archive of press releases for this

very purpose. *See* Labaton Press Room, https://www.labaton.com/en/about/press/News-and-Press.cfm.

Labaton and the other counsel have engaged in extensive out-of-court commentary on this case, far more extensive—and inflammatory!—than a few flame emojis. For example, Labaton provided a "lengthy statement" to American Lawyer (Law.com) reporter Scott Flaherty.[10] Labaton said that the Special Master's Report was "wholly unmoored from the relevant law and the actual facts." *Id.* Labaton told the press that the Special Master acted inappropriately as an adversary seeking to impugn Labaton:

> "The master could have concluded his endless and costly investigation long ago once he verified that the double-counting was, indeed, inadvertent," the firm said. "Instead, he opted to go down the rabbit hole chasing the scent of an 'improper' referral payment because he believed it should have been disclosed to the court. In doing so, he elected not to act as a neutral fact-finder (as was his stated charge) but rather as an adversary seeking to impugn Labaton and customer class counsel for making a referral payment that was entirely legal, ethical and appropriate under Massachusetts law. Judge Rosen may be offended by a 'bare referral' fee—one where the referring attorney does not have to do any work in order to receive the referral fee, but it is the law in Massachusetts."

Id. And, of course, Labaton sought to distract from the important news of its odd referral fees to a politically-connected Texas law firm that has led to an investigation by the Arkansas legislature with a patently meritless motion for recusal and even more meritless mandamus petition, each of which generated its own headlines.

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[10] Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton* (Frank Decl. Ex. F), available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/.

If the Court accepts Labaton's position that self-serving out-of-court statements somehow disqualify advocacy for absent class members, it is only a further reason that Labaton cannot continue representing the class in fee proceedings.

G. Lieff's insinuations about CCAF only support the utility of appointing a guardian *ad litem* who cannot settle class claims for private gain.

Finally, Lieff expressly incorporates the "matters set forth in the Surreply by Lieff Cabraser Heimann & Bernstein, LLP to Competitive Enterprise Institute's Motion for Leave to File *Amicus Curiae* . . . (ECF No. 168)." Dkt. 426. The Court may not recall the Surreply, and CCAF did not previously respond to it because the Court mooted the underlying motion two days after it was filed, on March 8, 2017, by granting CCAF's motion to file its *amicus* brief. Dkt. 172.

In the Surreply (Dkt. 168), Lieff accuses Mr. Frank of "misconduct" relating to the cash buy out of objections Lieff and other counsel made to objectors in *In re Capital One TCPA Litigation*, MDL No. 2416 (N.D. Ill.). Lieff filed its hair-curling Surreply in response to this footnote in CCAF's reply:

> As discussed in the Frank Memo, Lieff Cabraser once persuaded a CCAF client to instruct CCAF to dismiss his appeal seeking to reduce fees by $10 million in exchange for a personal $25,000 payment. In the absence of a court injunction or other rule precluding such payment offers or acceptances, class counsel can always buy off individual class members who have less at stake than the class counsel—an advantage to appointing a guardian *ad litem* who will not have that conflict.

Dkt. 154 at 11 n.5.

Lieff did not and cannot refute the underlying point of the footnote: that class counsel can and has successfully evaded appellate review by offering money to objectors, instead Lieff provides an avalanche of disingenuous characterizations and personal attacks to bury this central point. (With notable chutzpah, Lieff complained about CCAF's *ad hominem* attacks at the hearing. Tr. 8/9/2018 at 35. Again, the pattern and practice of class counsel has been to levy allegations against the Court, the Special Master, and CCAF that are better aimed at Class Counsel and the class representative.) But

Lieff's filings admit that they indeed paid $25,000 to Mr. Collins personally (and unknown amounts to other objectors) to end the *Capital One TCPA* appeal. *See* Dkt. 166-4 at 39 of 73, ¶¶ 13-15 (Selbin Decl., detailing settlement offer to Mr. Collins); *see also* 166-6 (2015 Frank Decl.). CCAF will be happy to provide additional detail rebutting Lieff's attacks if the Court wishes, but the point of this proceeding is not Lieff's and CCAF's litigation in another case, nor undisclosed expert opinions that Lieff did not even feel confident enough to submit to the Seventh Circuit, much less be tested by discovery and cross-examination, but that it seeks this Court to rely upon.

CONCLUSION

Any settlement between Class Counsel and the Special Master should provide at least as much relief to class members as the Report does, and such settlement should unambiguously waive counsel's ability to collaterally attack the settlement in the future. If these conditions are not met, the Court should appoint a guardian *ad litem* for the class (and it should consider the potential benefits of appointing a guardian even if a minimally acceptable settlement is reached).

If no settlement is reached, given the certainty of appellate challenges to any adverse ruling against Class Counsel, the Court should appoint an independent and separate guardian *ad litem* if any party objects to the Special Master serving in that role. CCAF is well-positioned to serve in this role with the assistance of Burch, Porter & Johnson, PLLC. All CCAF and Burch Porter attorneys have suitable experience to act as guardian *ad litem*, and their proposed rates are modest, especially compared to Class Counsel.

The Court should compensate guardian *ad litem* in a similar manner as it paid the Special Master—by holding class funds in trust and paying the guardian *ad litem* based on regularly-submitted detailed contemporaneous hours. However, to discourage frivolous disputes over billing, CCAF reserves its right to seek a fee multiplier from parties who unsuccessfully challenges the guardian's eminently reasonable rates and attorneys' fees.

Respectfully submitted,

Dated: August 13, 2018

/s/ M. Frank Bednarz

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Attorneys for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: August 13, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz

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

DECLARATION OF THEODORE H. FRANK IN SUPPORT OF THE CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS*

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as witness, could and would testify competently thereto.

2. I previously filed a declaration in this case which describes my professional experience and background founding the Center for Class Action Fairness ("CCAF"), which is now a part of the Competitive Enterprise Institute ("CEI"). *See* Dkt. 125-1 ("2017 Frank Declaration").

3. Among the topics I previously addressed were *ad hominem* attacks frequently hurled against me and CCAF by class counsel. I correctly anticipated some of Class Counsel's recent attacks nearly 18 months ago. In particular, I explained that I am not ideologically opposed to class actions, but just abusive class action practices. "That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food." *Id.* at 5.

4. I am often accused of being an "ideological objector," but the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, counsel for Thornton has asserted that CCAF seeks to attack the entire "class action industry" (Tr. 8/9/2018 at 36). The accusation—aside from being utterly irrelevant to the legal merits of CCAF's participation in this case—has no basis in reality. Since submitting my 2017 declaration, I have become the class representative in a pending federal class action, represented by a prominent plaintiffs' firm, seeking class-wide recovery for spam telephone calls under the TCPA. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.). I absolutely oppose the overbilling windfalls sought by class-action firms at the expense of class members, but that is exactly the sort of representation the class needs and has not been given by the compromised class representative in this case.

ATTORNEY EXPERIENCE AND RATES

5. Attorneys at CCAF have outstanding experience in class actions and complex civil litigation, and the rates we propose in this case are significantly lower than those that similarly experienced Class Counsel attorneys have requested.

6. CCAF attorneys have billed thousands of hours in dozens of cases where no fees were paid to CCAF, even in cases where CCAF was successful on appeal. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates*, for example, CCAF did not make a fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012).

7. As for my own background and experience, I graduated from University of Chicago Law School in 1994 with high honors and as a member of Order of the Coif and Law Review, where I had an Olin Fellowship in Law & Economics and Public Service Scholarship. I clerked for the Honorable Frank H. Easterbrook of the Seventh Circuit. I worked in prominent "Big Law" firms in Washington, DC, and Los Angeles for ten years, handling complex litigation for plaintiffs and defendants. I then served as the first head of the AEI Legal Center for the Public Interest and as an attorney for the McCain-Palin campaign, and have testified before federal and state legislative subcommittees about class actions, class action settlements, and *cy pres*. I founded CCAF in 2009, and have won national acclaim for its work from the *New York Times*, *Wall Street Journal*, *Forbes*, the *ABA Journal*, and several other legal publications. I have spoken about class action settlements across the country, including, *inter alia*, to the ABA Annual National Institute on Class Actions; to the Federalist Society National Lawyers Convention; to the DRI Corporate Counsel Roundtable; to numerous law firms and student groups at law schools; and in television and radio appearances.

8. My standard requested rate for CCAF work is currently $900/hour, which is what I last billed to a paying client in private practice in 2015. In fact, this month, I turned down an offer to serve as a non-testifying expert witness at $1800/hour. (Indeed, since I realize no personal profit from any fees CCAF receives, I would have been much better off financially if CCAF's August 5 filing simply stated "We are too busy to serve as guardian *ad litem*" and I used the time to instead accept the offer to consult on another case.) My standard rate is lower than the $925-$1000/hour billed by seven senior partners for Class Counsel and is likely lower than senior defense counsel rates. *See* Dkts. 114-15

at 7 (Labaton); Dkt. 114-17 at 8 (Lieff); Dkt. 357 at 167 (noting that WilmerHale bills similar rates). Courts have previously awarded $750/hour for my work, not including risk multiplier. *Edwards v. Nat'l Milk Producers Federation*, No. 4:11-cv-04766-JSW, 2017 WL 4581926 (N.D. Cal. Sept. 13, 2017) (awarding full attorneys' fee request with 1.6 lodestar multiplier).

9. Senior attorney Melissa Holyoak graduated Order of the Coif from the University of Utah S.J. Quinney College of Law in May 2003. In the fall of 2003, she began working as an associate in the Washington, DC, office of O'Melveny & Myers LLP. While at O'Melveny, she managed complex commercial and financial services litigation, argued before the Fifth Circuit Court of Appeals and other federal and state courts, deposed witnesses, and authored various motions and briefs in state and federal trial and appellate courts. From 2008 until the present, she has been engaged as a consultant by professional services firms relating to strategic planning, as well as financial services-related projects. In addition, from December 2010 through April 2012, she worked as a contract attorney for Gunster, Yoakley & Stewart, P.A., in West Palm Beach, FL, on complex financial services matters. She was engaged to analyze contracts, develop defenses, and draft responses relating to secondary mortgage market investor repurchase demands for large financial services clients involving origination, servicing, and fraud allegations. She also assisted in federal litigation involving allegations of fraudulent practices relating to foreclosure proceedings. Ms. Holyoak joined CCAF in July 2012. Since joining CCAF, both Ms. Holyoak and I have authored numerous district court and appellate briefs, reviewed and analyzed numerous settlements, reviewed and edited objections and other briefs, and appeared on behalf of CCAF in federal district and appellate courts in multiple cases, including successful arguments of a Seventh and Eighth Circuit appeal and is scheduled to argue a Ninth Circuit and D.C. Circuit appeal later this year.

10. The standard rate for Ms. Holyoak is currently $525/hour. It is my understanding and belief that her $525/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates and partners with similar

experience at $600-725/hour). Courts have previously awarded $475/hour for Ms. Holyoak's work, not including risk multiplier. *See*, *e.g.*, *Edwards*, 2017 WL 4581926.

11. Anna St. John is a 2006 graduate of Columbia Law School, where she was a James Kent Scholar. After law school, she served as a law clerk for the Honorable Rhesa H. Barksdale on the U.S. Court of Appeals for the Fifth Circuit, and she worked as an associate in the Washington, DC, office of Covington & Burling LLP. While at Covington, she managed complex insurance litigation on behalf of policyholders and white collar investigations, in connection with which she engaged in nearly all forms of written and document discovery, deposed and defended dozens of witnesses, and authored various motions and briefs in state and federal courts. She also has served as Deputy General Counsel to The Washington Ballet since October 2014. In March 2015, she joined CCAF.

12. I understand that when Ms. St. John left Covington in 2014, her billing rate exceeded the $450 to $475 rate we generally seek—and have been awarded—for her work with CCAF. *See*, *e.g.*, *In re Citigroup Inc. Securities Litig.*, No. 07-CV-9901, 2017 WL 3842601 (S.D.N.Y. Sept. 1, 2017); *Edwards*, 2017 WL 4581926. It is my understanding and belief that her $475/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates and junior partners with similar experience at $500-590/hour).

13. M. Frank Bednarz is a 2009 graduate of the University of Chicago Law School. He worked from 2010 to 2016 as an associate at Goodwin Procter LLP, where he practiced patent litigation including Hatch-Waxman litigation and litigation before the International Trade Commission. Mr. Bednarz joined CEI in May 2016 and is based in Chicago.

14. I understand that when Mr. Bednarz left Goodwin in 2016, his billing rate exceeded the $375 rate we generally seek—and have been awarded—for his work with CCAF. *See*, *e.g.*, *In re Southwest Airlines Voucher Litig.*, No. 17-3541, --- F.3d ---, 2018 WL 3651028 (7th Cir. Aug. 2, 2018) (reversing denial of CCAF's modest $80,000 fee request as compared to $1.8 million for class counsel

given that CCAF's involvement tripled relief to the class). It is my understanding and belief that his standard $375/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates with similar experience at $425-460/hour).

15. Adam Schulman is a 2010 graduate of Georgetown University Law Center who has worked for CCAF since 2011. Unlike many attorneys of his seniority, he has made first-chair court appearances in the U.S. Court of Appeals for the Third, Sixth, and Eleventh Circuits, as well as numerous such appearances in district court. *See, e.g.*, *In re Dry Max Pampers Litig.*, 713 F.3d 724 (6th Cir. 2013).

16. It is my understanding and belief that the $375/hour rate for Mr. Schulman's work is below rates charged by attorneys with similar skills and experience in this case. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates with similar experience at $425-460/hour). This rate has been approved courts in past fee requests by CCAF. *See, e.g.*, *Citigroup Inc. Securities Litig.*, 2017 WL 3842601; *Edwards*, 2017 WL 4581926.

17. All of these rates are further discounted to correspond to the rates of Burch, Porter & Johnson, PLLC.

18. Attached as **Exhibit A** are true and correct copies of the attorney profile pages available from the CEI website as they appeared on August 10, 2018.

19. CCAF proposes to serve as guardian *ad litem* with affiliated counsel at Burch, Porter & Johnson, PLLC ("Burch Porter"). The attorneys at Burch Porter have phenomenal experience in complex civil litigation, and are especially attractive from the perspective of the class because their normal Memphis, Tennessee rates are about 40-50% less than the rates Class Counsel seeks to charge the class for.

20. Given the excellent qualifications Burch Porter attorneys, and to promote a cohesive team between CCAF and Burch Porter, CCAF has agreed it will seek rates in this case comparable to

the prevailing Memphis rates reflected by Burch Porter's standard rates. For this case, I would bill $500/hour, Melissa Holyoak at $365/hour, Anna St. John at $325/hour, and Frank Bednarz and Adam Schulman each at $275/hour. These proposed rates are approximately *half* what Class Counsel billed for comparable attorneys. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing junior associates $340-380/hour and senior partners $925-1000/hour).

21. I cold-called Burch Porter attorney Gary Peeples with the offer to act as our co-counsel because I knew CCAF would not be able to adequately serve as GAL by itself; because I was familiar with Mr. Peeples's excellent work on short notice as a *pro bono* counsel for a friend of mine on a Supreme Court *amicus* brief; because I had been discussing the possibility with Mr. Peeples of him helping CCAF do an *amicus* brief in a different case in the Sixth Circuit that we had both been following; and because Mr. Peeples had been corresponding with me about this case since 2017, and I knew he had been following this litigation (in some ways closer than I had since the special master had been appointed), and would need much less time to come up to speed than a newly appointed attorney. I also knew that his firm was both large enough to handle the task of assisting us, while small and nimble enough that it would be less likely to be conflicted out. Burch Porter did not solicit us for this assignment.

22. *Boston Globe* reporter Andrea Estes left me a voice-mail about this case on November 4, 2016, and I called her back from my cell-phone while I was in the parking lot of a Wegman's supermarket in Fairfax, Virginia. Prior to her phone call, I had never heard of this case, and certainly did not suspect or anticipate that it would lead to a request for a paying guardian *ad litem* position. My concern is solely that the class is adequately represented, and I would be perfectly happy if Burch Porter was appointed as GAL without CCAF involvement.

THE LIMITED ROLE OF CEI DONORS

23. Plaintiffs' counsel assert that CCAF is somehow unfit to assist the Court because of unspecified biases it may have from CEI donors. Dkt. 427 at 11-12; 430 at 5; Tr. 8/9/2018 at 30, 37. This argument is fundamentally implausible. Even if it were true that CEI donors had directed me to

reduce fees to Class Counsel (and they have not), CCAF's supposed ideological bias aligns with class interests in this case. CCAF seeks appointment as guardian *ad litem* so that it can reduce unjustified fees from Class Counsel and distribute these fund to the class.

24. In any event, CCAF is not influenced by CEI donors, most of whom I am perfectly ignorant of. I previously described the operational independence of CCAF decisions in my 2017 declaration. Donors do not interfere with the selection of CCAF cases. In fact, we have filed objections and litigated appeals in opposition to CEI corporate donors, including in the pending Supreme Court case of *Frank v. Gaos*, where CEI donor Google has fervently opposed us at substantially more expense than it has provided CEI in funding. Dkt. 125-1 at 5-6.

25. As with the corporate donors discussed in my 2017 declaration, I am unaware of any individual donor who takes a position on the underlying litigation in this case. Because no interest has been communicated to me or other CCAF attorneys, we could not possibly be acting in this case at the behest of donors. Moreover, CEI pays me (and all CCAF attorneys) on a salary basis that does not vary with the result in any case. We do not receive a contingent bonus based on success in any case, a structure that would be contrary to the I.R.S. restrictions on public interest law firms.

26. Finally, contrary to counsel, there is nothing unusual, let alone sinister, about omitting the names of individual donors in CEI's tax forms. At the August 9 hearing, ERISA counsel compared us unfavorably to the NAACP on the grounds that the NAACP discloses its donors while CEI does not, but the NAACP honors its donors' privacy as much as CCAF does. The NAACP Legal Defense Fund's tax form indicates undisclosed individual donors contributed up to $1.5 million to that (c)(3) group in Tax Year 2016, the most recent publicly available filing. Attached as **Exhibit B** is a true and correct copy of the NAACP's legal defense fund's 2016 tax year form 990 filing, available from its website: http://www.naacpldf.org/files/about-us/PublicV2016%20LDF990.pdf.

TWITTER

27. At the hearing, Joan Lukey for Labaton attacked CCAF for social-media conduct she falsely attributed to me: "I'm not sure it's appropriate for someone to be a friend of the Court, so-

called -- it has meaning, amicus curiae, as you know -- who ridicules a young associate for working through the night to meet a 24-hour deadline. I was surprised by that conduct." Tr. 8/9/2018 at 36-37.

28. Ms. Lukey's accusation is false.

29. Attached as **Exhibit C** is a true and correct copy of a public Twitter exchange between me and Jared Cook (an employment attorney who is unaffiliated with CCAF), available online at https://twitter.com/tedfrank/status/1027589524245897217; this is apparently the exchange Ms. Lukey was complaining about, as it is the only one mentioning one of her associates.

30. As Exhibit C shows, on August 8, 2018, I tweeted (*i.e.*, posted on the social-media application Twitter) a screenshot of the section of Labaton's brief criticizing my earlier Twitter commentary, adding the comment "Pour one out for the poor Choate associate who went to law school for 3 years so he can bill a client $500/hour to read all my tweets in case I say something about his client's shady practices, and will now stay up late tonight to do a supplemental filing about this tweet." "Pour one out" is slang for the practice of pouring an alcoholic drink on the ground as a sign of reverence for a compatriot who cannot be with his friends who are drinking.

31. This was meant to be humorous because:

a. the Labaton brief's claim that my innocuous tweets have legal implications is an absurd argument on its face;

b. the juxtaposition of the informal slang "Pour one out" with the solemnity of a court filing, which in turn is juxtaposed with the silliness of the discussion in that court filing explaining fire emojis;

c. the ironic fact that "Pour one out" is usually slang reserved for a compatriot who is incarcerated or has been slain in gang combat, rather than simply working for a large firm where he makes a materially larger salary than I do;

d. a number of my attorney friends and followers would understand and sympathize with the plight of a large law-firm associate staying up late to perform an unpleasant task;

e. the ironic and self-deprecating suggestion that having to read my tweets was such an unpleasant task, as well as the absurdity of a highly-trained and highly-paid associate at a top law firm using his skills to bill a client for such a task (other attorneys responded to my tweet with humorous theories of what the billing entry would look like for reading tweets, or speculating what the ABA billing code is for reading tweets); and

f. the absurd suggestion that my tweet about complaints about tweets would itself somehow result in an emergency filing complaining about a tweet commenting about complaints about tweets—an absurdity that somehow became true at the August 9, 2018 hearing, and is now compounded with the most absurd series of paragraphs and sub-paragraphs I have ever filed in a declaration. To maximize the humorous recursion, I will likely tweet a screenshot of this paragraph 31 at some point this week.

Of course, as Mark Twain once commented, dissecting humor is like dissecting a frog; it can be done, but the subject usually dies in the process.

32. Attorney Jared Cook, whom to my knowledge I have never met, responded to my tweet with a series of tweets of his own complaining about the quality of the writing in the posted excerpt. As Exhibit C shows, on August 9, 2018, I defended the associate in question from this criticism, which I thought was unfair, given the circumstances in which the brief was written. While the brief's argument was a silly argument (which in turn was simply a function of the fact that Labaton did not have any meritorious arguments to make against CCAF), I did not ridicule the associate, and defended the associate from others' ridicule.

33. Attached as **Exhibit D** is a true and correct copy of the public August 6, 2018 "flame emoji" tweet that Labaton references in their opposition to CCAF (Dkt. 427 at 13), available online at https://twitter.com/tedfrank/status/1026519707229335552. This "self-aggrandizing" tweet was meant as praise for the fine work of my associate M. Frank Bednarz, who wrote 90% of an excellent

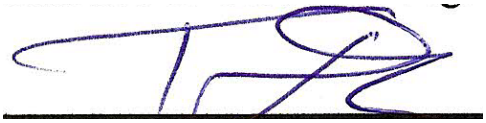
brief on very short notice, and then rewrote it and filed an additional supporting motion when, at the last minute, it turned out we were able to find a law firm to serve as our co-counsel. Mr. Bednarz took a paycut of over 60% to work for me at CCAF, and is dramatically underpaid, even compared to other attorneys of his experience at other public-interest law firms in Washington, D.C. Publicly praising his good work on Twitter with fire emojis he will find humorous is the least I can do to thank him (and again, the humor comes from the juxtaposition of a balding middle-aged man using teenage emoji slang), and when I say "least," I literally mean "least." But it's in the hope that if a plaintiffs' law firm realizes that they could do a lot more damage to me by poaching Mr. Bednarz with a $500,000/year job offer than spending similar amounts on BigLaw firms to attack my tweets, he might still want to work for me anyway.

34. Attached as **Exhibit E** is a true and correct copy of the public June 28, 2018 tweet that Labaton references in their opposition to CCAF (Dkt. 427 at 13), available online at https://twitter.com/tedfrank/status/1012397562987536385. Labaton's brief omits the fact that the actual tweet includes a screenshot from the court's recusal opinion directly referencing the decision and argument Labaton made for appointing the special master whose investigation Labaton is now criticizing as too thorough.

35. Attached as **Exhibit F** is a true and correct copy of Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton*, available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/. It demonstrates that Labaton is perfectly happy to make inflammatory comments about this case to the public when it serves its purposes. Labaton has repeatedly misrepresented this case and the Court's order as being about inadvertent duplicative billing, rather than the much more odious practices identified by the Court in its 2017 order.

I declare under penalty of perjury under the laws of the United States of America that that the foregoing is true and correct.

Executed on August 13, 2018, in Washington, D.C..



Theodore H. Frank

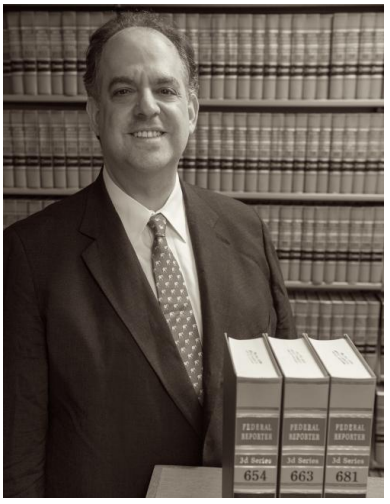
Frank Decl.

EXHIBIT A

COMPETITIVE ENTERPRISE INSTITUTE

Ted Frank

Director of Litigation and Senior Attorney



Theodore H. Frank is director of litigation and the director of the Center for Class Action Fairness at the Competitive Enterprise Institute. Before it merged with CEI in October 2015, he founded and ran CCAF as a non-profit, public interest law firm in 2009.

Frank has won several landmark appeals and tens of millions of dollars for consumers and other plaintiffs through his class action work. Adam Liptak of The New York Times calls Frank "the leading critic of abusive class action settlements" and the American Lawyer Litigation Daily referred to him as "the indefatigable scourge of underwhelming class action settlements."

Previously, Frank clerked for the Honorable Frank H. Easterbrook on the Seventh Circuit Court of Appeals, and was a litigator for 10 years until winning a sizable windfall from the 2004 World Series of Poker. He also served as the first director of the American Enterprise Institute's Legal Center for the Public Interest. Frank is a frequent public speaker and has testified before Congress multiple times on legal issues. He has been profiled by The Wall Street Journal, Forbes, GQ, and the ABA Journal, among other publications.

In 2008, Frank was elected to membership in the American Law Institute. He also serves on the Executive Committee of the Federalist Society Litigation Practice Group. Frank graduated from The University of Chicago Law School in 1994 with high honors and as a member of the Order of the Coif and the Law Review. He is a member of the District of Columbia Bar and the state bars of California and Illinois.

He is played by a much more handsome Gentile in a HBO docudrama based on a book that mentions Mr. Frank once on page 362.

For more information about the Center for Class Action Fairness and its work click here.

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Ted Frank | March 23, 2018

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Center for Class Action Fairness Changes Landscape of 'Cy Pres' Settlements
Ted Frank, Frank Bednarz | May 16, 2017

A Rose by Any Other Name Would Smell Just as Sweet, but These Flower-Delivery Settlement Coupons Are Noisome Even When You Call Them “E-Credits”
Ted Frank, Adam Schulman | May 15, 2017

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COMPETITIVE ENTERPRISE INSTITUTE

Melissa A. Holyoak

Senior Attorney

Melissa A. Holyoak is a senior attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. She joined the center as senior counsel in July 2012, and also served as the organization's corporate secretary until October 2015.

Holyoak is a former prosecutor and attorney with O'Melveny & Myers LLP, and has extensive experience as a class action litigator, arguing in district and appellate courts.

She graduated from the University of Utah S.J. Quinney College of Law in 2003 as a member of the Order of the Coif and the Law Review. Holyoak is a member of the District of Columbia Bar and the state bars of Missouri and Utah (inactive).

She is the mother of four small children and stays sane with soccer, tennis, and ballet classes.

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Publications by Melissa A. Holyoak

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Citations

Critical Mass: Roundup Trial Goes to Jury | New Expert Standard in New Jersey | 7th Circuit Fee Focus
Law.com
Melissa A. Holyoak, Ted Frank | August 8, 2018

State AGs, ABA Press High Court Over Google Privacy Deal
Law360
Ted Frank, Melissa A. Holyoak | July 17, 2018

'Fool for a client'? Ted Frank Goes Pro Se at SCOTUS to Pan Cy Pres Settlements
Westlaw
Ted Frank, Melissa A. Holyoak | July 12, 2018

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Anna St. John

Attorney

Anna St. John is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. She began working with the center in March 2015.

St. John also serves as deputy general counsel for The Washington Ballet. Previously, she was an attorney with Covington & Burling LLP and clerked for the Honorable Rhesa H. Barksdale on the Fifth Circuit Court of Appeals.

She is a graduate of Columbia Law School, where she was named a James Kent Scholar. St. John is a member of the state bars of New York and Louisiana and the District of Columbia Bar.

She resides in New Orleans, Louisiana.

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Citations

Google Privacy Case To Test Limits Of Novel Settlements
Law360
Anna St. John, Ted Frank | April 30, 2018

Shift to E-Commerce Is Saving Time, Creating Jobs
Washington Examiner
Anna St. John | July 10, 2017

Facebook User Says Privacy Deal Gives Class Nothing
Law360
Anna St. John | June 27, 2017

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Anna St. John | September 27, 2017

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Anna St. John | June 30, 2017

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COMPETITIVE ENTERPRISE INSTITUTE

Frank Bednarz

Attorney

M. Frank Bednarz is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. He returned to the Center in July 2016 after interning there during its inaugural year of existence, 2009-2010.

Previously, he was an attorney with Goodwin Procter LLP, where he practiced patent litigation including Hatch-Waxman litigation and litigation before the International Trade Commission. He also contributed to Goodwin's Digital Currency Perspectives Blog on bitcoin and the law.

Before joining Godwin Procter, Bednarz worked as an attorney for the University of Chicago Exoneration Project, representing wrongfully convicted individuals. He helped write a post-conviction petition for Eric Caine in 2009, which eventually led to Mr. Caine's release after nearly 25 years of wrongful imprisonment.

Bednarz is a graduate of University of Chicago Law School and holds a degree in chemistry from the University of Utah. He is a member of the state bars of Massachusetts and Illinois. He resides in Chicago, where he homebrews and participates in the sharing economy.

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Publications by Frank Bednarz

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Citations

A Tale Of Two Decisions: Trump Administration Got Antitrust Wrong, But Net Neutrality Right
Investor's Business Daily
Frank Bednarz | November 22, 2017

AT&T-Time Warner Merger: Does the DOJ Have a Case?
Variety
Ted Frank, Frank Bednarz | November 21, 2017

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CEI Appeal May Be the Cy Pres Case Supreme Court is Looking for
Frank Bednarz | February 21, 2018

Court Appoints Special Master to Investigate Overbilling in Anthem Class Action
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Adam Schulman

Attorney

Adam Schulman is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. Schulman has been working with the center since March 2011.

In August 2013, he won his first appellate oral argument in the Sixth Circuit case In re Dry Max Pampers Litigation, 724 F.3d 713 (6th Cir. 2013). Schulman is a graduate of Georgetown University Law Center. He is a member of the District of Columbia Bar and the state bar of Pennsylvania (non-resident, active status).

Schulman resides in Alexandria, Virginia, with his wife and son.

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Publications by Adam Schulman

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Op-Eds and Articles

Footlong Subs and Other Frivolous Lawsuits
Real Clear Policy
Adam Schulman | September 17, 2016

Citations

DOJ's Mixed Result in Class Case Still a Win for Business
Bloomberg Law
Adam Schulman | April 26, 2018

Court's New Math in Subway Foot-Long Sub Lawsuit: Zero + Zero = Zero
USA Today
Adam Schulman, Ted Frank | August 29, 2017

Public-interest firm calls $5.5 million settlement with Google over privacy settings 'unacceptable'
Legal NewsLine

Adam Schulman | January 3, 2017

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Attorneys and the Pretense of Knowledge
Adam Schulman | December 20, 2017

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EXHIBIT B

** PUBLIC DISCLOSURE COPY **

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Information about Form 990 and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

A For the 2015 calendar year, or tax year beginning JUL 1, 2015 and ending JUN 30, 2016

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Final return/ termin-ated
- ☐ Amended return
- ☐ Applica-tion pending

C Name of organization
NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Doing business as

Number and street (or P.O. box if mail is not delivered to street address) 40 Rector Street

Room/suite 5th Fl

City or town, state or province, country, and ZIP or foreign postal code New York, NY 10006

F Name and address of principal officer: Sherrilyn A. Ifill
40 Rector St. Fl 5, New York, NY 10006

D Employer identification number 13-1655255

E Telephone number 212/965-2200

G Gross receipts $ 24623513.

H(a) Is this a group return for subordinates? ☐ Yes ☒ No

H(b) Are all subordinates included? ☐ Yes ☐ No

If "No," attach a list. (see instructions)

H(c) Group exemption number ▶

I Tax-exempt status: ☒ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ▶ www.naacpldf.org

K Form of organization: ☒ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 1939 M State of legal domicile: NY

Part I Summary

Activities & Governance	1 Briefly describe the organization's mission or most significant activities: NAACP LDF's primary purpose is to support litigation in the areas of poverty and justice,		
	2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.		
	3 Number of voting members of the governing body (Part VI, line 1a)	3	29
	4 Number of independent voting members of the governing body (Part VI, line 1b)	4	28
	5 Total number of individuals employed in calendar year 2015 (Part V, line 2a)	5	77
	6 Total number of volunteers (estimate if necessary)	6	74
	7a Total unrelated business revenue from Part VIII, column (C), line 12	7a	0.
	b Net unrelated business taxable income from Form 990-T, line 34	7b	0.

		Prior Year	Current Year
Revenue	8 Contributions and grants (Part VIII, line 1h)	15682220.	11450575.
	9 Program service revenue (Part VIII, line 2g)	1955956.	693232.
	10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	1018071.	428488.
	11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	-176126.	-466077.
	12 Total revenue - add lines 8 through 11 (must equal Part VIII, column (A), line 12)	18480121.	12106218.
Expenses	13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)	2077500.	1596600.
	14 Benefits paid to or for members (Part IX, column (A), line 4)	0.	0.
	15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	6326553.	7676871.
	16a Professional fundraising fees (Part IX, column (A), line 11e)	941035.	403964.
	b Total fundraising expenses (Part IX, column (D), line 25) ▶ 1943028.		
	17 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24e)	5547450.	5547827.
	18 Total expenses. Add lines 13-17 (must equal Part IX, column (A), line 25)	14892538.	15225262.
	19 Revenue less expenses. Subtract line 18 from line 12	3587583.	-3119044.

		Beginning of Current Year	End of Year
Net Assets or Fund Balances	20 Total assets (Part X, line 16)	54303424.	52266314.
	21 Total liabilities (Part X, line 26)	7312078.	9583268.
	22 Net assets or fund balances. Subtract line 21 from line 20	46991346.	42683046.

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

▶ Signature of officer — Date 2/2/17

▶ Sherrilyn A. Ifill, President & Director-Counsel
Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name FREDERICK E. DAVIS, JR.	Preparer's signature	Date 2/2/17	Check ☐ if self-employed	PTIN P00446023
Firm's name ▶ Mitchell & Titus, LLP			Firm's EIN ▶	13-2781641
Firm's address ▶ One Battery Park Plaza New York, NY 10004			Phone no. (212) 709-4500	

May the IRS discuss this return with the preparer shown above? (see instructions) ☒ Yes ☐ No

See Schedule O for Organization Mission Statement Continuation

Part III Statement of Program Service Accomplishments

Check if Schedule O contains a response or note to any line in this Part III ..... [X]

1 Briefly describe the organization's mission:
The NAACP Legal Defense and Educational Fund is America's legal counsel on issues of race. Through advocacy and litigation, LDF focuses on issues of education, voter protection, economic justice and criminal justice. We encourage students to embark on careers in the

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? ..... [ ] Yes [X] No
If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? ..... [ ] Yes [X] No
If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ 8377315. including grants of $ 1336600.) (Revenue $ 693232.)
Legal Program provides legal assistance in connection with civil and human rights covering voting, fair employment, education, housing, health, environmental problems and capital punishment.

4b (Code:) (Expenses $ 2954387. including grants of $) (Revenue $)
Thurgood Marshall Institute allows the NAACP LDF to holistically address civil rights matters through an engaged collaboration with social scientists, demographers, political scientists, labor economists and other scholars; increase LDF's communication capacity, allowing the organization to shape and frame the debate on race and civil rights. Key to the work of the Institute is strategic communications using poll and focus-group tested messages, dynamic social media and collaborative communications with civil rights partners. This will increase LDF's voice and influence, and allow us to create new narratives and collaborative initiatives that can bring a sense of dynamism and possibility to civil rights advocacy.

4c (Code:) (Expenses $ 365966. including grants of $ 260000.) (Revenue $)
The Herbert Lehman Program offers grants, generally of $2,000 annually to undergraduates and of $3,000 annually to law students. Preference is given to US citizens who are entering the first year of full-time study.

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 11697668.

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	X	
2	Is the organization required to complete *Schedule B, Schedule of Contributors*?	2	X	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		X
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4	X	
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		X
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		X
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		X
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		X
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		X
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10	X	
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a	X	
b	Did the organization report an amount for investments - other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		X
c	Did the organization report an amount for investments - program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		X
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		X
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e	X	
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f	X	
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a		X
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	X	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		X
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		X
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		X
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		X
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		X
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I*	17	X	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18	X	
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		X

Part IV Checklist of Required Schedules *(continued)*

			Yes	No
20a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		X
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21	X	
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22	X	
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23	X	
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No", go to line 25a*	24a		X
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		X
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		X
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		X
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		X
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		X
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		X
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		X
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29	X	
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		X
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		X
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		X
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		X
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	X	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	X	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	X	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		X
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		X
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O	38	X	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	30		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		X	
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	2a	77		
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b		X	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a			X
b	If "Yes," has it filed a Form 990-T for this year? *If "No," to line 3b, provide an explanation in Schedule O*	3b			
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a			X
b	If "Yes," enter the name of the foreign country: ▶				
	See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a			X
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b			X
c	If "Yes," to line 5a or 5b, did the organization file Form 8886-T?	5c			
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a			X
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b			
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		X	
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		X	
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c			X
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e			X
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f			X
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g			
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h			
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8			
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a			
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b			
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	10b			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a			
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state?	13a			
	Note. See the instructions for additional information the organization must report on Schedule O.				
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a			X
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b			

Part VI Governance, Management, and Disclosure *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response or note to any line in this Part VI X

Section A. Governing Body and Management

				Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year ..... If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a	29		
b	Enter the number of voting members included in line 1a, above, who are independent	1b	28		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2			X
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person?	3			X
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4			X
5	Did the organization become aware during the year of a significant diversion of the organization's assets?	5			X
6	Did the organization have members or stockholders?	6			X
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a			X
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b			X
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:				
a	The governing body?	8a		X	
b	Each committee with authority to act on behalf of the governing body?	8b		X	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	9			X

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a	X	
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b	X	
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	X	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	X	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	X	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	X	
13	Did the organization have a written whistleblower policy?	13	X	
14	Did the organization have a written document retention and destruction policy?	14	X	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	X	
b	Other officers or key employees of the organization ..... If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions).	15b		X
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		X
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

X Own website ☐ Another's website X Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records: ▶

KEVIN C. THOMSON - (212) 965-2214
40 RECTOR STREET, FL 5, NEW YORK, NY 10006

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors; institutional trustees; officers; key employees; highest compensated employees; and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Sherrilyn A. Ifill	59.00									
President & Director-Couns	1.00	X		X				335554.	0.	35570.
(2) Gerald S. Adolph	8.00									
Chairman of the Board	1.00	X		X				0.	0.	0.
(3) David W. Mills	8.00									
Chairman of the Board	1.00	X		X				0.	0.	0.
(4) Patrick A. Bradford	4.00									
Secretary of the Board	1.00	X		X				0.	0.	0.
(5) Clifford P. Case	4.00									
Treasurer of the Board	1.00	X		X				0.	0.	0.
(6) William J. Bynum	1.50									
Board Member	1.00	X						0.	0.	0.
(7) Judith I. Byrd	1.50									
Board Member	1.00	X						0.	0.	0.
(8) James Castillo	1.50									
Board Member	1.00	X						0.	0.	0.
(9) Robyn Coles	1.50									
Board Member	1.00	X						0.	0.	0.
(10) Damien Dwin	1.50									
Board Member	1.00	X						0.	0.	0.
(11) Gregory Evans	1.50									
Board Member	1.00	X						0.	0.	0.
(12) Toni G. Fay	1.50									
Board Member	1.00	X						0.	0.	0.
(13) Henry Louis Gates, Jr.	1.50									
Board Member	1.00	X						0.	0.	0.
(14) Laurie Robinson Haden	1.50									
Board Member	1.00	X						0.	0.	0.
(15) Eric H. Holder Jr.	1.50									
Board Member	1.00	X						0.	0.	0.
(16) David E. Kendall	1.50									
Board Member	1.00	X						0.	0.	0.
(17) Michael R. Klein	1.50									
Board Member	1.00	X						0.	0.	0.

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(18) Kim Koopersmith	1.50									
Board Member	1.00	X						0.	0.	0.
(19) Tonya Lewis Lee	1.50									
Board Member	1.00	X						0.	0.	0.
(20) William Lighten	1.50									
Board Member	1.00	X						0.	0.	0.
(21) Cecilia S. Marshall	1.50									
Board Member	1.00	X						0.	0.	0.
(22) Gabriella E. Morris	1.50									
Board Member	1.00	X						0.	0.	0.
(23) Adebayo Ogunlesi	1.50									
Board Member	1.00	X						0.	0.	0.
(24) Luis Penalver	1.50									
Board Member	1.00	X						0.	0.	0.
(25) Steven B. Pfeiffer	1.50									
Board Member	1.00	X						0.	0.	0.
(26) Michele Roberts	1.50									
Board Member	1.00	X						0.	0.	0.
1b Sub-total ▶								335554.	0.	35570.
c Total from continuation sheets to Part VII, Section A ▶								1383848.	0.	138070.
d Total (add lines 1b and 1c) ▶								1719402.	0.	173640.

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 10

		Yes	No
3 Did the organization list any former officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3		X
4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4	X	
5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*	5		X

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
Sanky Communications, Inc., 599 11th Avenue, 6th Floor, New York, NY 10036	Direct Mail Consultant	242000.
Netology Technology Services 1200 Summer Street, Stamford, CT 06095	IT Consultant	217154.
Millennium Technology Group 325 Broadway, Suite 505, New York, NY 10007	IT Consultant	146650.

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 3

See Part VII, Section A Continuation sheets

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(27) Judith McCartin Scheide	1.50									
Board Member	1.00	X						0.	0.	0.
(28) Jonathan Soros	1.50									
Board Member	1.00	X						0.	0.	0.
(29) Angela Vallot	1.50									
Board Member	1.00	X						0.	0.	0.
(30) Kevin C. Thomson	39.50									
Chief Financial Officer	0.50			X				169287.	0.	5579.
(31) Janai Nelson	39.50									
Associate Director-Counsel	0.50				X			206608.	0.	7831.
(32) Kevin M. Keenan	39.50									
COO/General Counsel	0.50				X			191521.	0.	2647.
(33) Christina Swarns	40.00									
Director of Litigation	0.00				X			163194.	0.	26023.
(34) Leslie Proll	40.00									
Policy Director, DC Office	0.00				X			152068.	0.	20723.
(35) Monica Madrazo	40.00									
Director, HR & Administrat	0.00					X		130756.	0.	23179.
(36) Jin Hee Lee	40.00									
Deputy Director of Litigat	0.00					X		126305.	0.	25409.
(37) Monique Dixon	40.00									
Deputy Policy Director & Sr. Counsel	0.00					X		124967.	0.	12521.
(38) Donna S. Gloeckner	40.00									
Director, Information Serv	0.00					X		119142.	0.	14158.
Total to Part VII, Section A, line 1c								1383848.		138070.

Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512 - 514
Contributions, Gifts, Grants and Other Similar Amounts	1a Federated campaigns	1a	203459.				
	b Membership dues	1b					
	c Fundraising events	1c	2056123.				
	d Related organizations	1d					
	e Government grants (contributions)	1e					
	f All other contributions, gifts, grants, and similar amounts not included above	1f	9190993.				
	g Noncash contributions included in lines 1a-1f: $ 129618.						
	h Total. Add lines 1a-1f ▶			11450575.			
Program Service Revenue		Business Code					
	2a Program Revenue	541100		593232.	593232.		
	b Court Fees	541100		100000.	100000.		
	c						
	d						
	e						
	f All other program service revenue						
	g Total. Add lines 2a-2f ▶			693232.			
Other Revenue	3 Investment income (including dividends, interest, and other similar amounts) ▶			674836.			674836.
	4 Income from investment of tax-exempt bond proceeds ▶						
	5 Royalties ▶						
		(i) Real	(ii) Personal				
	6a Gross rents	2925.					
	b Less: rental expenses	0.					
	c Rental income or (loss)	2925.					
	d Net rental income or (loss) ▶			2925.			2925.
		(i) Securities	(ii) Other				
	7a Gross amount from sales of assets other than inventory	11508449					
	b Less: cost or other basis and sales expenses	11754797					
	c Gain or (loss)	-246348.					
	d Net gain or (loss) ▶			-246348.			-246348.
	8a Gross income from fundraising events (not including $ 2056123. of contributions reported on line 1c). See Part IV, line 18 a	293496.					
	b Less: direct expenses b	762498.					
	c Net income or (loss) from fundraising events ▶			-469002.			-469002.
	9a Gross income from gaming activities. See Part IV, line 19 a						
	b Less: direct expenses b						
	c Net income or (loss) from gaming activities ▶						
	10a Gross sales of inventory, less returns and allowances a						
	b Less: cost of goods sold b						
	c Net income or (loss) from sales of inventory ▶						
	Miscellaneous Revenue	Business Code					
	11a						
	b						
	c						
	d All other revenue						
	e Total. Add lines 11a-11d ▶						
	12 Total revenue. See instructions. ▶			12106218.	693232.	0.	-37589.

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns. All other organizations must complete column (A).

Check if Schedule O contains a response or note to any line in this Part IX ☐

Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1 Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21	1335100.	1335100.		
2 Grants and other assistance to domestic individuals. See Part IV, line 22	261500.	261500.		
3 Grants and other assistance to foreign organizations, foreign governments, and foreign individuals. See Part IV, lines 15 and 16				
4 Benefits paid to or for members				
5 Compensation of current officers, directors, trustees, and key employees	1231509.	818442.	304054.	109013.
6 Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7 Other salaries and wages	4070999.	3254080.	402122.	414797.
8 Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9 Other employee benefits	2029361.	1565052.	266574.	197735.
10 Payroll taxes	345002.	255844.	51190.	37968.
11 Fees for services (non-employees):				
a Management	43728.		19245.	24483.
b Legal	371709.	371709.		
c Accounting	65943.		65943.	
d Lobbying				
e Professional fundraising services. See Part IV, line 17	403964.			403964.
f Investment management fees	100598.		100598.	
g Other. (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Sch O.)	869789.	738338.	9930.	121521.
12 Advertising and promotion	48003.			48003.
13 Office expenses	900767.	465697.	84356.	350714.
14 Information technology	314160.	219335.	48466.	46359.
15 Royalties				
16 Occupancy	701046.	605608.	55555.	39883.
17 Travel	825478.	779578.	17638.	28262.
18 Payments of travel or entertainment expenses for any federal, state, or local public officials				
19 Conferences, conventions, and meetings	228970.	228970.		
20 Interest	125517.	89336.	20628.	15553.
21 Payments to affiliates				
22 Depreciation, depletion, and amortization	742321.	528668.	121810.	91843.
23 Insurance	109999.	81869.	16038.	12092.
24 Other expenses. Itemize expenses not covered above. (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a Court Costs	29713.	29713.		
b Photos/Press Release	25499.	24242.	419.	838.
c Bar Association Dues	19881.	19881.		
d Library	18040.	18040.		
e All other expenses	6666.	6666.		
25 **Total functional expenses.** Add lines 1 through 24e	15225262.	11697668.	1584566.	1943028.
26 **Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☐ if following SOP 98-2 (ASC 958-720)				

Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash - non-interest-bearing	1482564.	1	1026882.
	2	Savings and temporary cash investments	5688649.	2	8252695.
	3	Pledges and grants receivable, net	5956531.	3	3132020.
	4	Accounts receivable, net	82552.	4	41051.
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	3760.	5	0.
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instr). Complete Part II of Sch L		6	
	7	Notes and loans receivable, net		7	
	8	Inventories for sale or use		8	
	9	Prepaid expenses and deferred charges	285756.	9	314211.
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D — 10a: 17810710.			
	b	Less: accumulated depreciation — 10b: 2504726.	15573433.	10c	15305984.
	11	Investments - publicly traded securities	23658615.	11	22717095.
	12	Investments - other securities. See Part IV, line 11		12	
	13	Investments - program-related. See Part IV, line 11		13	
	14	Intangible assets		14	
	15	Other assets. See Part IV, line 11	1571564.	15	1476376.
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	54303424.	16	52266314.
Liabilities	17	Accounts payable and accrued expenses	3583106.	17	5966696.
	18	Grants payable		18	
	19	Deferred revenue		19	
	20	Tax-exempt bond liabilities		20	
	21	Escrow or custodial account liability. Complete Part IV of Schedule D		21	
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L		22	
	23	Secured mortgages and notes payable to unrelated third parties	3725549.	23	3613149.
	24	Unsecured notes and loans payable to unrelated third parties		24	
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17-24). Complete Part X of Schedule D	3423.	25	3423.
	26	**Total liabilities.** Add lines 17 through 25	7312078.	26	9583268.
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ [X] and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	14579094.	27	11773985.
	28	Temporarily restricted net assets	14412784.	28	13004781.
	29	Permanently restricted net assets	17999468.	29	17904280.
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds		30	
	31	Paid-in or capital surplus, or land, building, or equipment fund		31	
	32	Retained earnings, endowment, accumulated income, or other funds		32	
	33	Total net assets or fund balances	46991346.	33	42683046.
	34	Total liabilities and net assets/fund balances	54303424.	34	52266314.

Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI X

1	Total revenue (must equal Part VIII, column (A), line 12)	1	12106218.
2	Total expenses (must equal Part IX, column (A), line 25)	2	15225262.
3	Revenue less expenses. Subtract line 2 from line 1	3	-3119044.
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	46991346.
5	Net unrealized gains (losses) on investments	5	-179217.
6	Donated services and use of facilities	6	
7	Investment expenses	7	
8	Prior period adjustments	8	
9	Other changes in net assets or fund balances (explain in Schedule O)	9	-1010039.
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	42683046.

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII X

			Yes	No
1	Accounting method used to prepare the Form 990: ☐ Cash ☒ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		X
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both: ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	X	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both: ☐ Separate basis ☒ Consolidated basis ☐ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c	X	
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		X
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits	3b		

SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

▶ **Attach to Form 990 or Form 990-EZ.**

▶ **Information about Schedule A (Form 990 or 990-EZ) and its instructions is at** *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part I Reason for Public Charity Status (All organizations must complete this part.) See instructions.

The organization is not a private foundation because it is: (For lines 1 through 11, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state: _____

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☒ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An organization that normally receives: (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions - subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

10 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

11 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 11a through 11d that describes the type of supporting organization and complete lines 11e, 11f, and 11g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations .....

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1-9 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
Total						

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**

(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge						
4 **Total.** Add lines 1 through 3	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						21096299.
6 **Public support.** Subtract line 5 from line 4						37149993.

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
7 Amounts from line 4	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources	629921.	543360.	675383.	628503.	677761.	3154928.
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)	323111.	-105163.	12858.	-176126.	-465002.	-410322.
11 **Total support.** Add lines 7 through 10						60990898.

12 Gross receipts from related activities, etc. (see instructions) ▶ 12 5430230.

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

14 Public support percentage for 2015 (line 6, column (f) divided by line 11, column (f))	14	60.91 %
15 Public support percentage from 2014 Schedule A, Part II, line 14	15	59.01 %

16a **33 1/3% support test - 2015.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☒

b **33 1/3% support test - 2014.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

17a **10% -facts-and-circumstances test - 2015.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

b **10% -facts-and-circumstances test - 2014.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions ▶ ☐

Part III Support Schedule for Organizations Described in Section 509(a)(2)

(Complete only if you checked the box on line 9 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")						
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose						
3 Gross receipts from activities that are not an unrelated trade or business under section 513						
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5						
7a Amounts included on lines 1, 2, and 3 received from disqualified persons						
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year						
c Add lines 7a and 7b						
8 **Public support.** (Subtract line 7c from line 6.)						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
9 Amounts from line 6						
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975						
c Add lines 10a and 10b						
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12.)						

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15 Public support percentage for 2015 (line 8, column (f) divided by line 13, column (f))	15	%
16 Public support percentage from 2014 Schedule A, Part III, line 15	16	%

Section D. Computation of Investment Income Percentage

17 Investment income percentage for **2015** (line 10c, column (f) divided by line 13, column (f))	17	%
18 Investment income percentage from **2014** Schedule A, Part III, line 17	18	%

19a **33 1/3% support tests - 2015.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

b **33 1/3% support tests - 2014.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

Part IV Supporting Organizations

(Complete only if you checked a box in line 11 on Part I. If you checked 11a of Part I, complete Sections A and B. If you checked 11b of Part I, complete Sections A and C. If you checked 11c of Part I, complete Sections A, D, and E. If you checked 11d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No" describe in Part VI how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in Part VI how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in Part VI when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in Part VI what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 11a or 11b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in Part VI how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in Part VI what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in Part VI, including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action; (iii) the authority under the organization's organizing document authorizing such action; and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in Part VI.*	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in Part VI.*	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in Part VI.*	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in Part VI.*	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in Part VI.*	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in Part VI how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year.*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in Part VI how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in Part VI how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in Part VI how the organization maintained a close and continuous working relationship with the supported organization(s).*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in Part VI the role the organization's supported organizations played in this regard.*	3		

Section E. Type III Functionally-Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the yea(see instructions):*

a ☐ The organization satisfied the Activities Test. *Complete line 2 below.*

b ☐ The organization is the parent of each of its supported organizations. *Complete line 3 below.*

c ☐ The organization supported a governmental entity. *Describe in Part VI how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in **Part VI identify those supported organizations and explain** how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities.*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in Part VI the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement.*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? Provide details in *Part VI.*	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? If "Yes," describe in *Part VI the role played by the organization in this regard.*	3b		

Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970. **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E.

Section A - Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6 and 7 from line 4)	8		

Section B - Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**):			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions).	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C - Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions)	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally-integrated Type III supporting organization (see instructions).

Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D - Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in Part VI). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in Part VI). See instructions.	
9	Distributable amount for 2015 from Section C, line 6	
10	Line 8 amount divided by Line 9 amount	

Section E - Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2015	(iii) Distributable Amount for 2015
1	Distributable amount for 2015 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2015 (reasonable cause required-see instructions)			
3	Excess distributions carryover, if any, to 2015:			
a				
b				
c				
d	From 2013			
e	From 2014			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2015 distributable amount			
i	Carryover from 2010 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2015 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2015 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4.			
5	Remaining underdistributions for years prior to 2015, if any. Subtract lines 3g and 4a from line 2 (if amount greater than zero, see instructions).			
6	Remaining underdistributions for 2015. Subtract lines 3h and 4b from line 1 (if amount greater than zero, see instructions).			
7	**Excess distributions carryover to 2016.** Add lines 3j and 4c.			
8	Breakdown of line 7:			
a				
b				
c	Excess from 2013			
d	Excess from 2014			
e	Excess from 2015			

Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c; Part IV, Section B, lines 1 and 2; Part IV, Section C, line 1; Part IV, Section D, lines 2 and 3; Part IV, Section E, lines 1c, 2a, 2b, 3a and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6. Also complete this part for any additional information. (See instructions.)

Schedule B (Form 990, 990-EZ, or 990-PF)
Department of the Treasury
Internal Revenue Service

Schedule of Contributors

▶ Attach to Form 990, Form 990-EZ, or Form 990-PF.
▶ Information about Schedule B (Form 990, 990-EZ, or 990-PF) and its instructions is at *www.irs.gov/form990* .

OMB No. 1545-0047

2015

Name of the organization

NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number

13-1655255

Organization type (check one):

Filers of:	Section:
Form 990 or 990-EZ	[X] 501(c)(3) (enter number) organization
	[ ] 4947(a)(1) nonexempt charitable trust **not** treated as a private foundation
	[ ] 527 political organization
Form 990-PF	[ ] 501(c)(3) exempt private foundation
	[ ] 4947(a)(1) nonexempt charitable trust treated as a private foundation
	[ ] 501(c)(3) taxable private foundation

Check if your organization is covered by the **General Rule** or a **Special Rule.**
Note. Only a section 501(c)(7), (8), or (10) organization can check boxes for both the General Rule and a Special Rule. See instructions.

General Rule

[ ] For an organization filing Form 990, 990-EZ, or 990-PF that received, during the year, contributions totaling $5,000 or more (in money or property) from any one contributor. Complete Parts I and II. See instructions for determining a contributor's total contributions.

Special Rules

[X] For an organization described in section 501(c)(3) filing Form 990 or 990-EZ that met the 33 1/3% support test of the regulations under sections 509(a)(1) and 170(b)(1)(A)(vi), that checked Schedule A (Form 990 or 990-EZ), Part II, line 13, 16a, or 16b, and that received from any one contributor, during the year, total contributions of the greater of **(1)** $5,000 or **(2)** 2% of the amount on (i) Form 990, Part VIII, line 1h, or (ii) Form 990-EZ, line 1. Complete Parts I and II.

[ ] For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, total contributions of more than $1,000 *exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. Complete Parts I, II, and III.

[ ] For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, contributions *exclusively* for religious, charitable, etc., purposes, but no such contributions totaled more than $1,000. If this box is checked, enter here the total contributions that were received during the year for an *exclusively* religious, charitable, etc., purpose. Do not complete any of the parts unless the **General Rule** applies to this organization because it received *nonexclusively* religious, charitable, etc., contributions totaling $5,000 or more during the year ..... ▶ $ _____

Caution. An organization that is not covered by the General Rule and/or the Special Rules does not file Schedule B (Form 990, 990-EZ, or 990-PF), but it **must** answer "No" on Part IV, line 2, of its Form 990; or check the box on line H of its Form 990-EZ or on its Form 990-PF, Part I, line 2, to certify that it does not meet the filing requirements of Schedule B (Form 990, 990-EZ, or 990-PF).

Name of organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
1		$ 1000000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
2		$ 1500000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
3		$ 1070000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
4		$ 269420.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
5		$ 394900.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
6		$ 400000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)

Name of organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
7		$ 302250.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
8		$ 500000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part II **Noncash Property** (see instructions). Use duplicate copies of Part II if additional space is needed.

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

Schedule B (Form 990, 990-EZ, or 990-PF) (2015) Page 4

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part III *Exclusively* religious, charitable, etc., contributions to organizations described in section 501(c)(7), (8), or (10) that total more than $1,000 for the year from any one contributor. Complete columns (a) through (e) and the following line entry. For organizations completing Part III, enter the total of exclusively religious, charitable, etc., contributions of $1,000 or less for the year. (Enter this info. once.) ▶ $

Use duplicate copies of Part III if additional space is needed.

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

SCHEDULE C (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Political Campaign and Lobbying Activities

For Organizations Exempt From Income Tax Under section 501(c) and section 527

▶ **Complete if the organization is described below.** ▶ **Attach to Form 990 or Form 990-EZ.**

▶ **Information about Schedule C (Form 990 or 990-EZ) and its instructions is at *www.irs.gov/form990*.**

OMB No. 1545-0047

2015

Open to Public Inspection

If the organization answered "Yes," on Form 990, Part IV, line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then

- Section 501(c)(3) organizations: Complete Parts I-A and B. Do not complete Part I-C.
- Section 501(c) (other than section 501(c)(3)) organizations: Complete Parts I-A and C below. Do not complete Part I-B.
- Section 527 organizations: Complete Part I-A only.

If the organization answered "Yes," on Form 990, Part IV, line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then

- Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)): Complete Part II-A. Do not complete Part II-B.
- Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)): Complete Part II-B. Do not complete Part II-A.

If the organization answered "Yes," on Form 990, Part IV, line 5 (Proxy Tax) (see separate instructions) or Form 990-EZ, Part V, line 35c (Proxy Tax) (see separate instructions), then

- Section 501(c)(4), (5), or (6) organizations: Complete Part III.

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.

1 Provide a description of the organization's direct and indirect political campaign activities in Part IV.

2 Political expenditures ▶ $

3 Volunteer hours

Part I-B Complete if the organization is exempt under section 501(c)(3).

1 Enter the amount of any excise tax incurred by the organization under section 4955 ▶ $

2 Enter the amount of any excise tax incurred by organization managers under section 4955 ▶ $

3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? ☐ Yes ☐ No

4a Was a correction made? ☐ Yes ☐ No

b If "Yes," describe in Part IV.

Part I-C Complete if the organization is exempt under section 501(c), except section 501(c)(3).

1 Enter the amount directly expended by the filing organization for section 527 exempt function activities ▶ $

2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities ▶ $

3 Total exempt function expenditures. Add lines 1 and 2. Enter here and on Form 1120-POL, line 17b ▶ $

4 Did the filing organization file **Form 1120-POL** for this year? ☐ Yes ☐ No

5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments. For each organization listed, enter the amount paid from the filing organization's funds. Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC). If additional space is needed, provide information in Part IV.

(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds. If none, enter -0-.	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization. If none, enter -0-.

Part II-A **Complete if the organization is exempt under section 501(c)(3) and filed Form 5768 (election under section 501(h)).**

A Check ▶ [X] if the filing organization belongs to an affiliated group (and list in Part IV each affiliated group member's name, address, EIN, expenses, and share of excess lobbying expenditures).

B Check ▶ [ ] if the filing organization checked box A and "limited control" provisions apply.

Limits on Lobbying Expenditures (The term "expenditures" means amounts paid or incurred.)	(a) Filing organization's totals	(b) Affiliated group totals
1a Total lobbying expenditures to influence public opinion (grass roots lobbying)	42265.	42265.
b Total lobbying expenditures to influence a legislative body (direct lobbying)	154822.	154822.
c Total lobbying expenditures (add lines 1a and 1b)	197087.	197087.
d Other exempt purpose expenditures	15028175.	15028175.
e Total exempt purpose expenditures (add lines 1c and 1d)	15225262.	15225262.
f Lobbying nontaxable amount. Enter the amount from the following table in both columns.	911263.	911263.
g Grassroots nontaxable amount (enter 25% of line 1f)	227816.	227816.
h Subtract line 1g from line 1a. If zero or less, enter -0-	0.	0.
i Subtract line 1f from line 1c. If zero or less, enter -0-	0.	0.

If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e.
Over $500,000 but not over $1,000,000	$100,000 plus 15% of the excess over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 plus 10% of the excess over $1,000,000
Over $1,500,000 but not over $17,000,000	$225,000 plus 5% of the excess over $1,500,000
Over $17,000,000	$1,000,000.

j If there is an amount other than zero on either line 1h or line 1i, did the organization file Form 4720 reporting section 4911 tax for this year? [ ] Yes [ ] No

4-Year Averaging Period Under section 501(h)

(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the separate instructions for lines 2a through 2f.)

Lobbying Expenditures During 4-Year Averaging Period

Calendar year (or fiscal year beginning in)	(a) 2012	(b) 2013	(c) 2014	(d) 2015	(e) Total
2a Lobbying nontaxable amount	921518.	804224.	894627.	911263.	3531632.
b Lobbying ceiling amount (150% of line 2a, column(e))					5297448.
c Total lobbying expenditures	207198.	225101.	222907.	197087.	852293.
d Grassroots nontaxable amount	230380.	201056.	223657.	227816.	882909.
e Grassroots ceiling amount (150% of line 2d, column (e))					1324364.
f Grassroots lobbying expenditures	3711.	8174.	59990.	42265.	114140.

Part II-B **Complete if the organization is exempt under section 501(c)(3) and has NOT filed Form 5768 (election under section 501(h)).**

For each "Yes," response on lines 1a through 1i below, provide in Part IV a detailed description of the lobbying activity.	(a) Yes	(a) No	(b) Amount
1 During the year, did the filing organization attempt to influence foreign, national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of:			
a Volunteers?			
b Paid staff or management (include compensation in expenses reported on lines 1c through 1i)?			
c Media advertisements?			
d Mailings to members, legislators, or the public?			
e Publications, or published or broadcast statements?			
f Grants to other organizations for lobbying purposes?			
g Direct contact with legislators, their staffs, government officials, or a legislative body?			
h Rallies, demonstrations, seminars, conventions, speeches, lectures, or any similar means?			
i Other activities?			
j Total. Add lines 1c through 1i			
2a Did the activities in line 1 cause the organization to be not described in section 501(c)(3)?			
b If "Yes," enter the amount of any tax incurred under section 4912			
c If "Yes," enter the amount of any tax incurred by organization managers under section 4912			
d If the filing organization incurred a section 4912 tax, did it file Form 4720 for this year?			

Part III-A **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6).**

			Yes	No
1	Were substantially all (90% or more) dues received nondeductible by members?	1		
2	Did the organization make only in-house lobbying expenditures of $2,000 or less?	2		
3	Did the organization agree to carry over lobbying and political expenditures from the prior year?	3		

Part III-B **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6) and if either (a) BOTH Part III-A, lines 1 and 2, are answered "No," OR (b) Part III-A, line 3, is answered "Yes."**

1	Dues, assessments and similar amounts from members	1	
2	Section 162(e) nondeductible lobbying and political expenditures (do not include amounts of political expenses for which the section 527(f) tax was paid).		
a	Current year	2a	
b	Carryover from last year	2b	
c	Total	2c	
3	Aggregate amount reported in section 6033(e)(1)(A) notices of nondeductible section 162(e) dues	3	
4	If notices were sent and the amount on line 2c exceeds the amount on line 3, what portion of the excess does the organization agree to carryover to the reasonable estimate of nondeductible lobbying and political expenditure next year?	4	
5	Taxable amount of lobbying and political expenditures (see instructions)	5	

Part IV **Supplemental Information**

Provide the descriptions required for Part I-A, line 1; Part I-B, line 4; Part I-C, line 5; Part II-A (affiliated group list); Part II-A, lines 1 and 2 (see instructions); and Part II-B, line 1. Also, complete this part for any additional information.

Part IV Supplemental Information *(continued)*

Schedule C — **Affiliated Group Lobbying Expenditures Part II-A**

Name of Affiliated Group Member
EARL WARREN LEGAL TRAINING PROGRAM

Employer ID Number
13-2695683

Affiliated Group Member Address
40 RECTOR STREET, 5TH FLOOR
NEW YORK, NY 10006

Electing Member
NO

Limits on Lobbying Expenditures:		Line
Total lobbying expenditures to influence public opinion (grassroots lobbying)	0.	1a
Total lobbying expenditures to influence a legislative body (direct lobbying)	0.	b
Total lobbying expenditures (add lines 1a and 1b)	0.	c
Other exempt purpose expenditures	0.	d
Total exempt purpose expenditures (add lines 1c and 1d)	0.	e

Lobbying nontaxable amount.
Enter the amount from the following table:

If the amount on line e is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e
> 500,000 <= 1,000,000	100,000 + 15% > 500,000
> 1,000,000 <= 1,500,000	175,000 + 10% > 1,000,000
> 1,500,000 <= 17,000,000	225,000 + 5% > 1,500,000
Over $17,000,000	$1,000,000

	0.	f
Grassroots nontaxable amount (enter 25% of line 1f)	0.	g
Subtract line 1g from line 1a (limit to zero)	0.	h
Subtract line 1f from line 1c (limit to zero)	0.	i
Member's share of excess lobbying expenditures	0.	

SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Information about Schedule D (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts. Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements. Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply).
- ☐ Preservation of land for public use (e.g., recreation or education)
- ☐ Preservation of a historically important land area
- ☐ Protection of natural habitat
- ☐ Preservation of a certified historic structure
- ☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

		Held at the End of the Tax Year
a	Total number of conservation easements 2a	
b	Total acreage restricted by conservation easements 2b	
c	Number of conservation easements on a certified historic structure included in (a) 2c	
d	Number of conservation easements included in (c) acquired after 8/17/06, and not on a historic structure listed in the National Register 2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ _____

4 Number of states where property subject to conservation easement is located ▶ _____

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ _____

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ _____

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement, and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements.

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under SFAS 116 (ASC 958), not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide, in Part XIII, the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under SFAS 116 (ASC 958), to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ _____

(ii) Assets included in Form 990, Part X ▶ $ _____

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under SFAS 116 (ASC 958) relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ _____

b Assets included in Form 990, Part X ▶ $ _____

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that are a significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ Scholarly research
c ☐ Preservation for future generations
d ☐ Loan or exchange programs
e ☐ Other _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements. Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table:

		Amount
c Beginning balance	1c	
d Additions during the year	1d	
e Distributions during the year	1e	
f Ending balance	1f	

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds. Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

	(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a Beginning of year balance	22258708.	23471686.	22124511.	20758852.	23881401.
b Contributions		108.			
c Net investment earnings, gains, and losses	150872.	-1536.	3638135.	1812314.	-1002.
d Grants or scholarships					
e Other expenditures for facilities and programs	1245010.	1211550.	2290960.	446655.	3121547.
f Administrative expenses					
g End of year balance	21164570.	22258708.	23471686.	22124511.	20758852.

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as:

a Board designated or quasi-endowment ▶ 4.74 %
b Permanent endowment ▶ 84.59 %
c Temporarily restricted endowment ▶ 10.67 %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i) unrelated organizations	3a(i)	X	
(ii) related organizations	3a(ii)		X
b If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R?	3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a Land				
b Buildings		16031320.	1835026.	14196294.
c Leasehold improvements		11389.	5125.	6264.
d Equipment		1738001.	656575.	1081426.
e Other		30000.	8000.	22000.
Total. Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				15305984.

Part VII Investments - Other Securities.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely-held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. (Col. (b) must equal Form 990, Part X, col. (B) line 12.) ▶		

Part VIII Investments - Program Related.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. (Col. (b) must equal Form 990, Part X, col. (B) line 13.) ▶		

Part IX Other Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col. (B) line 15.)* ▶	

Part X Other Liabilities.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2) FUNDS HELD IN TRUST FOR OTHERS	3423.
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col. (B) line 25.)* ▶	3423.

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FIN 48 (ASC 740). Check here if the text of the footnote has been provided in Part XIII [X]

Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.

Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	12330500.
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12:				
a	Net unrealized gains (losses) on investments	2a	-179217.		
b	Donated services and use of facilities	2b			
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines 2a through 2d			2e	-179217.
3	Subtract line 2e from line 1			3	12509717.
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a	100598.		
b	Other (Describe in Part XIII.)	4b	-504097.		
c	Add lines 4a and 4b			4c	-403499.
5	Total revenue. Add lines 3 and 4c. *(This must equal Form 990, Part I, line 12.)*			5	12106218.

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.

Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	15628761.
2	Amounts included on line 1 but not on Form 990, Part IX, line 25:				
a	Donated services and use of facilities	2a			
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d	504097.		
e	Add lines 2a through 2d			2e	504097.
3	Subtract line 2e from line 1			3	15124664.
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a	100598.		
b	Other (Describe in Part XIII.)	4b			
c	Add lines 4a and 4b			4c	100598.
5	Total expenses. Add lines 3 and 4c. *(This must equal Form 990, Part I, line 18.)*			5	15225262.

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9; Part III, lines 1a and 4; Part IV, lines 1b and 2b; Part V, line 4; Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

Part V, line 4:

Earnings from the Herbert Lehman Endowment are used to support scholarships.

Part X, Line 2:

NAACP LDF qualifies as a charitable organization as defined by IRC Section 501(c)(3) and, accordingly, are exempt from federal income tax under IRC Section 501(a). Additionally, since it is publicly supported, contributions qualify for the maximum charitable contribution deduction under the IRC. NAACP LDF is also exempt from state and local income taxes.

Part XIII Supplemental Information *(continued)*

Management has analyzed the tax positions taken by this entity and has concluded that as of June 30, 2016, there were no uncertain tax positions taken or expected to be taken. Accordingly, no interest or penalties related to uncertain tax positions have been accrued in the accompanying combined financial statements.

NAACP LDF is subject to audit by taxing jurisdictions; however, no audits for any tax periods are currently in progress. Management believes that the entity is no longer subject to income tax examinations for years ended on or prior to June 30, 2013 under federal and New York tax jurisdictions.

Part XI, Line 4b - Other Adjustments:

Direct Special Event Expenses

Part XII, Line 2d - Other Adjustments:

Direct Special Event Expenses

SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, lines 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Information about Schedule G (Form 990 or 990-EZ) and its instructions is at www.irs.gov/form990.

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Fundraising Activities. Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a [X] Mail solicitations
b [X] Internet and email solicitations
c [X] Phone solicitations
d [ ] In-person solicitations
e [X] Solicitation of non-government grants
f [ ] Solicitation of government grants
g [X] Special fundraising events

2 a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? [X] Yes [ ] No

b If "Yes," list the ten highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col. (i)	(vi) Amount paid to (or retained by) organization
Gabrielle Gilliam - 338 Fenmore Street, Brooklyn, NY	Corporate/Foundation Consultant		X	4233345.	60019.	4173326.
Dwight Johnson Design - 276 Fifth Ave, Suite 703, New	Special Events Consultant (NEJAD)		X	2299758.	34173.	2265585.
Sanky Communications, Inc. - 599 11th Avenue, 6th Floor,	Direct Mail and Web Gift Consultant		X	1082340.	242000.	840340.
Enrique Ball - 80 Carroll Street, Brooklyn, NY 11231	Development Consultant		X	35954.	17308.	18646.
Total ▶				7651397.	353500.	7297897.

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AZ,AR,CA,CO,CT,DC,FL,GA,IL,KS,KY,IN,ME,MD,MI,MA,MN,MS,MO,ND,NE,NV,NH,NJ,NM
NY,NC,OH,OK,OR,PA,RI,SC,TN,UT,VA,WA,WV,WI

See Part IV for continuations

Part II Fundraising Events. Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 NEJAD (event type)	(b) Event #2 LDF Alumni Reunion (event type)	(c) Other events 2 (total number)	(d) Total events (add col. (a) through col. (c))
Revenue	1 Gross receipts	2299758.	30161.	19700.	2349619.
	2 Less: Contributions	2006262.	30161.	19700.	2056123.
	3 Gross income (line 1 minus line 2)	293496.			293496.
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs	41650.	0.	6810.	48460.
	7 Food and beverages	172281.	0.	2545.	174826.
	8 Entertainment	12600.	0.		12600.
	9 Other direct expenses	485080.	20351.	21181.	526612.
	10 Direct expense summary. Add lines 4 through 9 in column (d) ▶				762498.
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				-469002.

Part III Gaming. Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col. (a) through col. (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	
	7 Direct expense summary. Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____ .

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information:

Name ▶

Gaming manager compensation ▶ $ _____

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions:

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information (see instructions).

Schedule G, Part I, Line 2b, List of Ten Highest Paid Fundraisers:

(i) Name of Fundraiser: Gabrielle Gilliam

(i) Address of Fundraiser: 338 Fenmore Street, Brooklyn, NY 11225

(i) Name of Fundraiser: Dwight Johnson Design

(i) Address of Fundraiser: 276 Fifth Ave, Suite 703, New York, NY 10001

(i) Name of Fundraiser: Sanky Communications, Inc.

Part IV Supplemental Information *(continued)*

(i) Address of Fundraiser: 599 11th Avenue, 6th Floor, New York, NY 10036

SCHEDULE I (Form 990)

Department of the Treasury
Internal Revenue Service

Grants and Other Assistance to Organizations, Governments, and Individuals in the United States

Complete if the organization answered "Yes" on Form 990, Part IV, line 21 or 22.

▶ Attach to Form 990.

▶ Information about Schedule I (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization
NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number
13-1655255

Part I General Information on Grants and Assistance

1 Does the organization maintain records to substantiate the amount of the grants or assistance, the grantees' eligibility for the grants or assistance, and the selection criteria used to award the grants or assistance? ..... [X] Yes [ ] No

2 Describe in Part IV the organization's procedures for monitoring the use of grant funds in the United States.

Part II Grants and Other Assistance to Domestic Organizations and Domestic Governments. Complete if the organization answered "Yes" on Form 990, Part IV, line 21, for any recipient that received more than $5,000. Part II can be duplicated if additional space is needed.

1 (a) Name and address of organization or government	(b) EIN	(c) IRC section if applicable	(d) Amount of cash grant	(e) Amount of non-cash assistance	(f) Method of valuation (book, FMV, appraisal, other)	(g) Description of non-cash assistance	(h) Purpose of grant or assistance
ACLU Racial Social Justice 125 Broad Street, 18th Floor New York, NY 10004	13-6213516	501(c)(4)	150000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
ACLU Northern California 39 Drumm Street San Francisco, CA 94111	94-0279770	501(c)(4)	106250.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Advocates for Children of New York 151 West 30th Street, 5th Floor New York, NY 10001	11-2247307	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Charles Hamilton Houston Institute 1557 Massachusetts Avenue, Lewis Ha Cambridge, MA 02138	04-2103580	501(c)(3)	25000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Education Law Center 1315 Walnut Street, Suite 400 PhiladelphiA, PA 19107	23-2581102	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Just Children Legal Aid Justice Center - 1000 Preston Avenue, Suite A - Charlottesville, VA 22903	54-0884513	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or

2 Enter total number of section 501(c)(3) and government organizations listed in the line 1 table ..... ▶ 12.

3 Enter total number of other organizations listed in the line 1 table ..... ▶ 2.

LHA For Paperwork Reduction Act Notice, see the Instructions for Form 990.

Schedule I (Form 990) (2015)

See Part IV for Column (h) descriptions

532101
10-28-15

Part II Continuation of Grants and Other Assistance to Governments and Organizations in the United States (Schedule I (Form 990), Part II.)

(a) Name and address of organization or government	(b) EIN	(c) IRC section if applicable	(d) Amount of cash grant	(e) Amount of non-cash assistance	(f) Method of valuation (book, FMV, appraisal, other)	(g) Description of non-cash assistance	(h) Purpose of grant or assistance
Juvenile Justice Project of Louisiana - 1820 St. Charles Avenue, Suite 205 - New Orleans, LA 70130	20-5961971	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Advocates for Children's Services - Legal Aid of NC - P. O. Box 2101 - Durham, NC 27702	31-1784161	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
National Center for Youth Law 405 14th Street, 15th Floor' Oakland, CA 94612	94-2506933	501(c)(3)	60000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
New York Civil Liberties Union 125 Broad Street New York, NY 10004	90-0808294	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Texas Appleseed 1609 Shoal Creek Boulevard, Suite 2 Austin, TX 78701	74-2804268	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
The Regents of The University of California - 11000 Kinross Avenue, Suite 211 - Los Angeles, CA 90095	95-6006143	501(c)(3)	120000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Kentucky Youth Advocates 11001 Bluegrass Parkway, Suite 100 Jeffersontown, KY 40299	61-0929390	501(c)(3)	70000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Public Counsel Law Center 610 South Ardmore Avenue Los Angeles, CA 90005	23-7105149	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or

Part III Grants and Other Assistance to Domestic Individuals. Complete if the organization answered "Yes" on Form 990, Part IV, line 22. Part III can be duplicated if additional space is needed.

(a) Type of grant or assistance	(b) Number of recipients	(c) Amount of cash grant	(d) Amount of non-cash assistance	(e) Method of valuation (book, FMV, appraisal, other)	(f) Description of non-cash assistance
Scholarship Grants	105	261500.	0.		

Part IV Supplemental Information. Provide the information required in Part I, line 2, Part III, column (b), and any other additional information.

Part I, Line 2:

The Herbert Lehman Scholarship program obtains documentation from every student receiving scholarship aid which indicates that he/she remains in good standing with the university or college he/she is attending.

Part II, line 1, Column (h):

Name of Organization or Government: ACLU Racial Social Justice

(h) Purpose of Grant or Assistance: To provide data analyses,

Part IV Supplemental Information

litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race gender responsiveness education policies.

Name of Organization or Government: ACLU Northern California

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Advocates for Children of New York

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform race and gender responsive education policies.

Name of Organization or Government: Charles Hamilton Houston Institute

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Education Law Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Part IV Supplemental Information

Name of Organization or Government:

Just Children Legal Aid Justice Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race zn gender responsive education policies.

Name of Organization or Government: Juvenile Justice Project of Louisiana

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government:

Advocates for Children's Services - Legal Aid of NC

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: National Center for Youth Law

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: New York Civil Liberties Union

(h) Purpose of Grant or Assistance: To provide data analyses,

Part IV Supplemental Information

litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Texas Appleseed

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government:
The Regents of The University of California

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Kentucky Youth Advocates

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Public Counsel Law Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

SCHEDULE J (Form 990)

Department of the Treasury
Internal Revenue Service

Compensation Information

For certain Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

▶ **Complete if the organization answered "Yes" on Form 990, Part IV, line 23.**
▶ **Attach to Form 990.**
▶ **Information about Schedule J (Form 990) and its instructions is at *www.irs.gov/form990.***

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Questions Regarding Compensation

			Yes	No
1a	Check the appropriate box(es) if the organization provided any of the following to or for a person listed on Form 990, Part VII, Section A, line 1a. Complete Part III to provide any relevant information regarding these items.			
	☐ First-class or charter travel	☒ Housing allowance or residence for personal use		
	☐ Travel for companions	☐ Payments for business use of personal residence		
	☐ Tax indemnification and gross-up payments	☐ Health or social club dues or initiation fees		
	☐ Discretionary spending account	☐ Personal services (e.g., maid, chauffeur, chef)		
b	If any of the boxes on line 1a are checked, did the organization follow a written policy regarding payment or reimbursement or provision of all of the expenses described above? If "No," complete Part III to explain	1b	X	
2	Did the organization require substantiation prior to reimbursing or allowing expenses incurred by all directors, trustees, and officers, including the CEO/Executive Director, regarding the items checked in line 1a?	2	X	
3	Indicate which, if any, of the following the filing organization used to establish the compensation of the organization's CEO/Executive Director. Check all that apply. Do not check any boxes for methods used by a related organization to establish compensation of the CEO/Executive Director, but explain in Part III.			
	☒ Compensation committee	☐ Written employment contract		
	☒ Independent compensation consultant	☒ Compensation survey or study		
	☒ Form 990 of other organizations	☒ Approval by the board or compensation committee		
4	During the year, did any person listed on Form 990, Part VII, Section A, line 1a, with respect to the filing organization or a related organization:			
a	Receive a severance payment or change-of-control payment?	4a		X
b	Participate in, or receive payment from, a supplemental nonqualified retirement plan?	4b		X
c	Participate in, or receive payment from, an equity-based compensation arrangement?	4c		X
	If "Yes" to any of lines 4a-c, list the persons and provide the applicable amounts for each item in Part III.			
	Only section 501(c)(3), 501(c)(4), and 501(c)(29) organizations must complete lines 5-9.			
5	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the revenues of:			
a	The organization?	5a		X
b	Any related organization?	5b		X
	If "Yes" to line 5a or 5b, describe in Part III.			
6	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the net earnings of:			
a	The organization?	6a		X
b	Any related organization?	6b		X
	If "Yes" on line 6a or 6b, describe in Part III.			
7	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization provide any non-fixed payments not described on lines 5 and 6? If "Yes," describe in Part III	7		X
8	Were any amounts reported on Form 990, Part VII, paid or accrued pursuant to a contract that was subject to the initial contract exception described in Regulations section 53.4958-4(a)(3)? If "Yes," describe in Part III	8		X
9	If "Yes" to line 8, did the organization also follow the rebuttable presumption procedure described in Regulations section 53.4958-6(c)?	9		

Part II **Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees.** Use duplicate copies if additional space is needed.

For each individual whose compensation must be reported on Schedule J, report compensation from the organization on row (i) and from related organizations, described in the instructions, on row (ii). Do not list any individuals that are not listed on Form 990, Part VII.

Note: The sum of columns (B)(i)-(iii) for each listed individual must equal the total amount of Form 990, Part VII, Section A, line 1a, applicable column (D) and (E) amounts for that individual.

(A) Name and Title		(B) Breakdown of W-2 and/or 1099-MISC compensation			(C) Retirement and other deferred compensation	(D) Nontaxable benefits	(E) Total of columns (B)(i)-(D)	(F) Compensation in column (B) reported as deferred on prior Form 990
		(i) Base compensation	(ii) Bonus & incentive compensation	(iii) Other reportable compensation				
(1) Sherrilyn A. Ifill	(i)	300554.	0.	35000.	0.	35570.	371124.	0.
President & Director-Couns	(ii)	0.	0.	0.	0.	0.	0.	0.
(2) Kevin C. Thomson	(i)	169287.	0.	0.	0.	5579.	174866.	0.
Chief Financial Officer	(ii)	0.	0.	0.	0.	0.	0.	0.
(3) Janai Nelson	(i)	206608.	0.	0.	0.	7831.	214439.	0.
Associate Director-Counsel	(ii)	0.	0.	0.	0.	0.	0.	0.
(4) Kevin M. Keenan	(i)	191521.	0.	0.	0.	2647.	194168.	0.
COO/General Counsel	(ii)	0.	0.	0.	0.	0.	0.	0.
(5) Christina Swarns	(i)	163194.	0.	0.	0.	26023.	189217.	0.
Director of Litigation	(ii)	0.	0.	0.	0.	0.	0.	0.
(6) Leslie Proll	(i)	152068.	0.	0.	0.	20723.	172791.	0.
Policy Director, DC Office	(ii)	0.	0.	0.	0.	0.	0.	0.
(7) Monica Madrazo	(i)	130756.	0.	0.	0.	23179.	153935.	0.
Director, HR & Administrat	(ii)	0.	0.	0.	0.	0.	0.	0.
(8) Jin Hee Lee	(i)	126305.	0.	0.	0.	25409.	151714.	0.
Deputy Director of Litigat	(ii)	0.	0.	0.	0.	0.	0.	0.
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							

Part III Supplemental Information

Provide the information, explanation, or descriptions required for Part I, lines 1a, 1b, 3, 4a, 4b, 4c, 5a, 5b, 6a, 6b, 7, and 8, and for Part II. Also complete this part for any additional information.

Part I, Line 1a:

The President and Director-Counsel, Sherrilyn A. Ifill receives a housing allowance approved by the Compensation Board. This amount is included in her taxable income.

SCHEDULE M (Form 990)

Department of the Treasury
Internal Revenue Service

Noncash Contributions

- Complete if the organizations answered "Yes" on Form 990, Part IV, lines 29 or 30.
- Attach to Form 990.
- Information about Schedule M (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open To Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Types of Property

		(a) Check if applicable	(b) Number of contributions or items contributed	(c) Noncash contribution amounts reported on Form 990, Part VIII, line 1g	(d) Method of determining noncash contribution amounts
1	Art - Works of art				
2	Art - Historical treasures				
3	Art - Fractional interests				
4	Books and publications				
5	Clothing and household goods				
6	Cars and other vehicles				
7	Boats and planes				
8	Intellectual property				
9	Securities - Publicly traded	X	40	127618.	MV at close of busin
10	Securities - Closely held stock				
11	Securities - Partnership, LLC, or trust interests				
12	Securities - Miscellaneous				
13	Qualified conservation contribution - Historic structures				
14	Qualified conservation contribution - Other				
15	Real estate - Residential				
16	Real estate - Commercial				
17	Real estate - Other				
18	Collectibles				
19	Food inventory				
20	Drugs and medical supplies				
21	Taxidermy				
22	Historical artifacts				
23	Scientific specimens				
24	Archeological artifacts				
25	Other ▶ (Alcoholic Bev)	X	1	2000.	FMV
26	Other ▶ ( )				
27	Other ▶ ( )				
28	Other ▶ ( )				

29 Number of Forms 8283 received by the organization during the tax year for contributions for which the organization completed Form 8283, Part IV, Donee Acknowledgement 29

			Yes	No
30a	During the year, did the organization receive by contribution any property reported in Part I, lines 1 through 28, that it must hold for at least three years from the date of the initial contribution, and which is not required to be used for exempt purposes for the entire holding period?	30a		X
b	If "Yes," describe the arrangement in Part II.			
31	Does the organization have a gift acceptance policy that requires the review of any non-standard contributions?	31		X
32a	Does the organization hire or use third parties or related organizations to solicit, process, or sell noncash contributions?	32a		X
b	If "Yes," describe in Part II.			
33	If the organization did not report an amount in column (c) for a type of property for which column (a) is checked, describe in Part II.			

Part II **Supplemental Information.** Provide the information required by Part I, lines 30b, 32b, and 33, and whether the organization is reporting in Part I, column (b), the number of contributions, the number of items received, or a combination of both. Also complete this part for any additional information.

SCHEDULE O (Form 990 or 990-EZ)
Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ
Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.
▶ Attach to Form 990 or 990-EZ.
▶ Information about Schedule O (Form 990 or 990-EZ) and its instructions is at www.irs.gov/form990.

OMB No. 1545-0047
2015
Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.
Employer identification number: 13-1655255

Form 990, Part I, Line 1, Description of Organization Mission:
education, voting rights, fair employment, capital punishment, administration of criminal justice, and to increase educational opportunities through scholarships.

Form 990, Part III, Line 1, Description of Organization Mission:
public interest through scholarship and internship programs. LDF pursues racial justice to move our nation toward a society that fulfills the promise of equality for all Americans.

Form 990, Part VI, Section B, line 11:
A draft of form 990 is prepared by the Finance Department and reviewed by the CFO. Copies are then sent to Mitchell & Titus LLP for their review and comments. Once this is done, the Board of Directors receives a copy of the 990. The final draft is then filed.

Form 990, Part VI, Section B, Line 12c:
The Conflict of Interest Policy provides that the Board members and Officers complete a questionnaire and forward the completed document to the Office of the President & Director-Counsel (CEO). The President reviews the completed questionnaires for completeness, responsiveness and potential conflicts of interest. The President seeks the advice and counsel of the General Counsel with respect to further steps necessary to apprise the Board of potential conflicts of interest relating to any disclosed potential conflicts of interest appearing on the questionnaires. In the event of recognized conflicts of interest, the President contacts the

Name of the organization NAACP LEGAL DEFENSE & EDUC. FUND, INC. | Employer identification number 13-1655255

involved board member to assure his or her compliance with recusal requirements prior to any action affected by such conflict of interest. The LDF By-laws reserve authority for the Board to review the questionnaires annually.

Form 990, Part VI, Section B, Line 15a:

LDF By-laws permit payment of reasonable compensation for services rendered by officers and employees of the corporation. Pursuant to this authority, the Board created a Compensation Committee with the express purpose to review, on behalf of the Board, the compensation of the President & Director-Counsel (CEO). The Compensation Committee retained independent experts to prepare a formal study and recommendation of the reasonableness of the President's compensation. The report was received by the Committee and a determination was made that the study supported the reasonableness of the President's compensation. The Compensation Committee reported the results of the study and its determination to the Board in an executive session held in late 2012, with a quorum present. After discussion and consensus reached, the Board concurred with the recommendation and took informal action to express its favorable opinion of the compensation, without a vote. A copy of the independent study was mailed to all board members. Since the study has been completed the President and Director-Counsel has not received an increase.

Form 990, Part VI, Line 17, List of States receiving copy of Form 990:

AZ,AR,CA,CO,CT,DC,FL,GA,IL,KS,KY,IN,ME,MD,MA,MI,MN,MS,MO,ND,NE,NH,NJ,NM,NY NC,NV,OH,OK,OR,PA,RI,SC,TN,UT,VA,WA,WV,WI,HI,TX

Form 990, Part VI, Section C, Line 18:

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

NAACP Legal Defense & Educational Fund, Inc. makes the 990 available on its website under the "About Us" tab.

Form 990, Part VI, Section C, Line 19:

LDF does not make its governance documents, conflict of interest policy and financial statements readily available upon request, but will also do so based upon a discretionary determination by its CFO and/or General Counsel of the requesting individual's or entity's "need to know" such information. For example, upon request, financial statements are routinely made available to vendors, potential funders and entities with which LDF will have common business and/or public interest relationships requiring demonstration of the organization's sound fiscal status.

Form 990, Part XI, line 9, Changes in Net Assets:

Charges for Pension Benefit other than net periodic pension cost -1010039.

Form 990, Part XII, Line 2c:

The process has not changed from prior years.

SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.

▶ Attach to Form 990.

▶ Information about Schedule R (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization

NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number

13-1655255

Part I **Identification of Disregarded Entities** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity

Part II **Identification of Related Tax-Exempt Organizations** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity? Yes	(g) No
EARL WARREN LEGAL TRAINING PROGRAM - 13-2695683, 40 Rector Street, 5th Floor, New York, NY 10006	PROVIDE SCHOLARSHIPS TO LAW STUDENTS	New York	501(c)(3)	7	NAACP Legal Defense and Educational Fund,	X	

See Part VII for Continuations

Part III **Identification of Related Organizations Taxable as a Partnership** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512-514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V-UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No

Part V **Transactions With Related Organizations** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note. Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II-IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		X
b	Gift, grant, or capital contribution to related organization(s)	1b		X
c	Gift, grant, or capital contribution from related organization(s)	1c		X
d	Loans or loan guarantees to or for related organization(s)	1d		X
e	Loans or loan guarantees by related organization(s)	1e		X
f	Dividends from related organization(s)	1f		X
g	Sale of assets to related organization(s)	1g		X
h	Purchase of assets from related organization(s)	1h		X
i	Exchange of assets with related organization(s)	1i		X
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		X
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		X
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		X
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		X
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n	X	
o	Sharing of paid employees with related organization(s)	1o	X	
p	Reimbursement paid to related organization(s) for expenses	1p		X
q	Reimbursement paid by related organization(s) for expenses	1q	X	
r	Other transfer of cash or property to related organization(s)	1r		X
s	Other transfer of cash or property from related organization(s)	1s		X

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

	(a) Name of related organization	(b) Transaction type (a-s)	(c) Amount involved	(d) Method of determining amount involved
(1)	Earl Warren Legal Training Program	N	5700.	Past usage
(2)	Earl Warren Legal Training Program	O	30000.	Past usage
(3)	Earl Warren Legal Training Program	Q	35700.	FMV
(4)				
(5)				
(6)				

Part VI **Unrelated Organizations Taxable as a Partnership** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512-514)	(e) Are all partners sec. 501(c)(3) orgs.? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V-UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) NO	(k) Percentage ownership

Part VII Supplemental Information

Provide additional information for responses to questions on Schedule R (see instructions).

Part II, Identification of Related Tax-Exempt Organizations:

Name of Related Organization:

EARL WARREN LEGAL TRAINING PROGRAM

Direct Controlling Entity: NAACP Legal Defense and Educational Fund, Inc.

Department of Treasury
Internal Revenue Service
Ogden UT 84201

Notice	CP211A
Tax period	June 30, 2016
Notice date	November 7, 2016
Employer ID number	13-1655255
To contact us	Phone 1-877-829-5500 FAX 801-620-5555

019998.558014.142035.30131 1 AV 0.376 373

N A A C P LEGAL DEFENSE AND
EDUCATIONAL FUND INC
40 RECTOR STREET
NEW YORK NY 10006-1705

019998

Important information about your June 30, 2016 Form 990

We approved your Form 8868, Application for Extension of Time To File an Exempt Organization Return

We approved the Form 8868 for your June 30, 2016 Form 990.

Your new due date is February 15, 2017.

What you need to do

File your June 30, 2016 Form 990 by February 15, 2017. We encourage you to use electronic filing—the fastest and easiest way to file.

Visit www.irs.gov/charities to learn about approved e-File providers, what types of returns can be filed electronically, and whether you are required to file electronically.

Additional information

- Visit www.irs.gov/cp211a.
- For tax forms, instructions, and publications, visit www.irs.gov or call 1-800-TAX-FORM (1-800-829-3676).
- Keep this notice for your records.

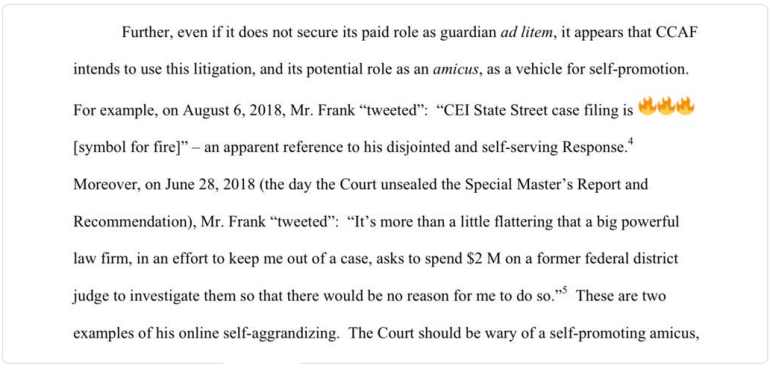
If you need assistance, please don't hesitate to contact us.

Frank Decl.

EXHIBIT C

(((tedfrank))) @tedfrank · Aug 8

Pour one out for the poor Choate associate who went to law school for 3 years so he can bill a client $500/hour to read all my tweets in case I say something about his client's shady practices, and will now stay up late tonight to do a supplemental filing about this tweet.



Further, even if it does not secure its paid role as guardian *ad litem*, it appears that CCAF intends to use this litigation, and its potential role as an *amicus*, as a vehicle for self-promotion. For example, on August 6, 2018, Mr. Frank "tweeted": "CEI State Street case filing is 🔥🔥🔥 [symbol for fire]" – an apparent reference to his disjointed and self-serving Response.[4] Moreover, on June 28, 2018 (the day the Court unsealed the Special Master's Report and Recommendation), Mr. Frank "tweeted": "It's more than a little flattering that a big powerful law firm, in an effort to keep me out of a case, asks to spend $2 M on a former federal district judge to investigate them so that there would be no reason for me to do so."[5] These are two examples of his online self-aggrandizing. The Court should be wary of a self-promoting amicus,

9 6 67

Jared Cook @jkimballcook · 9h

The bracketed emoji explanation comes off as pretentious, and putting tweet in quotation marks comes off as even more pretentious.

If you're going to be pretentious, your writing needs to be beyond reproach. Inconsistent italics on "amicus" doesn't help.

1 1

Jared Cook @jkimballcook · 9h

Also: "self-promotion," "self-serving," "self-aggrandizing," and "self-promoting" all in a single paragraph. Laying it on a bit thick, aren't we?

1 2

(((tedfrank)))
@tedfrank

Follow

Replying to @jkimballcook

Yes, would love to see what @legalwritingpro software thought of that, though, to be fair, they wrote that within a week, with only ~30 hours to adjust to our filing. I've had more embarrassing typos on briefs I filed 16 hours after starting writing them.

9:16 AM - 9 Aug 2018

2 Likes

2

Frank Decl.

EXHIBIT D

(((tedfrank)))
@tedfrank

Follow

CEI State Street case filing is 🔥 🔥 🔥

cei.org/sites/default/ ...

10:25 AM - 6 Aug 2018

1 Retweet **2** Likes

1 2

Frank Decl.

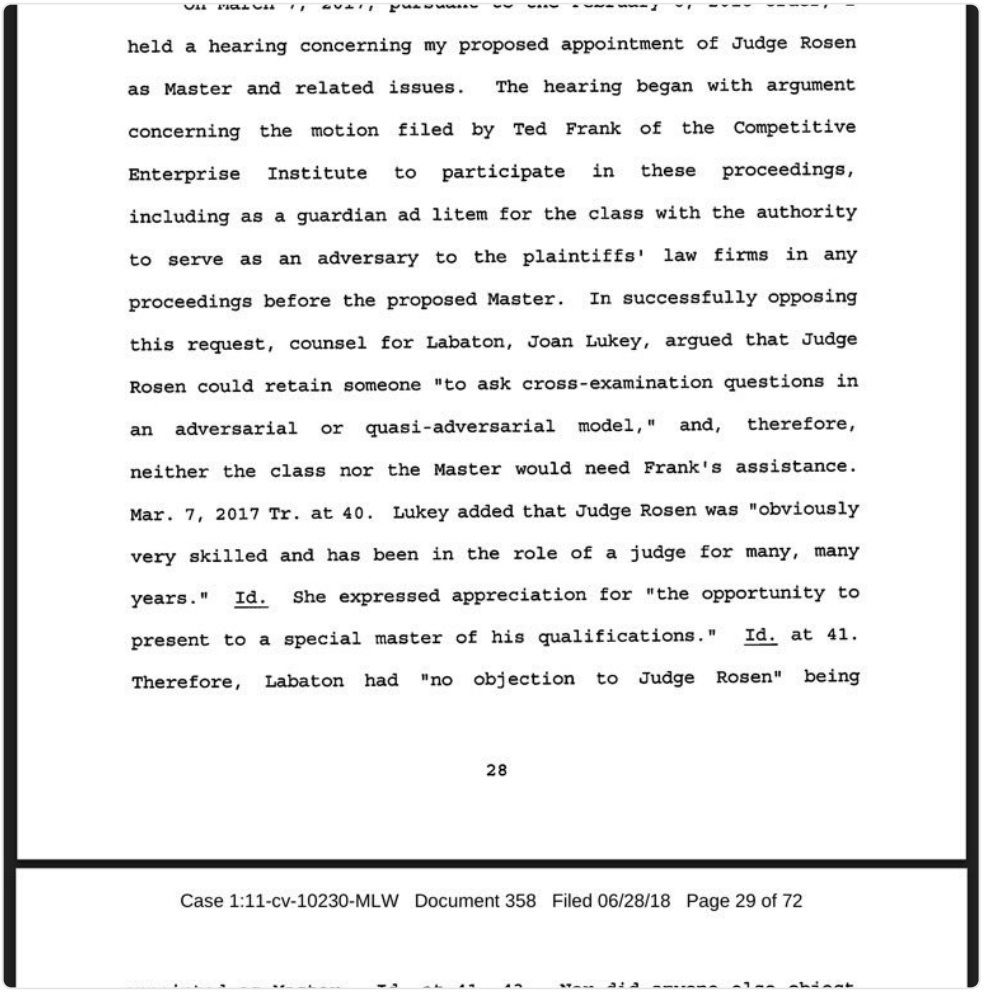
EXHIBIT E

(((tedfrank)))

@tedfrank

Follow

It's more than a little flattering that a big powerful law firm, in an effort to keep me out of a case, asks to spend $2M on a former federal district judge to investigate them so that there would be no reason for me to do so.



held a hearing concerning my proposed appointment of Judge Rosen as Master and related issues. The hearing began with argument concerning the motion filed by Ted Frank of the Competitive Enterprise Institute to participate in these proceedings, including as a guardian ad litem for the class with the authority to serve as an adversary to the plaintiffs' law firms in any proceedings before the proposed Master. In successfully opposing this request, counsel for Labaton, Joan Lukey, argued that Judge Rosen could retain someone "to ask cross-examination questions in an adversarial or quasi-adversarial model," and, therefore, neither the class nor the Master would need Frank's assistance. Mar. 7, 2017 Tr. at 40. Lukey added that Judge Rosen was "obviously very skilled and has been in the role of a judge for many, many years." Id. She expressed appreciation for "the opportunity to present to a special master of his qualifications." Id. at 41. Therefore, Labaton had "no objection to Judge Rosen" being

28

Case 1:11-cv-10230-MLW Document 358 Filed 06/28/18 Page 29 of 72

11:09 AM - 28 Jun 2018

32 Retweets **46** Likes

3 32 46

Frank Decl.

EXHIBIT F

Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton

After a special master tapped to review overbilling in a $75 million legal fee award in a securities class action settlement faulted Labaton Sucharow and its co-counsel, the firm fired off criticisms of its own.

By Scott Flaherty | June 29, 2018

A newly unsealed special master's report accuses the law firm Labaton Sucharow and its co-counsel of deliberately misleading the court about how it distributed the legal fees from a $300 million settlement with State Street Corp., prompting Labaton Sucharow to call the master's analysis "wholly unmoored" from legal precedent and professional conduct rules.

The report recommends Labaton Sucharow return as much as $8.1 million of its share of a $75 million fee award to the class, and says Garrett Bradley, lead partner at the Thornton Law Firm (https://tenlaw.com/) in Boston, should pay up to $1 million in fines.

Labaton Sucharow is one of three plaintiffs firms, along with Thornton and Lieff Cabraser Heimann & Bernstein, that served as lead counsel in a securities case against State Street that settled in 2016 for $300 million. U.S. District Judge Mark Wolf in Boston initially approved a plaintiffs legal fee award of $75 million in that case, but later appointed a special master (https://www.law.com/americanlawyer/almID/1202780879704/three-firms-admit-to-overbilling-agree-to-pay-2m-for-probe-of-bills/)—retired federal Judge Gerald Rosen—to review the fees (https://www.law.com/nationallawjournal/2018/06/19/how-a-fee-inquiry-led-to-hints-of-public-corruption-that-have-labaton-fighting/) after an article in The Boston Globe raised questions about potential double counting of hours.

The Globe had previously published an exposé detailing the political donation habits (http://www.law.com/sites/almstaff/2016/11/01/boston-investigation-puts-spotlight-on-law-firm-campaign-donations/) of lawyers at Thornton, and followed that with an examination (https://www.bostonglobe.com/metro/2016/12/17/lawyers-overstated-legal-costs-millions-state-street-case-opening-window-questionable-billing-practices/tmeeuAaEaa4Ki6VhBpQHQM/story.html) of the fee request in the State Street case.

In light of the Globe's reporting, the plaintiffs firms admitted in 2017 to double-counting some hours put in by "staff attorneys" who were paid on an hourly basis and worked temporarily for the three firms, primarily doing document review. Although they described those mistakes as inadvertent and argued that they shouldn't affect the $75 million fee award, the plaintiffs firms initially agreed to pay $2 million to fund the special master's investigation.

However, the probe ended up stretching out for about a year and costing nearly $4 million, according to court records. At the end of it, the special master issued a 377-page report that was kept confidential (https://www.law.com/nationallawjournal/2018/03/06/special-master-delays-high-stakes-report-on-75m-class-action-fee-request/) while the parties to the case proposed that sections be redacted.

The long-awaited public version of the report (https://static.reuters.com/resources/media/editorial/20180628/statestreetclassaction--rosenreport.pdf), penned by Rosen and released on Thursday, walks through a litany of conduct that the special master viewed as "questionable."

Rosen detailed the double-counting issues that the firms had already acknowledged. But he also trained his eye on money that Labaton Sucharow paid to a Texas-based lawyer named Damon Chargois, who helped the firm secure an Arkansas state teachers' pension fund as an institutional investor client. The Arkansas pension fund ultimately served as lead plaintiff in the State Street securities case.

According to Rosen's report, Labaton Sucharow paid Chargois—who had connections to the Arkansas pension fund, but didn't actually work on the State Street case—roughly $4.1 million under a referral agreement, but failed to disclose the payment to the court, other members of the settlement class and even its co-counsel in the case.

"By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the court in the dark and denied it the very information it needed in order to determine how much of the settlement funds should go to counsel, and which counsel, and how much," Rosen wrote.

Rosen also criticized Labaton for its responses to the special master investigation, itself. Instead of expressing remorse for any potential misconduct, Rosen wrote, the firm responded with a "phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting.

"Although Labaton certainly has a right to present its best case," the special master continued, "some acknowledgment of the potential harm this conduct has caused to class members, co-counsel and the court would have been not only appropriate, but expected."

Ultimately, after describing the mistakes made by the firms in how they counted hours ahead of their fee request and citing the undisclosed Chargois referral fee, Rosen recommended that the three firms pay back a little more than $4 million to the class to correct for the double-counting issues.

He also suggested imposing a sanction of $400,000 to $1 million against the Thornton firm, a reduction of the billing rates for contract lawyers that worked on the case—an amount totaling about $2.42 million that would also be returned to the class—and he recommended that Labaton Sucharow be required to pay $4.1 million in connection with the Chargois referral deal. Some $3.4 million of that would go to lawyers involved in a parallel Employee Retirement Income Security Act case, who were dragged into the special master investigation but weren't faulted for any conduct, while the remaining $700,000 would go back to the State Street investor class members.

But Rosen also concluded that, despite his concerns, no Labaton Sucharow lawyers should be recommended for professional discipline.

Labaton Sucharow quickly issued a stern response to the special master's findings. The firm, represented by Joan Lukey of Choate Hall & Stewart (https://www.law.com/law-firm-profile?id=58&name=Choate), filed a formal set of objections (https://www.documentcloud.org/documents/4567867-Labaton-State-Street-Objections-to-Special.html) in court on Thursday and released a lengthy statement Friday describing the master's report as "wholly unmoored from the relevant law and the actual facts.

"The master could have concluded his endless and costly investigation long ago once he verified that the double-counting was, indeed, inadvertent," the firm said. "Instead, he opted to go down the rabbit hole chasing the scent of an 'improper' referral payment because he believed it should have been disclosed to the court. In doing so, he elected not to act as a neutral fact-finder (as was his stated charge) but rather as an adversary seeking to impugn Labaton and customer class counsel for making a referral payment that was entirely legal, ethical and appropriate under Massachusetts law. Judge Rosen may be offended by a 'bare referral' fee—one where the referring attorney does not have to do any work in order to receive the referral fee, but it is the law in Massachusetts."

Labaton Sucharow also noted that Wolf, as presiding judge, would have to conduct a "de novo" review of the special master's recommendations before deciding on a course of action. Once that review happens, the firm said it fully expects that the judge would "reject the master's novel and unusual interpretations" of the issues.

Thornton also lodged objections (https://www.documentcloud.org/documents/4567868-Thorton-Law-State-Street-Objections-to-Special.html) on Thursday; Lieff Cabraser, which largely escaped the harshest criticism in Rosen's special master report, had not filed objections as of Friday afternoon, according to the court docket.

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

DECLARATION OF GARY S. PEEPLES IN SUPPORT OF THE CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS*

DECLARATION OF GARY S. PEEPLES

I, Gary S. Peeples declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. I am an attorney with the law firm Burch, Porter & Johnson, PLLC ("Burch Porter"), and I am submitting this declaration in support of the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") and in support of CCAF's Amended Motion for Leave to Participate as Guardian *Ad Litem* for the Class.

3. Although I am not a law professor, I have long had an academic interest in class action litigation. That interest began in law school, where I worked as a research assistant for Professor Brian T. Fitzpatrick. Since law school, I have continued to pay close attention to class action litigation, including the work of CCAF. I have been following this case since early 2017.

4. In support of CCAF's motion to be appointed guardian *ad litem*, I have selected a team of attorneys from Burch Porter at different levels of seniority who would litigate on behalf of the class. The team consists of: (1) Joseph (Jef) Feibelman, (2) Jennifer S. Hagerman, (3) me (Gary S. Peeples), and (4) William Irvine, Jr. All four members of this team have outstanding credentials and litigation experience that make us well-suited to represent the class's interest in this case.

5. Jef Feibelman is a senior member of Burch Porter, with nearly fifty years' worth of complex business litigation experience. He graduated from Yale Law School in 1969 and after graduating clerked for the Honorable Bailey Brown of the U.S. District Court for the Western District of Tennessee. Mr. Feibelman has deep experience in numerous areas of commercial litigation because he is one of Burch Porter's most experienced trial attorneys. He also has significant experience serving as a mediator and/or arbitrator in complex commercial disputes. Mr. Feibelman's experience in class action litigation is extensive; he has represented plaintiffs, defendants, and served as a mediator in class action lawsuits. Moreover, Mr. Feibelman has significant experience as a special master. For example, he was appointed by a state chancery court to issue a report and recommendation concerning

a discovery dispute closely related to the underlying merits of a complaint alleging self-dealing by a trust. Mr. Feibelman has served as a special master in other cases as well. Mr. Feibelman's ordinary billing rate is $475/hour, which is paid by clients in the Memphis legal market.

6. Jennifer S. Hagerman is a Burch Porter member with almost 20 years' worth of experience in labor and employment law and complex commercial litigation. She graduated from Vanderbilt University Law School in 1999 and clerked for the Honorable Julia Smith Gibbons of the U.S. District Court for the Western District of Tennessee. After working for two years at Burch Porter, Ms. Hagerman returned to clerk for Judge Gibbons, who had been elevated to the United States Court of Appeals for the Sixth Circuit. Most of Ms. Hagerman's practice is in federal court, where she has significant experience defending clients against putative class and collective actions. Ms. Hagerman's ordinary billing rate is $375/hour, which is paid by clients in the Memphis legal market.

7. As for my own background and experience, I graduated from Vanderbilt University Law School in 2010 and clerked for the Honorable Jon P. McCalla of the U.S. District Court for the Western District of Tennessee. I then worked as an associate at Jones Day (Chicago) before clerking for the Honorable Ronald Lee Gilman of the United States Court of Appeals for the Sixth Circuit. I joined Burch Porter following my clerkship with Judge Gilman and my practice focuses on labor and employment law, complex commercial litigation, and appellate work. As a senior associate, my ordinary billing rate is $275/hour, which is paid by clients in the Memphis legal market.

8. Finally, William D. Irvine, Jr. is the most junior member of the proposed team. He graduated from Vanderbilt Law School in 2016 and clerked for the Honorable Sheryl H. Lipman of the U.S. District Court for the Western District of Tennessee. Mr. Irvine, who is a junior associate, litigates regularly in federal court and his ordinary billing rate is $200/hour, which is customary for the Memphis legal market.

9. Burch Porter is one of the oldest and most established law firms in Memphis. The firm has regularly been ranked as first in Memphis for bet-the-company litigation. Additionally, Burch

Porter has been engaged in socially significant litigation, including the representation of Dr. Martin Luther King, Jr. during the Memphis sanitation strike of 1968.

10. Although Burch Porter's rates are quite low when placed alongside those charged by East Coast law firms of comparable quality, Memphis is the poorest of any metropolitan statistical area according to a recent study by the University of Memphis, and attorney billing rates are accordingly lower than virtually all other large markets. Burch Porter's billing rates appear to be approximately *half* of what Class Counsel billed for comparable attorneys. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing junior associates at $340-800/hour and senior partners at $925-1000/hour).

11. Attached as **Exhibit A** are true and correct copies of the attorney profiles available from the Burch Porter website as they appeared in August 2018.

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

Executed on August 13, 2018, in Memphis, Tennessee.

Gary S. Peeples

EXHIBIT A TO DECLARATION

Burch, Porter & Johnson, PLLC
130 North Court Avenue | Memphis, TN 38103
901.524.5000 phone | 901-524-5024 fax
www.bpjlaw.com

Jef Feibelman

Member

Email: jfeibelman@bpjlaw.com
Phone: 901.524.5109

PRACTICE AREAS

- Alternative Dispute Resolution, Mediation & Arbitration
- Commercial & Business Litigation
- Education, Charitable & Not-For-Profit Organizations
- Intellectual Property, Information Technology & Media Law
- Labor & Employment Law

Jef Feibelman engages principally in the litigation, arbitration or mediation of complex commercial matters. He has litigated substantial claims involving fraud, breach of contract, misappropriation of trade secrets, breach of non-compete and confidentiality agreements, shareholder and partnership disputes, and business dissolution and valuation controversies. He has also been retained or appointed in numerous matters of public interest involving state and federal constitutional law and statutory interpretation.

Mr. Feibelman regularly counsels boards and governing bodies of corporations on fiduciary issues, director/officer liability, and corporate governance/ethics. An experienced trial lawyer with extensive jury and bench trial experience in both federal and state courts, from 2014 to 2016 he was the Tennessee State Chair of the American College of Trial Lawyers. He, with Joel Porter, served as lead counsel for the plaintiffs in one of the largest commercial recoveries in state history. He serves as Special Master by court appointment on pending litigation and as a special litigation committee in corporate disputes. He also regularly serves as a mediator or arbitrator in complex commercial and business disputes.

In 2006, he was awarded the Lawyer's Lawyer Award by the Memphis Bar Association, its highest honor. In 2016, Mr. Feibelman was selected by the University of Memphis Cecil C. Humphreys School of Law Alumni Chapter as a Pillars of Excellence honoree. He is ranked by *Chambers USA: America's Leading Lawyers for Business* in Band 1 of General Commercial Litigators in Tennessee (2017), one of only 10 attorneys across the state of Tennessee to receive this ranking. Mr. Feibelman began his law practice in 1970 after a clerkship with Hon. Bailey Brown, U.S. District Court for the Western District of Tennessee. He joined the firm as a member in 1977 and served as its managing partner from 2007-2010.

EDUCATION

- Yale University (J.D., 1969)
- Yale University (B.A., 1966)

Burch, Porter & Johnson, PLLC
130 North Court Avenue | Memphis, TN 38103
901.524.5000 phone | 901-524-5024 fax
www.bpjlaw.com

Jef Feibelman

PROFESSIONAL ACTIVITIES AND HONORS

- Ranked by *Chambers USA: America's Leading Lawyers for Business* in Band 1 in the area of General Commercial Litigators in Tennessee (2014-2017)
- State Chair, American College of Trial Lawyers Tennessee State Committee (2014-2016)
- Named *Best Lawyers®* "Lawyer of the Year" for Litigation - Securities in the Memphis area (2016)
- Named *Best Lawyers®* "Lawyer of the Year" for Bet-the-Company Litigation in the Memphis area (2011, 2012, and 2013)
- Named *Best Lawyers®* "Lawyer of the Year" for Litigation - Banking & Finance in the Memphis area (2014)
- Named to *Best Lawyers in America®* list in the areas of Bet-the-Company Litigation, Commercial Litigation, Ethics and Professional Responsibility Law, Litigation - Banking & Finance, Litigation - Labor & Employment, Litigation - Securities (1995- 2018)
- Named to the "Top 100 Tennessee Super Lawyers" list (2007- 2017)
- Named to the "Top 50 Memphis Super Lawyers" list (2007- 2017)
- Named to the Mid-South Super Lawyers list in the area of Business Litigation (2007-2017)
- Recipient, Pillars of Excellence Award, University of Memphis Cecil C. Humphreys School of Law Alumni Chapter (2016)
- Recognized in the area of Litigation in *Chambers USA: America's Leading Lawyers for Business* (2009- present)
- Member, Business Court Advisory Commission (by appointment of Tennessee Supreme Court)
- Fellow, Memphis Bar Foundation and Tennessee Bar Foundation
- Member, Advisory Committee on Rules, U.S. Sixth Circuit Court of Appeals
- Member, Tennessee Judicial Selection Commission (Tennessee Bar Association Representative) (2002- 2008)
- Member, Board of Professional Responsibility Advisory Committee (Tennessee Supreme Court Appointment)
- Member, Federal Court Local Rules Revision Committee
- Director, Memphis Bar Association (1981-1983, 1992-1994)
- Adjunct Professor, University of Memphis Law School (1980-1988, 1992-1994)
- Adjunct Professor, Rhodes College (1973-1974, 1977-1978)
- Law Clerk to U.S. District Judge Bailey Brown (1969-1970)

PUBLICATIONS AND PRESENTATIONS OF NOTE

- Presenter, "Developments in Ethics," Memphis Bar Association (2014)
- Presenter, Charter School Leadership Institute, Nashville, Tennessee (2006)
- Presenter, Tennessee Bar Association Young Lawyers, Ethics Seminar (June 2006)

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Jef Feibelman

PUBLICATIONS AND PRESENTATIONS OF NOTE (cont'd)

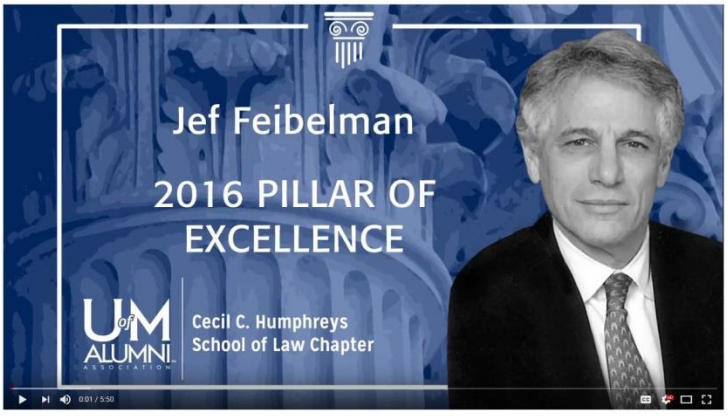
- Presenter, "Practice and Procedure Before the Board of Professional Responsibility," Memphis Bar Association (February 2006)
- Presenter, "Mediation," Memphis Bar Association (December 2005)
- Presenter, "Public Trust & Confidence in the Legal System," Memphis Bar Association (November 2005)
- Presenter, "Fun with Ethics - An Oxymoron," Memphis Bar Association (September 2005)
- Presenter with U.S. Magistrate Judge Tu Pham, Memphis Bar Association Young Leaders Institute (2005)
- Presenter, Seminar on Legal Ethics, U.S. Department of Justice Office of Legal Education (October 2004)
- Presenter, "21st Century Law, Technology & Ethics," Memphis Bar Association (October 2004 and October 2012)
- Presenter, Federal Practice Seminar, Memphis Bar Association (September 2004)
- Presenter, American Inns of Court, Leo Bearman, Sr. Inn, Board of Professional Responsibility (September 2004)
- Presenter, "Labor & Employment Law Section Annual Review," Memphis Bar Association (December 2003)

ADMITTED TO PRACTICE

- Tennessee, 1969

BAR ASSOCIATIONS

- American Bar Association
- Tennessee Bar Association
- Memphis Bar Association



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https://www.youtube.com/watch?v=N_UsjxbHls4&feature=youtu.be

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PRACTICE AREAS

- Commercial & Business Litigation
- Healthcare Law
- Labor & Employment Law
- Products Liability

Jennifer Hagerman's practice focuses on employment litigation and complex commercial litigation, with a particular emphasis on matters pending in federal court. She has represented clients in cases involving employment discrimination, retaliation, restrictive covenants, wage and hour class actions, civil rights, healthcare, education and numerous areas of commercial law. She also advises clients on a variety of employment matters including non-solicitation and non-competition agreements, employee handbooks, and employee classification under the FLSA. Following law school, Ms. Hagerman served as a judicial clerk to the Honorable Julia S. Gibbons, former Judge of the United States District Court for the Western District of Tennessee. Ms. Hagerman then joined the firm for two years before returning to serve as a judicial clerk to Judge Gibbons upon Judge Gibbons' elevation to the United States Court of Appeals for the Sixth Circuit. She is a Past President of the Association of Women Attorneys Memphis Chapter and a Past Chairman of the Board of Directors of the Center City Commission, now the Downtown Memphis Commission. Ms. Hagerman is also involved in a variety of legal and community organizations, including serving as a member of the Board of Directors of the Memphis Bar Association.

EDUCATION

- Vanderbilt University (J.D., 1999); Managing Editor, *Vanderbilt Law Review (1998-1999); Vanderbilt Law Review* Note Award *(1999)*
- Southern Methodist University (B.B.A., 1995), *magna cum laude*

PROFESSIONAL ACTIVITIES AND HONORS

- Named to the *Best Lawyers in America®* list in the areas of Commercial Litigation, Employment Law - Management, Litigation - Labor & Employment, and Litigation - Land Use & Zoning (2015-2017)
- Member, Board of Directors, Memphis Bar Association (2015- 2017)
- Named to the Mid-South Super Lawyers list in the area of Employment and Labor (2013-2016)
- Named to the Mid-South Rising Stars list in the area of Employment and Labor (2008 - 2012)
- Tennessee Bar Foundation Fellow (Elected 2010)
- Memphis Bar Foundation Fellow (Elected 2009)

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PROFESSIONAL ACTIVITIES AND HONORS (cont'd)

- Association of Women Attorneys Memphis Chapter (Vice President, 2005-2007; Incoming President, 2008; President, 2009; Immediate Past President, 2010)
- Top 40 Under 40, *Memphis Business Journal* (2007)
- Adjunct Professor, University of Memphis School of Law (2004 - 2006)
- Tennessee Lawyers Association for Women (Recording Secretary, 2003 & 2004)
- Law Clerk to the Honorable Julia Smith Gibbons, United States Court of Appeals for the Sixth Circuit (2002 - 2003)
- Law Clerk to the Honorable Julia Smith Gibbons, United States District Court for the Western District of Tennessee (1999 - 2000)

MOST RECENT PUBLICATIONS AND PRESENTATIONS OF NOTE

- Presenter, "Employment Law Wrap Up," Burch, Porter & Johnson Client Seminar (December 2016)
- Presenter, "Hot Topics in Employment Law 2016," Memphis Bar Association (December 2016)
- Author, "Calculating and Counting FMLA Leave: An Increasingly Complex Task," HR Professional Magazine (October 2016)
- Presenter, "Controlling Unemployment Costs," National Business Institute Seminar (September 2016)
- Presenter, "Ethics and Social Media," Memphis Bar Association, Bench, Bar and Boardroom Conference (September 2016)
- Author, "Wage and Hour Issues Continue for Hospitality Industry," HR Professional Magazine (November 2015)
- Presenter, "Proposed FLSA Regulations: What You Need to Know NOW," Burch, Porter & Johnson Client Seminar (September 2015)
- Author, "Sixth Circuit Provides Useful Guidance to Employers on Attendance and ADA Accommodation," HR Professionals Magazine (July 2015)
- Presenter, "Navigating the Minefields of Social Media in Court," Memphis Bar Association, Bench, Bar and Boardroom Conference (May 2015)
- *A complete list is posted on www.bpjlaw.com/attorneys/hagerman-jennifer-s/*

ADMITTED TO PRACTICE

- Tennessee, 1999
- United States District Court for the Western District of Tennessee, 2000
- United States Court of Appeals for the Sixth Circuit, 2002

BAR ASSOCIATIONS

- Federal Bar Association
- American Bar Association
- Tennessee Bar Association
- Memphis Bar Association
- Association for Women Attorneys

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PRACTICE AREAS

- Commercial & Business Litigation
- Labor & Employment Law

Gary Peeples' practice focuses on civil litigation, including labor and employment law. After graduating from Vanderbilt University Law School in 2010, he served as a law clerk to the Honorable Jon P. McCalla of the United States District Court for the Western District of Tennessee. He then worked as an associate in the labor and employment group at a global law firm. Mr. Peeples subsequently served as a law clerk to the Honorable Ronald Lee Gilman of the United States Court of Appeals for the Sixth Circuit. He joined Burch, Porter & Johnson as an Associate in 2014.

Mr. Peeples' practice includes defending companies large and small in state and federal court and in administrative matters. He has experience in all phases of litigation, including pre-suit investigations, discovery (including taking and defending depositions), motions practice, trials, post-trial motions, and appeals. Another significant component of his practice involves advising employers on how to comply with federal and state law.

Outside of work, Mr. Peeples enjoys playing basketball and reading non-fiction. He considers Memphis to be his adopted home.

EDUCATION

- Vanderbilt University (J.D., 2010); Order of the Coif; Articles Editor, *Vanderbilt Law Review*
- University of Illinois (M.S., 2006)
- University of Illinois (B.A., 2005)

PROFESSIONAL ACTIVITIES AND HONORS

- Member, Tennessee Bar Association Leadership Law Class of 2018
- Member, Leo Bearman Sr. American Inn of Court
- Named a Super Lawyer Rising Star (2016-2017)
- Law Clerk to the Honorable Ronald Lee Gilman, United States Court of Appeals for the Sixth Circuit
- Law Clerk to the Honorable Jon P. McCalla, United States District Court for the Western District of Tennessee
- Elected to the Order of the Coif (top 10% of law school class)
- Articles Editor, *Vanderbilt Law Review*
- Vanderbilt Scholastic Excellence Awards (top grade in class) in Contracts, Criminal Law, Intellectual Property, Property, and Regulatory State

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Gary S. Peeples

PUBLICATIONS AND PRESENTATIONS OF NOTE

- Author, Mental Health in the Workplace – Is There an Effective Prescription for Employers?," HR Professionals Magazine, (March 2018)
- Author, "Judge Richard Posner's Retirement and His Influence on Labor and Employment Law," HR Professionals Magazine, (October 2017)
- Author, "The Role of Human Resources in Mergers and Acquisitions," HR Professionals Magazine, (June 2017)
- Author, "Google V. Government: "Don't Be Evil" Meets "Give Us Your Employee Data" HR Professionals Magazine, (February 2017)
- Author, "House of Representatives Votes to Delay the Implementation of the Department of Labor's New Overtime Rule," Burch, Porter & Johnson Client Alert, (October 2016)
- Author, "Warning! Millennial Recruiting May Lead to Disparate-Impact Claims Under the ADEA," HR Professionals Magazine, (June 2016)
- Author, "New Law Gives Employers an Easier Path in to Federal Court in Trade Secrets Cases," Burch, Porter & Johnson Client Alert, (May 2016)
- Author, "Short-Term Workers, Long-Term Effects," HR Professionals Magazine, (December 2015)
- Panelist, Greater Memphis Chamber 2015 HR Legal Summit, "Hot Topics: The Employment Laws You Need to Know Now" segment, October 2015
- Author, "Disparate Impact Discrimination 101," HR Professionals Magazine (January 2015)
- Author, "Tennessee Legislative Update: Significant Changes Favor Employers," HR Professionals Magazine (August 2014)

ADMITTED TO PRACTICE

- Tennessee, 2013
- United States Court of Appeals for the Sixth Circuit, 2011
- United States District Court for the Western District of Tennessee, 2011
- Illinois, 2010 (currently on inactive status)
- United States District Court for the Northern District of Illinois, 2012

BAR ASSOCIATIONS

- Illinois Bar Association
- American Bar Association
- Memphis Bar Association

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Practice Areas

Intellectual Property, Information Technology & Media Law »
Labor & Employment Law »

Products Liability »

Admitted to Practice

Tennessee, 2017

United States District Court for the Western District of Tennessee, 2017

Bar Admissions

Memphis Bar Association

Tennessee Bar Association

Federal Bar Association

American Bar Association

William D. Irvine Jr.

Associate

William Irvine is a native Memphian who received his bachelor's degree from the University of Tennessee in Knoxville and his juris doctor from Vanderbilt Law School. After completing his education, Mr. Irvine came back to Memphis to pursue his career where he felt he could be beneficial to his community. His practice focuses on Intellectual Property, Information Technology & Media Law, Labor & Employment Law, and Products Liability.

Mr. Irvine enjoys cooking and cheering on our Memphis Grizzlies. Though he is a Memphis native, Mr. Irvine has enjoyed living in other parts of the world, including Los Angeles, California and Seoul, South Korea, where he was a high school teacher and swim coach.

Education

- Vanderbilt University (J.D., 2016)
- University of Tennessee (B.A. 2010), *magna cum laude*

Professional Honors & Activities

- Law Clerk to the Honorable Sheryl H. Lipman, United States District Court for the Western District of Tennessee
- Vanderbilt University Law School Moot Court Board (2015-2016)

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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.	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] Prof. Gillers testified that his sole objection to referral fees when writing his article was the fact that lawyers sometimes paid and received them without client consent. Supp. Ex. B (Gillers 7/12 Dep.) at 487:22-488:3. However, his published words speak for themselves, and contradict his non-credible testimony.

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

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[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. And, during his March deposition, Prof. Gillers still attempted to defend his position that Lieff shared responsibility for the nondisclosure. Supp. Ex. C (Gillers 3/20/18 Dep.) at 227:4-228:13. Yet, after observing that Lieff's argument "had persuasive force for the Special Master," he has now reversed course. *See* Supp. Ex. B (Gillers 7/12/18 Dep.) at 540:1-5.[6]

Even after exploring Prof. Gillers' new opinions during his July deposition, his about-face remains inexplicable (if anything, it is now harder to understand). According to Prof. Gillers, the knowledge that the Chargois payment was for a referral fee – as opposed to acting as client-facing local counsel – was the dispositive factor in determining which firms needed to disclose the payment to the Court. *See*, *e.g.*, *id.* at 526:21-527:11 (testifying that the "important" hypothetical fact that led to his reversal was that "Lieff Cabraser [had] a reasonable and good faith belief based on what it knows that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving.").[7] Therefore, in his view, if the other

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[6] Prof. Gillers explained that the impetus for the change in his opinion was a hypothetical posed to him during his March 20, 2018 deposition. He testified that the Master subsequently asked him to address "the extent to which, if at all, [his] views would alter if [he] assumed as true facts contained in [Lieff's counsel's] hypothetical." Supp. Ex. B (Gillers 7/12/18 Dep.) at 515:7-13. Despite testifying that he altered his opinion based on questioning at his deposition, his Supplemental Report ostensibly relies on a substantially revised statement of facts drafted by counsel for the Master and contained in his Supplemental Report, not the hypothetical posed during his deposition. *See* R&R Ex. 233 at 1-61.

[7] Prof. Gillers also testified that another assumed fact bearing on his new opinion was that Lieff believed Chargois received a fee "with the express knowledge and [written] approval of the client." Supp. Ex. B (Gillers 7/12/18 Dep.) at 530:14-19. This is contradicted by Prof. Gillers' Original Report, in which he stated that Labaton, Thornton, and Lieff were required to disclose the Chargois payment to the Court regardless of "whether or not the Chargois Arrangement complies with Rule 1.5(e)." R&R Ex. 232 at 74. Similarly, in his most recent deposition, Prof. Gillers testified that "if I were to assume that the division of fee agreement with Chargois was valid under Massachusetts rules at the time, that fact is irrelevant to me to the duty to disclose . . . ." Supp. Ex. B (Gillers 7/12/18 Dep.) at 554:8-15. Prof. Gillers did not explain this discrepancy. However, it is clear that the hypothetical fact that the Chargois Agreement complied with MRPC 1.5(e) did not factor into Prof. Gillers' new opinion.

Customer Class Counsel knew that Chargois did not work on the case, then they too would have been required to disclose the payment to the Court. *Id*. at 549:8-11.

Prof. Gillers proffered a vague and subjective standard to justify his selective blaming of Labaton. He stated that "an exercise of judgment on a case-by-case basis" is necessary to determine whether a fee agreement must be disclosed. *Id.* at 612:14-22. As "criteria" for this judgment, Prof. Gillers identified: (1) the amount of money paid as part of the fee agreement; (2) what was done to earn that money; and (3) "whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem that information relevant to the judge's decision." *Id.* at 613:15-24. According to Prof. Gillers, if Chargois were paid somewhat less (how much less is unclear), or if he did more work (how much work is also unclear), then disclosure would not have been required. *Id.* at 551:16-552:5, 641:8-17. 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. *See, e.g.*, Supp. Ex. B (Gillers 7/12/18 Dep.) at 560:4-7 ("I don't think Judge Wolf might have said that a man who did no work under the [] assumed valid division of fee agreement . . . is entitled to any money."). 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." *See id.* at 612:4-13 ("[I]t's a question of materiality or judgment. I don't think there's a formula for identifying a number. Here I was addressing a particular fee of a particular person for a particular service. And I think this is something you look at on a case-by-case basis."). He describes the obligation to disclose fee-sharing agreements as a "judgment call." *Id*. at 550:23-551:7.

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. Prof. Gillers' (invented) test asks "whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem [the] information relevant to the judge's decision." Viewing the above facts in their totality, an entirely reasonable answer is "no."

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] Prof. Gillers argues that the alleged omission of Chargois from the fee petition constitutes a misrepresentation. Supp. Ex. B (Gillers 7/12/18 Dep.) at 614:18-617:20. 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. He explains that the nature of the work performed is relevant, but he cannot describe, even generally, how much work would obviate the disclosure obligation. Supp. Ex. B (Gillers 7/12/18 Dep.) at 552:1-5 ("Q: But you're unable to quantify what that level [of work] is . . . A: Correct."). Likewise, he states that the amount of the payment is also a factor, but he does not offer any specifics (other than explaining that a four-figure payment is not enough). *Id.* at 612:4-6 ("I don't think there's a formula for identifying a number."). In fact, the standard that he describes is so unclear that he cannot even respond to simple hypotheticals. *Id.* at 643:11-17 ("This is not an appropriate end-of-day circumstance to play around with hypotheticals. There are variables, and I've given you my answer to one hypothetical. And if those facts are changed, I'd have to think about whether and to what extent my answer would differ."). 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, despite his concession that he is not a "Rule 11 expert." *Id.* at 580:21-22. 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. Now, only after the Master prodded him, Prof. Gillers has added such an opinion. *See* Supp. Ex. B (Gillers 7/12/18 Dep.) at 579:10-20. 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. Prof. Gillers conceded that First Circuit case law does not support his opinion. Supp. Ex. B (Gillers 7/12/18 Dep.) at 581:19-23 ("Q: You have no basis in the law, no case of any kind in the First Circuit to support an opinion that an omission constitutes a Rule 11 violation, correct? A: Yes."); *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; *see also* Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 11 ("Labaton's ethical obligations to keep class members reasonably informed as to the proposed settlement are shaped by its legal obligations under the Rules of Civil Procedure, with which the Special Master found as a matter of law Labaton had met."); 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"); Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 11 (the "Special Master's finding that Mass. R. Prof. C. 1.2 and 1.4 imposed additional ethical disclosure obligations on Labaton when there were no legal obligations, and no ethical guidance in Massachusetts reaching a similar conclusion, is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority.").

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."); Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 7 ("Even if the Court were to adopt the Special Master's unique interpretation of Mass. R. Prof. C. 1.5(e) as it existed at the time of the retention agreement between Labaton and ATRS, Hopkins' ratification would have been adequate consent to the fee sharing agreement . . . ."). 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."). During his July deposition, Prof. Gillers reconfirmed his view. Supp. Ex. B (Gillers 7/12/18 Dep.) at 566:12-24.

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. *See, e.g.*, Supp. Ex. D (Gillers 3/21 Dep.) at 440:6-19 ("I intend to rely upon Professor Gillers' opinions. I may not adopt all of 'em, but I intend to rely upon them in

one way or another."); 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."); Master's July 3, 2018 Response to Customer Class Counsels' Motion for Accounting, and for Clarification that the Master's Role has Concluded at 10 ("Gillers played a valuable role in advising the Special Master on several specialized and underdeveloped areas of legal ethics . . . [his opinions] were highly informative to the Master's investigative process."); *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.

Keller Rohrback claims that, even though Mr. Sarko dodged questions from the Department of Labor ("DOL") about allocation of fees, he would have taken a completely different approach if he had known that Customer Class Counsel were going to pay a portion of their share to an attorney who did not work on the case. Keller Exception at 2-4. 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), and (ii) offers no authority to support the notion that Chargois' lack of work on the case triggered a disclosure obligation. *Id.* at 3-4 and n.1. 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. The DOL – and not ERISA Counsel – required as a condition of settlement that the ERISA plan plaintiffs receive an increased allocation and that the fees deducted from that allocation be capped at $10.9 million. *See* Supp. Ex. E (Goldsmith 9/20/17 Dep.) at 96:8-99:12; 106:19-107:22; 253:16-254:18. 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*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 14, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

[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 August 14, 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

Volume: 3

Pages: 457-686

Exhibits: 25-30

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 PROFESSOR STEPHEN GILLERS

July 12, 2018, 10:04 a.m. - 4:22 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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about what, if any, discipline should be imposed, even if my reading of the rule is correct. I've talked about my reading of the rule back in March.
I don't know what the Massachusetts disciplinary authorities would do on these facts. I know that experts that you called have testified that there would be no discipline and that may be true empirically. They may have more knowledge about how the Massachusetts disciplinary authorities choose to proceed in their prosecutorial discretion than I have.
So I think that answers your question. If not, you can ask me some more.
Q. Well, do you believe that an attorney should be faulted at all if he follows the letter of the existing rules of professional responsibility without knowledge of any judicial gloss?
MR. SINNOTT: Objection. Joan, wasn't this covered at length during his original deposition?
MS. LUKEY: I don't know, but I need it for background for where I'm going.
A. I were -- if I were a disciplinary counsel and that's all there was, that a lawyer followed the

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rule as written in the text of the rule despite what might have been an obligation imposed by the Saggese gloss, I would not be inclined to cite that lawyer for discipline depending, of course, on the lawyer's disciplinary history. That's always a factor in considering these decisions.
Q. When you wrote the op-ed, sir, was it your intention to express a view that you considered division of fees to be undesirable?
A. No.
Q. Was it your intention to express the view that you only considered the division of fees between lawyers to be undesirable if the client did not consent?
A. It was -- well, again, I don't think I can improve on my prior answers because you're -- again you're asking me to reconstruct my state of mind in 1979.
My purpose was to avoid a return to the days in which it was common for lawyers to get a portion of a fee without the client's knowledge.
Q. So to be clear, in writing this article -- the words will speak for themselves -- but your purpose was to express displeasure with a situation

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in which lawyers divided fees without the client's knowledge; is that right?
A. Right.
Q. Okay. Sir, the article or op-ed is entitled "Lawyers: Paid for doing Nothing?"
Doesn't that suggest that you were writing about the concept of a so-called "bare referral" or forwarding fee where the lawyer did no work for this fee?
A. Titles to op-eds articles are written after they're accepted by the editors. That was not my title.
Q. So it was not your intent to express displeasure with bare referral fees; is that right?
A. It was not my intent to express displeasure with bare referral fees by which I mean -- I assume a referral fee -- well, maybe you want to define "bare."
Q. Do you have an understanding of what the phrase "bare referral fees" means?
A. I do from your -- yeah, from your submissions that I read, and that is one like the Massachusetts rule. I think that's what we're talking about, but we should make that clear.

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Q. Yes.
A. It was not my intention to express disapproval of bare referral fees. I did not even know the term until this case.
Q. So, for the record, you understand that a "bare referral fee" as that phrase is used in Massachusetts means that there is a division of the fee with a forwarding or referring lawyer who does no work on the case, correct?
A. Right.
Q. And that doesn't trouble you, the fact that you may have an attorney receiving a fee for doing no work, right?
A. With the client's knowledge.
Q. Yes.
A. Right. No, that doesn't trouble me in the sense that I would not fault a lawyer who complied with the bare referral fee rule. Separately I've talked about my policy references which is a different kind of question.
Q. Yes, it is, sir. So we are separating what you consider to be ethically permissible from what you would prefer aspirationally as a matter of policy, correct?

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Q. Okay. I'm not going to take the time to go through each of these, sir, but is it your testimony that each of these revised questions is only revised stylistically?
A. Except for the Lieff Cabraser issue.
Q. Which one is that?
A. The answer to question three is that.
Q. Is there any reference to Lieff Cabraser in any of these questions or answers here --
A. No --
Q. -- in this page?
A. -- there is not, nor does there have to be.
Q. So I just asked you about that same question.
You're saying that you don't consider your question to be different, but you meant to imply with your answer that it was different; is that right?
A. The answer to three and four are both -- incorporate a question that emerges from the hypothetical that Mr. Heimann asked me at the first deposition.
Q. Well, sir, there's a change that's more than stylistic because what you've done is to go from

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suggesting that all three firms -- because they had awareness that there was a fee paid to Mr. Chargois -- were responsible for disclosure to a changed finding that only Labaton was responsible because it knew all of the terms and details of that arrangement. Correct?
A. I can't answer that the way you phrased it. I said ten minutes ago that one of the instructions I understood from Judge Rosen was to address the extent to which, if at all, my views would alter if I assumed as true facts contained in Mr. Heimann's hypothetical. I said that I knew that that was part of my charge.
When we talk about these questions, I said they are stylistic changes, except for the incorporation of what I'm calling "the Lieff Cabraser issue" which is incorporated in the answer paragraph -- in the answer to question three and the answer to question four.
Q. Okay, sir.
A. Furthermore, I don't know what Lieff Cabraser knew. That's a finding of fact.
Q. Okay.
A. So it's -- let me just finish.

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Q. I'm sorry, I thought you were, sir.
A. So it's stated generically. It's not stated as "the Lieff Cabraser issue." That is a shorthand we're using.
It's stated generically to describe that the report will address issues that are prompted by the facts Mr. Heimann asked me to assume to be true.
Q. That causes me to ask you the question, sir, the factual background in the supplemental report -- the section called factual background Roman numeral two -- up to the questions presented section that we were just addressing --
A. Yes.
Q. -- who wrote that section, that background?
A. Mr. Sinnott and Miss McEvoy and probably others in his firm. Maybe Judge Rosen gave his opinion on that. I don't know.
Q. Were those findings that you were asked to assume to be true for purposes of your opinions?
A. Correct.
Q. So those were not findings that you made; is that right?
A. Yes, correct.
Q. Okay. So to the extent there are changes in

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the facts as there are in Section 2, you were asked to accept as true those changes to the facts, correct?
A. I was asked to accept as true the factual assumptions as changed, yes.
Q. Did you yourself do a comparison to see how the facts had changed in the new fact section that was provided to you by the master's team?
A. I read new facts, not in Track Changes. I don't know if I did a comparison of Track Changes.
Q. In your changes to your opinion section you not only absolved Lieff of legal liability for failure to disclose the Chargois Arrangement to the Court, you also absolved Thornton, correct -- the Thornton Law Firm?
A. Incorrect.
Q. Well, you made a finding that related to Garrett Bradley and what he put in his declaration -- not a finding. I'm sorry.
You offered an opinion of law on the conduct of his signing of the fee petition for the Thornton Law Firm, correct?
A. That's a separate issue.
Q. Yes. Are you saying that you did not

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the answer was yes. And then issued -- I formed an opinion at the deposition.

So I cannot -- I did not play with the hypothetical. I said if this is true, then my opinion is such and such.

Q. What were the facts in the hypothetical that were determinative for you in concluding that if true Lieff did not have an obligation to disclose to the Court?

A. Okay. So if you want to do that and because my earlier efforts to paraphrase the hypothetical were questioned at the first deposition, even though I was doing it within minutes of the hypothetical and thought I had gotten it correct, we need the hypothetical which should not be hard to find if we search "hypothetical" in the first deposition.

Q. There will be a lot of hits on "hypothetical," sir.

A. Oh. Hypothetical and asked by Richard Heimann.

Q. I'm not sure it's that easy. Can you tell us which facts were important to you?

A. I can tell you to the best of my memory.

Q. Please do.

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A. All right. So Lieff Cabraser has a reasonable and good faith belief based on what it knows that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving.

Q. Okay.

A. And I remember the word "valuable" in particular.

Now I'm not saying that was the full scope of the hypothetical which is not before me. I'm giving you my best recollection.

Q. Okay. Well, we're looking for the hypothetical, but given the limited time and given that it's your opinions that we're talking about, you considered it to be of import to your opinion as to whether Lieff Cabraser had any obligation to disclose to the Court if it were true that Lieff Cabraser had a reasonable good faith belief that Damon Chargois was providing valuable services to the class commensurate with the fee he was receiving, correct?

A. Correct.

Q. Is there any other fact that you recall in the hypothetical or otherwise that would influence

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your or did influence your opinion as to whether Lieff had any responsibility for not disclosing to the Court?

MR. HEIMANN: Let me interject the testimony in question begins at page 248 of the first deposition.

MS. LUKEY: Thank you. Got it? We don't want to mark the whole deposition, but we can hand it out.

THE SPECIAL MASTER: Maybe he can refresh his recollection with it so we don't have to mark it as an exhibit.

MS. LUKEY: 248?

MR. HEIMANN: 248 of the first day.

(Pause.)

BY MS. LUKEY:

Q. Professor Gillers, I'm going to hold -- I'm going to hand you a copy of the transcript. I am going to refer you to the section because Richard goes through each of the facts seriatim.

And looking at the top of page 248 of day one was one of the facts that you assumed that bore on your opinion as to whether Lieff had any obligation to disclose to the Court that the Lieff

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Cabraser lawyers understood that Chargois served as legitimate local counsel to the Arkansas Teacher Retirement System?

A. That was one of the facts in the hypothetical which I assumed to be true for purposes of my answer.

Q. Was -- otherwise stated, was one of the facts that Lieff Cabraser understood that Mr. Chargois was the legitimate bona fide local counsel to the Arkansas Teacher Retirement System?

(Pause.)

A. Where are you reading now? What line?

Q. Line 18.

A. Well, it doesn't end retirement system.

Q. Well, I'm not reading per se. I'm giving you the facts and the correct name of the client.

So what I'm asking you is is this one of the facts, but I am inserting the correct name of the client, the whole name.

So I'm just trying to refresh your memory as to what the facts were that caused you to form the opinion that if true Lieff Cabraser would not have an obligation to disclose?

A. Right. So you're telling me that ATRS is

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the Arkansas Fund?
Q. Yes.
A. Okay.
Q. So just so we have all the facts in mind, 'cause you wanted to see the hypothetical, I want to be sure we refresh your memory so you're comfortable you've given us all the facts, one fact that you took into account in forming the opinion that if true would mean that Lieff did not have an obligation to disclose to the Court was that Damon Chargois was providing bona fide local counsel service to the client?
A. Correct.
Q. And that he did so with the express knowledge and approval of the client?
A. Written approval.
Q. In written approval -- I'm sorry, okay -- of the client. Correct?
A. Correct.
Q. And that he provided valuable legal services to the client and to the class in his role as local counsel, correct?
A. Yes.
Q. And that both Labaton as lead counsel and

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the client as lead class representative regarded the fees that were being paid to Mr. Chargois as fair and reasonable and consistent with the value that Chargois' services provided to the class and to the benefits obtained on behalf of the class, correct?
A. Right. You skipped two lines. The clarification in line five at the question in line two refers to this case.
Q. Okay. So we're talking about this case --
A. Yes.
Q. -- not another case?
A. Yes.
Q. So that's important, too?
A. Yes.
Q. And that the value of the services and --
A. Can you hold one second? I want to read the next question.
(Pause.)
A. Okay.
Q. Then I think -- I think this is the last one.
The value of the services -- of those services to the class and to the benefits obtained for the class were consistent with the fee.

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A. Right. So I interject a question and consistent, and Mr. Heimann says what the value of his services and the value of those services to the class and to the benefits obtained for the class. And then I say okay. Then he asks the question.
Q. All right. So now that you've had a chance to refresh your memory, I'm not going to read anything from this.
You should feel free to refer to the page to refresh your memory further if you need to in answering, but will you tell us please what the facts are that if true caused you to form the opinion that Lieff Cabraser did not have an obligation to disclose to the class -- to the Court? Excuse me.
A. After the end of page 249 there is colloquy. Then we move to page 253, and I ask for a clarification on the hypothetical.
And I say in the first assumption could we add Lieff had a reasonable good faith understanding that Chargois was -- this doesn't parse perfectly, but I wanted to inject the reasonable, good faith understanding as a predicate for each of the factual assumptions I'd been asked

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to make. And Mr. Heimann says you may augment all of my proposed assumptions with that clarifier. Okay.
Q. So I think after reviewing this that it brings us back to where you were before, and you made what seemed to be a pretty accurate answer, which is if you assumed as true that Lieff Cabraser had a reasonable, good faith belief that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving approved by the client in writing, then in your view Lieff Cabraser would not have an obligation to disclose to the Court?
A. Well, I'm not going to answer based on your paraphrase of the hypothetical. I'm going to answer based on the hypothetical. And my answer was that -- my answer was no to the question that Mr. Heimann asked me.
You're paraphrasing --
Q. Actually, I wasn't paraphrasing. I took down what you said, and I just read it back. So -- originally.
But now that you've had a chance -- I don't want to waste a lot of time on this, sir, but

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A. Yes.
Q. In the subsequent report you only speak in terms of Labaton, correct, having that obligation?
A. I don't -- certainly Labaton could not enjoy the facts assumed in the hypothetical as -- as presented by Mr. Heimann.
So it is true that I assume that the Heimann hypothetical facts do not apply to Labaton. If it did, then my answer would be the same. It's not a law firm-specific answer. I tried to capture the difference by using the phrase "counsel who knew the terms of the Chargois Arrangement."
Q. What page are you referring to, sir?
A. It's in the answer to question -- to questions three and four on page 63 of my copy.
Q. Okay. Okay. When --
A. It's the stuff we went through earlier.
Q. Did you assume -- well, let me strike that.
Did your opinion as to the obligation to disclose to the Court the Chargois payment extend to the Thornton Law Firm or just to Labaton alone?
A. I didn't think about Thornton Law Firm at all.
Q. I take it then that you did not go back and

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review pages 55 through 57 in the findings of fact as to what you were to be assuming about what Thornton did or didn't know, correct?
A. I did not because again this was not Lieff specific.
Q. So if the facts were true in Mr. Heimann's hypothetical that we just went through for Lieff they would not have an obligation to disclose the Court, and if those same facts were true for the Thornton Law Firm, it would not have an obligation to disclose to the Court?
A. That's what it means to say it's a generic standard and not law firm specific.
Q. And if those facts were not true, then the obligation to the Court would survive?
MR. SHARP: Objection.
A. It would then depend upon what the not true facts were and what other facts there may be. So I addressed only the facts in the Lieff hypothetical.
Q. Did you have reason to believe that the master was prepared to adopt the facts in Mr. Heimann's hypothetical?
A. Um --
(Pause.)

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A. You used the term reason to believe, and I -- I -- I inferred from the oral argument that Mr. Heimann offered on April 13 that it had persuasive force for the special master; that it was influential or could have influence.
No one told me what he was concluding. I've never read his report and recommendation.
Q. You never have?
A. No. Nor the response -- the firm responses.
Q. Have you read the statement of facts that you were asked to assume, to the extent that you know what the facts are in the fact section of your report, regarding the state of the Thornton Law Firm's knowledge?
A. Could you ask that again?
Q. Yes, sir.
Have you read the statement of facts that you were asked to assume to be true in your own report on the issue of the facts found by the master that you were asked to assume regarding the Thornton Law Firm's state of knowledge?
A. No, because I think that my treatment of the issue as a generic issue fulfilled my responsibility.

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Q. So as far as you were concerned, what you were trying to convey in your opinions and your answers to the questions presented was that you knew that Labaton didn't meet the hypothetical facts; you didn't know whether Lieff or the Thornton Law Firm met the hypothetical facts; but if they both did, then they didn't have an obligation to disclose to the Court?
A. Correct.
Q. Okay.
(Pause.)
A. Let me -- let me say from the perspective of collegiality, I do intend to eventually read everything, but these items have become public only recently. I was not privy to anything that went on between May 8th and last week.
So it's not that I'm uninterested. Certainly professionally I'm interested. But that -- but I didn't have the time, and these are voluminous documents.
Q. Indeed.
A. Yeah.
Q. Sir, at anytime in the course of your work on your supplemental report, did the special master

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A. Yeah, I mention the news sources only as another source of some information about Thornton.
Q. Did you have discussions about the contents of your supplemental report with the master or anyone on his team as you were preparing it?
A. No. As I recall, they were preparing their -- let me back up for a second.
There were conversations after the oral argument or even after the various experts testified about their testimony. Non-definitive, not reaching conclusions, just commenting on what Bruce Green said or Peter Joyce said or Brad Wendell said and what do you think of Professor Vairo.
When it came time to do my supplement, my best recollection is that the special master and Mr. Sinnott were largely unavailable because they were preparing -- they were busy preparing the report and recommendations.
That doesn't mean that they would not take my calls, but they were busy, and I knew it. And so I was working on my own. I don't remember at that time period any focused conversation on my report. In fact, my best recollection is I sent it in, and I signed it.

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There was a day -- I think it was a Monday -- that Mr. Sinnott either called or wrote and said we need your report; we have a deadline. And I rushed to finish it.
So I don't -- I see it as -- in this time period -- that is, the actual drafting of it -- how it reads as largely a product of my own work. It was not -- it was not a collegial effort by any means.
Q. But you don't recall when in there you received their portion of the work, mainly the fact section that you were asked to assume to be true?
A. All I can tell you is that after the oral argument and certainly before I signed off in my own mind on my supplemental declaration, I would not have finalized my declaration without having read their portion. That's for sure. But I -- I don't -- I cannot say that I did not begin it before having read their portion.
Q. I believe you told us it didn't cause you to alter anything that you had written, correct?
A. Correct. Right.
Q. Did it cause you to alter any beliefs that you had formed but not yet committed to paper?

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A. Correct.
Q. It did not?
A. Did not.
(Pause.)
Q. If we go to page 92 of your report, sir.
MR. HEIMANN: Is this the Track Changed version?
MS. LUKEY: Yes, and I think there's only one page 92.
A. Right.
Q. This is the one that you were referencing earlier where you changed the heading to read: "The Massachusetts Rules of Professional Conduct required disclosure of the Chargois Arrangement to the Court by those who knew its terms."
And which terms were you referring to in that section?
A. Right, that Chargois was receiving his payment for the -- from the State Street matter out of the recovery and did no work on the matter.
Q. Okay. So you were aware that all three firms knew that Chargois was receiving a fee and knew its amount because they split up the responsibility, correct?

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A. Right.
Q. So what they -- what you are suggesting in this section is if they did not know that Mr. Chargois did no work on the matter, they would not have had an obligation to disclose the arrangement to the Court, correct? Maybe I should eliminate the negatives.
They would have had an obligation to disclose to the Court had they been aware that he did no work on the case; is that right?
A. Right.
Q. Okay. Did the amount of the fee have any significance to your opinion as to who was obligated to disclose to the Court?
A. Yes, I think I included that.
Q. I don't remember hearing anything in that regard.
A. Oh, yes. Yes. The amount matters.
Q. Can you explain for us why it matters?
A. It's a lot of money, and it is from the class recovery, and the judge has the ability to reject any agreement between Labaton and Chargois regarding Chargois' payment.
Q. All right. Well, let me break it into two

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parts.
Going back to the issue of your belief that if they were unaware that he did no work, they would not have an obligation -- sorry. I'm doing the double negatives again.
Your belief is that they would have had an obligation to disclose if they were aware that Chargois was being paid but had done no work on the case, right? Step one.
A. I'm sorry, can you tell me that again?
Q. Certainly. We were just discussing the fact that you hold the opinion that any lawyer or law firm that was aware that Mr. Chargois did no work on the case but received a fee would have an obligation to disclose to the Court that a fee was being paid to Chargois?
A. Given the size of the fee.
Q. If it were a small fee, they would not have had an obligation?
A. Yeah, if there were a small fee, I wouldn't be here. If it was a thousand dollars, I wouldn't be here. I think that judgment is required.
Q. Well, where do you draw the line?
A. Well, that's a wonderful question, and there

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is a concept of materiality.
So if I were asked to testify that a lawyer acted improperly by not disclosing a three- or four-figure sum, I would decline. I think it matters what the amount of money is.
Where do you draw the line? It's a judgment call.
Q. Can you describe for us as a matter of principle why it matters in performing an analysis what the amount of the fee was?
A. Because I think that 4.1 million dollars is imposing enough, is large enough to likely influence the Court which has the fiduciary duty to protect the class and makes the decision of how the class money will be distributed.
Q. Okay. So there would have been some level at which none of these lawyers would have had an obligation to disclose to the Court in your view that Mr. Chargois had received a fee for which he had performed no work; is that right?
A. There would have been some level at which I would not fault the lawyers for not disclosing. The Court might have a different view. But we have different roles.

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Q. But you're unable to quantify what that level is --
A. Correct.
Q. -- is that correct?
A. It's certainly correct.
Q. And would I be correct in assuming that the level would depend in part on the size of the overall award from which the fee was being paid?
A. It could.
Q. Well, $1,000 on a $10,000 fee might be considered, I gather in your principled view, something to be disclosed.
One thousand dollars on 20 million in an award wouldn't be considered something that would require disclosure?
A. I think proportionality enters into it, yes.
Q. Is that proportionality of the work performed or the overall percentage of the fee that's being awarded?
A. In this case for me it's the amount.
Q. Flat out the amount?
A. Right.
Q. It doesn't matter how big or small the overall fee award was?

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A. Right.
Q. Okay. Now we are -- we've already discussed working with applicable rules from the Commonwealth of Massachusetts which is a bare referral fee state.
So would you agree that the mere fact that a bare referral fee was paid does not in and of itself require disclosure to the Court?
A. Would be paid.
Q. The mere fact that an attorney received a bare referral fee would not have to be disclosed to the Court in a state that permits bare referral fees, correct?
MR. SINNOTT: I'm going to object, Joan, as to the characterization of this as a referral fee.
MS. LUKEY: You can object all you want. It's a fee division. I'll rephrase it.
BY MS. LUKEY:
Q. In the Commonwealth of Massachusetts where the division of a fee between lawyers -- however characterized -- is permissible if the requirements of 1.5(e) are otherwise met, is there an obligation for the paying lawyers to disclose that payment to the Court in the absence of a consideration of the

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size of the payment?
A. I just want to clarify that at this point when you're before the Court the fee has not yet been paid to Chargois. So they're not disclosing a paid fee; they would be disclosing an intention to pay Chargois from the Court award.
Q. We can use that clarification, sir.
A. Okay. So if I were to assume that the division of fee agreement with Chargois was valid under Massachusetts rules at the time, that fact is irrelevant to me to the duty to disclose because the Court does not have to honor and can actually reject the private contract, valid though it may be, between the paying and receiving lawyer in the Court's role as a fiduciary for the class.
Q. So to be clear then, what you are saying is even if it's a bare referral state, in your view the paying attorneys would have the obligation to disclose the intent to share their fee to the Court; is that right?
A. Yes, that's right.
Q. But it would be dependent upon the amount of the fee whether they have that obligation; is that right?

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A. I would -- yes. I would say that amount can matter.
Q. Okay. In the award process you understand here that the Court had made a determination that the total amount of the attorneys' fees requested was reasonable, correct?
A. Correct.
Q. And that award was entered, if I recall correctly, sometime around November 2, 2016 --
A. Yes.
Q. -- correct?
A. Correct.
Q. Within about two or three weeks an issue arose about the double recording of some time which is not the issue that you're here to opine about when these proceedings began -- so the proceedings began late 2016, early 2017, right?
A. Right.
Q. You are aware, sir, that the Court has never revoked, rescinded or modified the finding of reasonableness in the award of the total fees on November 2, 2016, correct?
A. Correct, yes.
Q. You have not formed an opinion, I assume,

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that the Court was incorrect in concluding that the total amount of fees requested just under 75 million and 24 percent was reasonable -- you haven't formed the conclusion that that's wrong, have you?
A. I have not. I'm not capable of doing that in my expertise, and I have not been asked to do that.
Q. Okay. And you formed no opinions in any way as to why the Court hasn't revised, revoked or modified the finding of reasonableness or the fee award, right?
A. Correct.
Q. Is it of any consequence at all to you that the Court even after these proceedings were underway never chose to reverse, revoke or modify the fee award or the finding of reasonableness?
A. No.
Q. You are aware that the Court did not request and was not provided with a breakdown of the allocation of the total fee of just under 75 million among counsel, correct?
A. Among customer class.
Q. Among all the law firms.
A. Among all the law firms, yes, I'm aware the

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Court did not ask or was not provided that information.
Q. But it is nonetheless your opinion that the Court should have been told that on the portion that was going to the customer class counsel, that they intended to take part of their fee and share it with Mr. Chargois; is that right?
A. Yes -- no, not correct because I don't consider -- I understand that one of your positions is that the fee for Chargois was coming out of the Labaton or customer class recovery and that therefore the Court did not have to know; that the lawyers were paying it out of their pocket. And we went over this I think -- or we could have gone over this in the first deposition because I address that issue in my first report.
So my position in that report was and is that there was no fee for the firms until the Court awarded it. There was an undifferentiated corpus of money that was the recovery from the settlement. And that the Court should have been told about the 4.1 Chargois payment in order for it to exercise its fiduciary obligations to the class in deciding how to allocate the corpus of money it was responsible

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to disburse.
Q. Was it the obligation of the Court to determine what constituted a reasonable fee to be paid to the attorneys from the overall award?
A. Yes.
Q. Did the Court make a determination that the number of just under 75 million, just under 25 percent, was a reasonable allocation in totality for the fees?
A. It did.
Q. Once the Court had made that determination of reasonableness and the fees were therefore available for distribution, you do not consider those fees to belong to the attorneys?
A. The problem is that the Court did not know what I'm saying it should have been told before it made the decision to give the money to the lawyers; that that -- that knowing about the Chargois fee may have affected the Court's judgment about how it went about disbursing the money.
Q. Well, the Court was deciding what constituted a reasonable total fee by percentage and by dollars, correct?
A. Yes.

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Q. And the Court decided that what constituted a reasonable fee was just under 75 million and just under 25 percent, correct?
A. Yes.
Q. So if that's the reasonable number in its totality and the judge has properly made that determination, the judge has fulfilled his fiduciary obligation to the class, has he not?
A. No, because in order to fulfill that obligation he needs to know the fact that was not revealed. He -- he -- if you reveal -- not you but if Labaton or the customer class counsel who knew the full story had revealed that information to the Court, the Court might have said, no, you cannot pay Chargois; you give this money to the class. I'm reducing the award to the lawyers by 4.1 million dollars and giving the money to the class.
The Court has that power. There's no question about it. The Court is not bound by private agreements. So the class might have been 4.1 million dollars richer.
Q. But if the Court has determined that a particular dollar amount and a particular percentage is reasonable, what would be the basis on which the

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Court would say to customer class counsel I'm not going to let you pay the referral fee or the forwarding fee, whatever you want to call it?
A. Because I don't think Judge Wolf might have said that a man who did no work under the, um, assumed valid division of fee agreement you had is entitled to any money. That money comes out of the undifferentiated corpus of money that you received in settlement, and I have the power -- there's no question about it -- to redirect that money to the class.
Now Judge Wolf might have said fine. We don't know. He might have viewed the situation harshly. He might have said, well, why didn't you tell me before; why didn't you the tell the class in the notice of pendens; that they were entitled to learn that. We don't know what he would have done, and I don't know what he would have done.
I'm only saying it was information that he in the exercise of his fiduciary obligation should have been told.
Q. But you're not saying it -- as I recall, you state in your report, you are not making that statement either pursuant to either Rule 54 or Rule

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23 --
A. Correct.
Q. -- correct?
A. Right.
Q. So you are looking outside the Rules of Civil Procedure to come up with your opinion that he should have been told?
A. I'm looking outside the rule -- the two rules you mentioned.
Q. Are you looking at any rule -- Federal Rule of Civil Procedure?
A. There is in the report, as we've discussed, a portion on Rule 11 -- an additional portion of Rule 11.
Q. We're going to come to that in a moment, sir. Are you contending under Rule 11 he should have been told?
A. Yes.
MR. HEIMANN: Before we get there, can we break for lunch?
THE WITNESS: That's a cliffhanger.
THE SPECIAL MASTER: Somebody's stomach is growling.
MR. SINNOTT: Is this a good time to

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going to be asking you the question that begins at line 18.
MR. HEIMANN: What was the page again, Joan?
MS. LUKEY: 106.
MR. HEIMANN: Thank you.
(Pause.)
A. Okay. How far down do you want me to read?
Q. Read as far as you want, but I'm going to repeat the question beginning at line 18.
A. Go ahead.
Q. Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral to Chargois & Herron, and you answered on behalf of Arkansas alone. Correct?
A. Correct.
Q. So you did agree that that was a ratification on behalf of Arkansas?
A. I accepted that it was.
Q. Do you still accept that it was a ratification on behalf of Arkansas Teacher Retirement System?
A. Yes.

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Q. That nonetheless doesn't change your opinion that the fee agreement was inadequate under Rule 1.5(e); is that right?
A. Correct.
Q. Even though it was ratified by the client?
A. In its individual capacity.
Q. There was no class at that time of course, was there?
A. There was no class at that time?
Q. At the time that the engagement was entered into.
A. Right.
(Pause.)
A. Just to be clear, it's the time that the attorney/client relationship was formed, not the time that Mr. Hopkins filed his March 2018 affidavit when there was a class.
Q. Right.
A. Okay.
Q. Sir, one of the things that's new in your supplemental report begins at page 87, and it's a discussion of comment 14(a).
A. Right. Oh --
Q. There's more than one? Is that right?

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A. Page 87.
MR. FINNERTY: It's past page 99. It's one of the pages marked 10.
MS. LUKEY: Oh, okay.
MR. FINNERTY: It's 87 in your supplemental report. It's actually page 97 in the redline.
Q. I'm sorry. In the redline it's page 97, and this is the comment to Rule 3.3(d).
A. Right.
Q. This was a new edition when you did your supplement, correct?
A. Correct.
Q. And can you tell us, sir, what new facts came to your attention that caused you to add this argument which is not present in your original report?
A. I added the argument to address an issue that arose in Professor Joy's deposition. There are --
THE REPORTER: I'm sorry, I couldn't hear you.
THE WITNESS: I'm sorry.
A. I added the argument to address testimony by

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Professor Joy. There are no new facts.
MR. HEIMANN: I'm having trouble finding it. What page again?
MS. LUKEY: It's actually 97.
MR. HEIMANN: Ninety-seven?
MS. LUKEY: Yes.
BY MS. LUKEY:
Q. So nothing had actually changed, but Professor Joy when asked took the position that these proceedings were not ex parte, correct? And that's what caused you to add 14(a) to your argument?
A. That's what led me to add discussion of 14(a) and 3.3(d).
Q. The circumstance of whether the earlier proceedings were adversarial in character or were ex parte didn't change between your original report and your subsequent report --
A. True.
Q. -- correct?
A. Yes.
Q. But because Professor Joy rejected the notion that this was equivalent to an ex parte proceeding within the meaning of comment 14(a), you

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there was no time left for the parties' attorneys or experts to respond?
A. I did not know and I did not think about it. Throughout this proceeding time -- time deadlines have been expanded, and, you know, it could have been that it would be again.
I understand that Judge Wolf has said that you can submit expert reports in response to my supplement plus this deposition at the end of this month.
So as it turns out, you'll have that opportunity, though I realize you will not have had that opportunity before Judge Rosen submitted his report, but Judge Rosen might then in this never-ending case submit an amended report in light of the further discovery.
This is not in the purview of a person in my role. I have a role that is not the same as Judge Rosen's role and certainly not the same as Judge Wolf's role. And I try to do the best I can at it.
Q. Okay. All right. Now we get to Rule 11.
If you turn the page to where we were, we get to yet another page 10 because the entire new

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edition, which is seven or eight pages long, will bear the number of the original report where it didn't appear.
And we have a section called Omission of the Chargois Arrangement From the September 15, 2016 Fee Petition Violated Rule 11 Federal Rule of Civil Procedure.
Whose idea was it to add a Rule 11 section against Labaton?
A. You asked me this earlier, and the answer was that Judge Rosen and/or Mr. Sinnott asked me to address that issue.
Q. If they had not asked you to address it, would you have been addressing it on the basis of anything that occurred in the other expert depositions?
A. No.
Q. So this was purely at their request; is that right?
A. Yes.
Q. Were you asked to write a report supporting a Rule 11 finding, or did you come up with that on your own?
A. I was asked to -- no one told me to support

Page 580

or not support it. I was asked to address the Rule 11 issue.
Q. All right. You decided you were going to recommend a Rule 11 -- a finding of a Rule 11 violation, correct?
A. Except for the word "recommend."
Q. Right. You found a Rule 11 violation?
A. I wrote what I wrote. I'm not recommending anything. The judge -- there are reasons why the Court would reject a Rule 11 violation.
Sanctions are discretionary, and the rest is up to the Court and up to Judge Rosen as to whether to recommend to the Court because we have different roles in this matter.
Q. Well, you don't mean to downplay the significance of accusing an esteemed member of the bar of a Rule 11 violation, do you?
A. No.
Q. You did that though, didn't you?
A. I did, yes.
Q. Are you a Rule 11 expert?
A. No.
Q. In fact, you told us you're not an expert on the Federal Rules of Civil Procedure at all, are

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you?
A. Did I say any of them?
Q. I believe you said you were not an expert on the rules of -- Federal Rules of Civil Procedure. If you want to tell us that you are --
A. No, I'm not --
Q. -- go ahead.
A. -- no, but I -- Rule 11 is very closely aligned to Rule 3.3, and Rule 11 comes up in my work. So I felt comfortable addressing Rule 11.
Q. Can you cite to any case in the First Circuit where the Court has ever found that a Rule 11 violation occurred by reason of an omission?
A. No.
Q. That was new in your theory, wasn't it? That's yours, not the First Circuit's in other words?
A. What's the question?
Q. You have no basis in the law, no case of any kind in the First Circuit to support an opinion that an omission constitutes a Rule 11 violation, correct?
A. Yes.
Q. You are aware, of course, as any of us can

Page 610

of disclosure?
A. Not disclosed in the ERISA counsel's fee petition --
Q. Right.
A. -- annexed to this.
Q. Yes.
A. Right. I would have to study that and see how much and consider whether or not -- as we discussed with regard earlier to Rule 11, whether the amount under the circumstances was such that I think it should have been disclosed in ERISA counsel's fee petition.
Q. Well, so it isn't -- I gather then in your opinion the disclosure obligation isn't absolute; it's dependent upon amount?
A. We discussed this, yes. There could be amounts that are comparatively small where I would not make the same judgment.
Q. Doesn't there have to be some objective standard by which one judges if a disclosure obligation exists particularly when you're talking about an alleged misrepresentation by omission?
A. There has to be some judgment, and that judgment looks to the size of the payment and the

Page 611

reason for the payment. So why would -- if I were called upon to address that issue for ERISA counsel's fee petition, I would read the fee petition.
I would inquire about the work of the law firms who are not identified, assuming there are law firms who are not identified, and the amounts they're being paid, and I would make a judgment as a matter of the substantiality of the omission.
Q. So is it your testimony then that we're not talking about omission but substantiality of omission?
A. I think that plays into it. Let's say an ERISA counsel paid a firm $500 out of its recovery, that's comparatively a trivial amount.
I think we could all agree -- maybe we could not agree -- but at some point you reach a dollar amount where it would not create a 3.3 or Rule 11 violation. Ten dollars? A hundred dollars? Reimbursement of FedEx expenses?
And so one does look to the amounts and what the amount -- the money was paid for.
Q. So what's the objective standard by which a law firm or lawyer is to determine under your view

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of the law whether they have to disclose to the Court an allocation to another firm, even if the Court hasn't asked?
A. I couldn't -- it's a question of materiality or judgment. I don't think there's a formula for identifying a number.
Here I was addressing a particular fee of a particular person for a particular service. And I think this is something you look at on a case-by-case basis. The amount is large. The services at best modest. Maybe less than modest. Coupled with the interest of the class and the obligation of the judge as fiduciary.
Q. So there is no objective standard by which a law firm can determine whether omitting information as to a payment to another law firm constitutes a material misrepresentation, and therefore a violation of Rule 11? Is that what you're telling us?
A. There is -- there's an exercise of judgment on a case-by-case basis, and law firms have to decide how risk averse they want to be. They may feel, well, I can defend this, but the better course would be to disclose it, even if I could defend not

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disclosing it. That's a fact that --
THE REPORTER: I'm sorry, it would be a better?
THE WITNESS: Oh, sorry.
A. Even if I could defend not disclosing it, that's a situation that permeates commercial life and law firm practice.
Q. But we're talking about an ethics violation allegation?
A. As well --
Q. You're alleging a violation of Rule 11, and you're saying there's no objective standard for the law firm to decide whether it's a violation; it's a matter of their own judgment?
A. I think -- no. I think there are criteria. I don't think there's a formula.
Q. And what are the criteria?
A. Amount of the money. What was done to earn the money. At the very least.
Q. Even in --
A. And whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem that information relevant to the judge's decision.

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Q. And under Rule 54(d) would that reasonably prudent judge typically ask if he were concerned about a payment to a different law firm?
A. He might or he might look at this petition and see a bunch of recipients and conclude that there's no one not listed who is getting money; and if there was a problem, there would be an objector or the class representative would highlight the problem because that person also has obligations to the class.
So it is not necessarily true that the judge would ask faced with this petition. In other words, the judge could be misled by the empirically true items of information in the petition and conclude that this is the universe of recipients. A functional equivalent to the petition saying "and there is no one else."
Q. We have now gone through each of the instances in which the law firms are listed and read the paragraphs to which those footnotes relate.
To what paragraph or paragraphs can you point and what language within those paragraphs that suggests that this is an exhaustive listing of everyone who is receiving part of the money as

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opposed to everyone who worked on the case?
A. Chargois fits in no paragraph. Chargois gets a paragraph of his own. My testimony is based on an itemization of the identification of the recipients coupled with their petitions that could lead the judge to conclude that there is no one else.
Q. Please tell us what language there is that would suggest to the reasonable judge that no one else is receiving a payment.
A. The language is what is not there. It purports to be a complete list.
Q. Where? Where does it purport to be a complete list of the recipients?
A. In the listing -- in the identification of the recipients a judge is encouraged to believe -- I think it's a reasonable inference on the part of a judge reading this petition that there is no one receiving money from the class settlement who is not on this petition.
Q. I just need you to tell me where you're referring to that anywhere suggests that no one else is receiving any money.
A. From the existence of the list itself. Just

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as -- just as in the Seventh Circuit case there was nothing false that was stated. And the Court went out of its way to point out that the information was empirically true. But the omission made it materially misleading because it was highly relevant.
Q. But in this case the language specifically relates to those who have worked on the case, not to those who are being paid for the case?
A. And so are we asking the judge to read this by way of microscope and say, hmm, is this artfully drafted to exclude lawyers who are receiving money who did not work on the case; is something being withheld from me. Is this language chosen so as to be literally true.
And if the existence of someone else emerged, that would be the defense. The judge is not expected to come to that view, and indeed I think that is partly what is behind the case law on candor to the Court. Am I misleading the judge by omitting the recipient of money when I'm identifying recipients of money?
Q. You have read, I assume, Professor Rubenstein's declarations?

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A. There are three.
Q. Yes.
A. I didn't read the first because that was on part one. I did read the second. I didn't read the third.
Q. Do you recall that he identifies by having performed a survey how many times in class actions in the last several years in this circuit attorneys' fees awards have been made?
A. In the second?
Q. Yes, sir. Do you recall that?
A. I do.
Q. Do you recall that he states that in none of those instances did any judge in the circuit ask whether there were funds being allocated to other attorneys?
A. Yes, I don't know that it was none, but it was almost none.
Q. Okay.
A. It may have been none.
Q. Does that mean in each of those instances, which from memory was something over a hundred -- in each of those instances if there were referral fees, those attorneys were guilty of a Rule 11 violation?

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acting attorney did?
A. Could, but the judge in his discretion might not find a violation under those circumstances. And a judge in his discretion here might include that Mr. Sucharow did not include Mr. Chargois because he believed that since the fee in his view -- in Mr. Sucharow's view was coming from counsel's recovery, he did not have to.
So, yeah, that bears on what remedy a Court might think appropriate under Rule 11.
Q. So if the reasonable attorney in Massachusetts would believe that the fee under these circumstances was coming from the class counsel's share of the attorneys' fee award, that would not be a Rule 11 violation, would it?
A. Sorry, I was reading the Rule 11 case --
Q. Sure. If the reasonable attorney in this circuit would believe that disclosure was not necessary because the -- I got to start over because my phone got me.
If a reasonable attorney in this circuit would believe that disclosure of the referral fee payment was not necessary because the money was coming from funds that actually belonged to customer

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class counsel after the awarded fees, then the conduct of not disclosing would not constitute a Rule 11 violation, correct?
A. No, I don't think the bar gets to vote. I mean I think that would be a factor that a judge would consider in determining whether a sanction was appropriate. But I don't think it is a factor on the threshold question of violation.
Q. I thought you just said that the requirement was that a reasonable attorney would believe the conduct to be inappropriate? You said it was no longer subjective intent, it was now a reasonable attorney standard --
A. Yes -- no, as the Court sees it.
Q. You meant as the Court sees what a reasonable --
A. Yes.
Q. -- attorney would do?
A. Right.
Q. Okay. So let's say the actual reasonable attorney in this circuit would believe that it was permissible not to disclose a referral fee because the money came out of class counsel funds, their law firms' funds, then you're saying the judge can

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override that even though that's what the reasonable attorney would actually believe?
A. That's what -- the First Circuit says counsel is held to standards of due diligence and objective reasonableness. And I don't -- I don't think that if you took a vote and the bar voted one way, 70/30, that that is preclusive of a judge's otherwise -- concluding otherwise.
Q. Wouldn't that mean that the standard was actually what the judge thinks and not what the reasonable lawyer thinks?
A. That's why there are judges. That's what judges do.
Q. Well, not when they're applying standards that involve an element of intent, and what happened here according to you -- although I'm not conceding this point -- is that the subject of intent standards was replaced by the reasonable objective lawyer standard.
When that happens, the Court doesn't get to substitute its judgment for what the reasonable objective lawyer would actually believe, does it?
A. I believe that a Court should properly, in assessing what a reasonable attorney would do, look

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to what attorneys do but not be bound by what attorneys do.
Q. So in that instance if the Court would be looking to what attorneys do, presumably something like the declaration and testimony of Camille Sarrouf would be taken into account then, correct?
A. Yes.
Q. Okay. If the attorney who received the 4.1 million dollars had done some work on the case, does the judge still have a right to know that?
A. Well, the key words are "some work." The hypothetical went beyond some work. And so we're going in circles, but at some point I agree that the quality of the work, the nature of the work, the value -- that was the word -- the value of the work and other facts contained in the hypothetical would relieve the lawyer from disclosure I've identified.
Q. Okay. So the lawyer would not --
THE REPORTER: I'm sorry, from disclosure?
THE WITNESS: I've identified.
BY MS. LUKEY:
Q. So if the referring attorney did some valuable work for which he received a proportional

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appropriate payment in the amount of 4.1 million dollars and the lead counsel chose not to disclose that attorney in the lodestar or his work in the lodestar, not to disclose the attorney at all or the payment at all, that would be okay? Right?
A. Based on the facts posed to me in the hypothetical, I have the opinion I have. If you change the facts and make them more ambiguous, then I might have a different opinion.
And -- so I'm not prepared to answer a counter-hypothetical that is much softer than the one that I was presented with in March.
Q. Well, I want to know whether the -- in your view the opinion -- in your opinion the obligation to disclose is dependent on whether or not the attorney did -- who was receiving the funds did valuable work?
Take the Chargois situation, except he did valuable work. Was there any ethical violation if he was not revealed or disclosed to the Court?
A. I think the question posed to me in the hypothetical was valuable work commensurate with the money that he was being received meaning that the money that he was being paid was earned by the

Page 643

quality and quantity of the work he did.
Q. Well, not necessarily the quantity but by his contribution to the case.
If his contribution to the case was sufficiently valuable to warrant a fee of 4 million dollars, then there would be no obligation on the part of lead counsel to disclose him to the Court if he chose not to, correct?
A. I'd have to think about that.
Q. You have no opinion on it?
A. This is not -- no. This is not an appropriate end-of-day circumstance to play around with hypotheticals. There are variables, and I've given you my answer to one hypothetical.
And if those facts are changed, I'd have to think about whether and to what extent my answer would differ.
Q. Well, sir, you're the expert, and I'm attempting to determine which variables actually matter. I believe --
A. As an expert --
Q. I believe that what you've told us is that the variable that matters is that he didn't do any work for a large sum of money.

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And to confirm or rebut that, I am asking whether if he did valuable work does he have to be disclosed?
A. As an expert and presented with a hypothetical, I would want to drill -- I might want to drill down on the hypothetical and clarify some language.
In the hypothetical in March I did that. I asked a followup question. Sometimes I want to think about it and not just come to a conclusion.
Q. Well, unfortunately, the litigation system is such that we have limited time and limited opportunity.
Are you able to give me an answer to the question as to whether a referring attorney who made a valuable contribution to the case and received a substantial fee must nonetheless be disclosed to the Court to prevent lead counsel from being in an ethical violation position?
A. I would say it would depend on facts I have to think about.
Q. Well, unfortunately, I don't have another chance come back to you, but we'll have to let it go at that. We have no further questions on direct.

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MR. SINNOTT: Josh.
MR. SHARP: Yes. First I'd like to mark the supplemental report because that's what I'm keying off of. I'm sure everybody has it.
(Exhibit 27 marked for identification.)
EXAMINATION
BY MR. SHARP:

Q. Okay, professor. One of the additions to your supplemental report concerns the propriety of expert opinion and whether the Rules of Professional Conduct have been violated. Is that right?
A. Yes.
Q. And you believe that courts in Massachusetts accept expert opinion on whether the Rules of Professional Conduct have been violated?
A. Well, I found two cases, one from the district court and the famous case of Fishman versus Brooks.
Q. And you believe that those cases show that courts in Massachusetts accept that expert opinion on whether --
THE REPORTER: I'm sorry, accept or

Exhibit C

Volume: 1
Pages: 1-373
Exhibits: 1-24

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 PROFESSOR STEPHEN GILLERS

March 20, 2018, 9:03 a.m.-6:30 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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as your prior assumptions suggested, on what we assumed about the knowledge of the Lieff Cabraser lawyers.

Your prior question assumed that the lawyers had a reasonable basis to believe that Chargois was getting -- and I'll use the word appropriate, not a clearly excessive fee -- for valuable work to the class, and I said in answer to your question that if that were true there would be no need to -- it was not my opinion that the Court had affirmatively be told about Chargois.

If you want me to make those same assumptions, which were not the assumptions I was making in my opinion, then the conclusion is the one I gave you before.

Q. Where in your report do you make some other assumption about the state of Lieff Cabraser's awareness of the Chargois Arrangement other than that Lieff Cabraser didn't know?

MS. LUKEY: Objection.

A. Just ask me that again.

Q. What assumptions -- I'll ask it a different way.

What assumptions did you make about the

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state of Lieff Cabraser's awareness of the Chargois Arrangement, and where in your report do you report those assumptions?

A. Okay. So Chargois -- the assumptions I make are that even though Lieff Cabraser did not know what Labaton knew about the Chargois Arrangement, Chargois never shows up in any of the work that is done on behalf of the Arkansas Teachers.

Lieff and Thornton have a basis to believe that Chargois is perhaps acting as local counsel doing some liaison work with Arkansas Teachers but has that basis as a result of I think things Michael Thornton says yet never encounters Chargois.

Chargois is getting a substantial amount of money -- more money than someone who is merely local counsel and not doing valuable work meriting 4.1 million dollars would ordinarily receive.

There is a duty to the class as counsel to protect its recovery. In my opinion there is -- that duty requires Lieff Cabraser to ascertain that the Chargois payment -- to ask questions about the Chargois payment, about the fact that 4.1 million dollars is going to Chargois.

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My opinion is based on the fact that all Lieff knows is that Chargois has been characterized as local counsel and is getting 4.1 million dollars and that the class has never been told when invited to consider whether to object to counsel fees.

So I think you make a valuable point that the knowledge of Lieff may be such that it didn't trigger any need to disclose Chargois because of his valuable contributions.

But, on the other hand, the unusual nature of the payment for a local counsel would have at least impelled the firm in protecting its client to look into the matter.

Q. Where is that in your report, sir?

A. It's not.

Q. It's not in your report?

A. No.

Q. So you're sandbagging me here?

A. I'm sandbagging you?

Q. Yeah.

A. It's not my job to answer that question.

Q. In your report you address none of what you've just described, correct?

A. The -- the statement of facts lays out the

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facts I described.

Q. Show me where.

A. It will take a long time to find it.

Q. We're going to take the time. As long as we have the time to do it, we're going to do it because I don't think it's there.

You show me -- you show me where the facts you just described are laid out in the report.

A. It refers to the 4.1 million dollars. Can we agree on that?

Q. That I'll agree with.

A. All right. It refers to the fact that Chargois has been described as local counsel and that Lieff has been privy to those descriptions. That's in the statement of facts.

THE WITNESS: Maybe someone can pick that up if you doubt that --

Q. Is that all Lieff Cabraser was told about Chargois' role, that he was local counsel, that's it?

A. There's a paragraph -- well, we can get the exact language perhaps.

And it knows that the class has not been told that Chargois is in the picture. So it knows

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those three things. And those three things are in the report which includes the statement of facts.
Q. Well, those three things plus other things are in the factual section of the report I agree.
A. And therefore what?
Q. Well, there's nowhere in your opinion part of the report where you put together what you've just described as what you think Lieff Cabraser should have done based on its knowledge.
A. I think that's a valid point.
Q. Why not?
A. I think it's a valid point.
Q. I understand. Why didn't you put it in the report if it's your opinion?
A. It's a legitimate question.
Q. Answer it.
A. I -- I did not pull it together.
There was nothing in the report that suggested valuable contribution. I was relying on those three facts. Now your point is I should have had a summary sentence identifying those three facts as influencing my conclusion.
Q. No. I think you should have explained why you thought Lieff Cabraser violated their ethical

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obligations based on the extent of Lieff Cabraser's knowledge.
A. All right.
Q. That's what I would have expected an ethics expert to do in a report when he's accusing a law firm and lawyers of engaging in ethical violations. Isn't that fair?
A. It's fair.
(Pause.)
BY MR. HEIMANN:
Q. Let me ask you to refer to page 42 of the report.
In the statement of facts the following, among other things appears: Lieff -- and I assume that's a reference to Lieff Cabraser, not to Mr. Lieff personally?
A. Correct.
Q. -- and the Thornton Law Firm were not privy the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which Arkansas is a co-lead counsel. Do you see that?
A. Yes.
Q. Going over to page 43, first full paragraph.

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"As indicated earlier, the arrangement was addressed amongst the three customer class firms in the April 24, 2013 'Dublin' e-mail in which Garrett Bradley described a financial obligation owed to Chargois. Bradley characterized Chargois as local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System.
The Labaton attorneys addressed on the e-mail, Chris Keller and Eric Belfi, did not offer any additional explanation nor did either attorney inform their co-counsel that Chargois was not performing any work in the matter."
Do you see that?
A. Yes.
Q. Were you also aware, by the way, that that e-mail was copied to Mr. Chargois and that he indicated in the affirmative to the accuracy of the description of him in that e-mail that was shared with the Lieff lawyers?
A. I was aware that he was copied. I wasn't aware that he indicated accurately to the description of him.
Q. Then if you'll go over to the next page, page 44, there's a reference to an e-mail that was

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sent to, among others, the Lieff Cabraser lawyers in July of 2016 in which Damon Chargois was identified as the local attorney in this matter who has played an important role. Do you see that?
A. Yes.
Q. That's what Lieff Cabraser lawyers were told about Chargois --
A. Right.
Q. -- among other things, right?
A. Right.
Q. And then further down in the same page, "None of the Labaton attorneys followed up on this e-mail in writing, nor does the record contain any evidence that any of the Labaton attorneys informed their co-counsel either before or after this e-mail that Chargois had played no role in the State Street case, nor did the Labaton attorneys attempt to explain what 'important role' Chargois played."
Do you see that?
A. I do.
Q. And then further on page 44, Bob Lieff testified that he thought Chargois was local counsel for Labaton, and then they quote from his testimony.
"I thought he was local counsel for

Exhibit D

Volume: 2

Pages: 374-456

Exhibits: None

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 PROFESSOR STEPHEN GILLERS

March 21, 2018, 1:52-3:32 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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left hanging that I haven't got an answer for is whether or not we'll be able to cross-examine him further, whether or not we're going to be able to defer our expert reports until we get his revised report and whether or not you're going to allow us to submit additional proof or evidence once we have his final report.

THE SPECIAL MASTER: I'm going to kill the snake that's closest to me --

MR. KELLY: Whoa, whoa, whoa.

THE SPECIAL MASTER: That's Brian. -- which is to get the discovery and the experts that we're doing here.

I may ask Professor Gillers to amend his report to conform with or to take into account what he's heard in your questions and exhibits he's been shown.

Richard, what I'm not understanding is what in the factual record and in your hypothetical was not before Professor Gillers other than maybe subjective state of mind?

MR. HEIMANN: Well, sir, first --

THE SPECIAL MASTER: Other than maybe --

MR. HEIMANN: I won't argue this anymore

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with the professor here. If we have him stand out, then we can have the argument, but I have an answer to your question.

THE WITNESS: Shall I leave the room?

THE SPECIAL MASTER: No, no.

I'll make the decision on all of those questions at some point. We're under a very tight timeframe, and I'll make the decision on all of your points, but I intend to rely upon Professor Gillers' opinions. I may not adopt all of 'em, but I intend to rely upon them in one way or another. If I don't adopt them, I'll say where I don't adopt them.

I believe Judge Wolf will want to see the report. I believe Judge Wolf will want to make a report public. He's already said he's going to make the report public after you folks have an opportunity to weigh in on privilege issues according to our agreement and those sorts of things.

What I am hoping to do by having -- asking him to amend his report is to consider what he's heard so far, and he may also, by the way, as a good expert want to consider the views of your experts. I don't know that he will.

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THE WITNESS: Of course I will.

THE SPECIAL MASTER: But that's -- that's the point, isn't it?

And I -- frankly, I thought that was the point of having this whole process in my view, and the reason I was able to persuade Judge Wolf to give us the extension that was requested was because that was the process. You saw the letter I sent to him.

MR. HEIMANN: The public saw the letter.

THE SPECIAL MASTER: That was not my doing. That was not my doing.

MR. HEIMANN: I understand that. It doesn't -- it doesn't make it any less prejudicial, however, from our perspective.

THE WITNESS: If Bruce Green says something that causes me to realize that I made a mistake on a point and I concede that, is that concession -- can that concession become part of the record?

I mean wouldn't we then deem my report amended to the extent of that concession? That would be a good thing. Presumably it's beneficial to you.

So a report can get changed in light of

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an expert's acceptance of another expert's testimony. If it can get changed that way, if it's not static and frozen that way, then why is it static and frozen if an examination at a deposition of an expert reveals a gap that the expert is prepared to fill.

MR. HEIMANN: Because that's the way the rules work is the short answer to that question.

THE SPECIAL MASTER: You've taken an artificial construct of the rule --

MR. HEIMANN: Well --

THE SPECIAL MASTER: -- which is 26(b) applies to trial.

In my view we are still in the information-collecting stage, and we will be. I don't view -- I don't view April 13th as trial.

MR. HEIMANN: All right. Well, we disagree on that, judge. I mean to me that's -- that's the key to this whole case is whether or not --

THE SPECIAL MASTER: You are --

MR. HEIMANN: Can I finish?

THE SPECIAL MASTER: No.

You are creating an artificial construct

Exhibit E

Volume: 1

Pages: 1-266

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 DAVID J. GOLDSMITH

September 20, 2017, 9:21 a.m.-4:20 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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extra burdens and scrutiny on ERISA counsel?
A. I don't think they placed extra burdens and scrutiny on ERISA counsel. As I said, their interest, their sole interest was to ensure the proper and perhaps favored treatment of class members that held the ERISA-governed assets.
Q. How much of a cap did DOL put on the customer class lawyers' fees?
A. That's not -- well, none. But that's not -- that's sort of a nonsequitur because the fees -- there was a cap on fees, not fees to go to any particular lawyer. The cap on fees came out of the ERISA settlement allocation.
That cap didn't come from any lawyer versus any other lawyer.
THE SPECIAL MASTER: Could I just -- we're trying to understand exactly what that cap was. It's characterized as the ERISA settlement allocation.
THE WITNESS: Right.
THE SPECIAL MASTER: And the 10,900 -- 10,900,000 cap on attorneys' fees was applied to, as we understand it, David, the 60-million-dollar allocation -- the proposed 60-million-dollar

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allocation to the ERISA class. Right?
THE WITNESS: Yes.
THE SPECIAL MASTER: So putting it another way, attorneys' fees from that 60-million-dollar ERISA allocation could not exceed 10.9 million dollars?
THE WITNESS: Yes.
THE SPECIAL MASTER: Is that right?
THE WITNESS: Yes.
THE SPECIAL MASTER: Okay.
THE WITNESS: It would be like this. It would be --
THE SPECIAL MASTER: And the -- and the -- let me complete it.
THE WITNESS: Go ahead. Sorry.
THE SPECIAL MASTER: And so the 10.9 million dollars was really in fact part of the larger 75 million dollars in attorneys' fees, correct?
THE WITNESS: Correct.
THE SPECIAL MASTER: Except that no more than 10 million dollars -- point 9 million dollars could come out of the ERISA allocation.
THE WITNESS: Yes, sir.

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THE SPECIAL MASTER: Is that correct?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: That was the purpose of the cap?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Okay.
THE WITNESS: If I can offer something on this. The fee cap term was proposed by the DOL. It was their idea. It was something they insisted on, and it was something we agreed to with some reluctance.
I wasn't happy about it because I thought it would be confusing -- and I think I'm right about that -- and I thought -- and I think it's not simple to administer. But I don't think it's unfair, and I think Judge Wolf was right to approve it.
I think the best way to think about it is it's simply a term that is mechanical and helps -- it is one of the terms that determines what class members will get out of the settlement.
The DOL wanted to ensure a premium for ERISA class members both by looking to the gross ERISA money. So they --

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THE SPECIAL MASTER: The 60 million dollars.
THE WITNESS: That's the 60 million dollars, and the 60 million already gives the ERISA people more than they otherwise would get because the 60 million is 20 percent of the 300 million settlement whereas the actual ERISA class members, we believe, constitute less than 20 percent of the class. So that's one premium vehicle.
The other premium vehicle is this 10.9 percent cap because the ERISA people are paying -- and I say that word in quotation marks -- less fees than everybody else so long as the judge awarded the fee that we asked for which the judge did.
So the way to look at it is it's a premium vehicle, if I can use that term, off of the net --
THE SPECIAL MASTER: Right.
THE WITNESS: But when I heard about this term, which was not my idea -- it came from the DOL and only the DOL -- I said this is confusing, and it's going to -- and it's going to be -- it's going to complicate matters. And I was right about that. So that's all it is.

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THE SPECIAL MASTER: So distilling this down, isn't it accurate to say that DOL wanted to ensure that the ERISA class members got a greater share vis-a-vis attorneys' fees, and therefore wanted to set a cap -- the 10.9 million dollars -- on the amount of attorneys' fees that could come out of the 60-million-dollar allocation?

THE WITNESS: I would characterize it a little differently.

I don't know if they were -- if they were counting fees in the same way. I don't think they were looking to it like we want our people to get charged less than your people.

I think what they were doing was after they agreed to the 60 million ERISA allocation versus the 240 million ERISA allocation, later it was -- 'cause time-wise, judge, it was much later that they came back to us and said, oh, by the way, we want more; we want this attorney fee cap.

So it was an additional term by which they could boost the premium --

THE SPECIAL MASTER: Yeah, to attempt to maximize the ERISA class members' recovery.

THE WITNESS: Yes, yes. And I think it

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was -- I can't say what was in the mind of the DOL, but I don't think it was focused on paying fees because, you know, individual class members are not paying fees.

It's a gross fee, of course, that gets deducted from the gross settlement fund. I think this was a mechanism that the DOL decided to use to, as you say, judge, maximize the ERISA premium.

THE SPECIAL MASTER: Okay. And that was the objective in doing this, to maximize the recovery to the ERISA class members?

THE WITNESS: Yes.

THE SPECIAL MASTER: Okay. So, as I understand it, the 10.9-million-dollar cap was the cap that would apply as a part of the 60-million-dollar allocation, correct?

THE WITNESS: Yes. It's a cap on fees that would apply to the 60-million-dollar allocation. And depending on --

THE SPECIAL MASTER: Right.

THE WITNESS: It's a cap because if the Court had offered a lesser fee, depending on what it would have been, it's possible that the amount of fees deducted from both buckets would have been the

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same.

THE SPECIAL MASTER: Okay. So, in fact, the ERISA lawyers got approximately 7-and-a-half million dollars, correct?

THE WITNESS: Yes.

THE SPECIAL MASTER: So there was -- as between the cap and the actual allocation of fees to ERISA counsel, there was approximately a 3.4-million-dollar differential?

THE WITNESS: I mean arithmetically if you subtract one number from other, that's true.

But I don't think those two numbers have anything to do with each other. We agreed with ERISA counsel early in the case -- I personally didn't have anything to do with the negotiations, but there was an agreement struck early in the case long before the settlement that the ERISA counsel would have 9 percent of the gross fee.

I believe that 9 percent was a function of the approximate ERISA volume of the class. Basically -- basically how big the ERISA case was compared to the Arkansas case.

THE SPECIAL MASTER: Based upon what was known at the time.

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THE WITNESS: Known at the time, correct. Later -- much later Larry decided to voluntarily bump that percentage up to 10 percent, and that's -- and that is the fee that the ERISA counsel received.

There was never, to my knowledge, any sort of cross-over or discussion of how this cap, which was requested by the DOL and negotiated between the DOL and Lynn Sarko to my recollection, informed or had anything to do with the 9/91 and then later 10/90 agreement.

THE SPECIAL MASTER: Okay. So at least from the DOL's perspective, if the differential between the 10.9-million-dollar cap and what ERISA counsel received didn't go to ERISA counsel for fees, shouldn't DOL have rightly expected that differential to go to the ERISA class since DOL's objective was to maximize the recovery to the ERISA class?

MS. LUKEY: Objection.

THE WITNESS: Well, DOL did maximize the recovery to the ERISA class, and I believe that DOL was well aware of the -- what I would call the 9 percent/91 percent agreement. And the reason I say

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object?
MS. CHIPLOCK: Yes. This is Dan Chiplock objecting because Richard Heimann is not here to do it.
MR. SINNOTT: Okay. Thank you for protecting the shield, Dan. We could barely hear your objection.
What did you object to just for the record, Dan?
MR. CHIPLOCK: I just objected to the question as phrased, the form of the question.
MR. SINNOTT: Okay, thank you.
BY MR. SINNOTT:
Q. They were under much greater scrutiny and attention with respect to their fees, the ERISA counsel, than customer class counsel were with respect to theirs, correct?
A. Yes, it appears that way.
Q. Is it an overstatement to say that DOL could have blown up this agreement?
A. I mean not -- not as between plaintiffs and State Street, but I think that both plaintiffs and State Street had an interest in satisfying the DOL's concerns and moving the entire kit and caboodle

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forward.
I mean I also don't think based on my experience that ERISA counsel was much interested in having their fees overseen by the DOL, and I -- to my knowledge, the ERISA counsel was satisfied by the agreement that we struck with them from the beginning.
I mean I think there was one of the other e-mails that you showed me had a portion where Lynn said something to the effect of the DOL is asking me about our fee agreements, and I haven't answered their questions.
So I think -- I think all the counsel would agree that the DOL was being a bit, you know, nosy about various fee agreements, and I don't think anyone was interested in -- in cooperating with them on that particular question.
The fee cap was again a vehicle by which the DOL was able to secure a maximized premium on the dollars that would go to the class members. It was not a way to impact attorneys' fees that were being paid to counsel.
THE SPECIAL MASTER: Could I just -- going back to bringing the DOL -- the necessity to

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bring the DOL into the tent -- the settlement tent, I think you testified earlier -- and I just want to make sure that it's still your testimony -- that it was necessary to have DOL as part of the settlement and that DOL be satisfied because State Street wanted DOL as part of a global settlement because State Street wanted a release from all parties, including DOL?
THE WITNESS: Right. It was State Street that wanted the DOL in there. We didn't want them.
THE SPECIAL MASTER: Yeah, because State Street needed a release from everybody including DOL, correct?
THE WITNESS: Correct.
THE SPECIAL MASTER: So DOL needed to be satisfied.
THE WITNESS: They did.
BY MR. SINNOTT:
Q. David, when did you first learn of the presence or association of a referring attorney or if you knew him by name of Damon Chargois in the State Street case?
A. I first learned of the existence of the

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referring arrangement, and the first name of the referring attorney on Monday, November 21, 2016. That was the Monday before Thanksgiving.
THE SPECIAL MASTER: That was after the class had been certified.
THE WITNESS: Yes, sir.
Q. Now had you worked on any previous cases in which Mr. Chargois was the referring attorney?
A. Not to my knowledge. But, as I sit here today, I know that I have worked on two.
Q. And which two are those?
A. A10 Networks --
THE REPORTER: I'm sorry?
THE WITNESS: Letter A number 10.
A. -- Networks and Hewlett-Packard.
THE SPECIAL MASTER: You didn't work on Colonial?
THE WITNESS: No, sir.
BY MR. SINNOTT:
Q. You didn't work on K12?
A. No, sir.
Q. When you say you worked on those cases with him, did you meet him during those cases?
A. Well, I did not work with him at all. I

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been reached?
A. Correct.
Q. And all of the staff attorneys' work on the case had been completed about the time of that e-mail, correct?
A. I believe so based on my understanding of the overall timeline.
Q. Are you aware of an e-mail between Evan Hoffman and Mike Rogers from March of 2015 concerning staff attorney hours?
A. I do believe I have a vague recollection of an e-mail like that, yes.
Q. Okay. And I know it's a bit difficult because I'm not there to show you the documents --
A. Right.
Q. -- but do you recall that on March 6, 2015 Mike Rogers sent Evan Hoffman a timekeeper report that listed the hours worked by each of the Thornton assigned reviewers by name?
A. I don't have a visual recollection of it, Emily, but I may well have seen that in researching these facts, you know, on my -- on my -- you know, for my own purposes.
Q. And do you recall that in the August 2015

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e-mail that you referred to earlier Evan referenced the March report that he had received from Mike Rogers, and he told Mike he was seeking a daily breakdown because he was compiling the document review hours for Thornton?
A. I don't remember that specific wording, but, you know, I'm sure the e-mail says what it says.
Q. So, again, I know it's a bit difficult because I'm not there in person. I'd just like to read the Bates numbers into the record, if I may.
A. Sure.
Q. The documents are TLF-SST-18436, TLF-SST-18438, TLF-SST-31155; TLF-SST-31158 and TLF-SST-1947.
Thank you, David. I have no further questions.
A. Sure.
MR. SINNOTT: All right. Thank you, Emily. Dan, or, Richard, any questions?
MR. HEIMANN: This is Richard, and, yes, I have a number of questions.
CROSS-EXAMINATION
BY MR. HEIMANN:
Q. Hello, David.

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A. Hello.
Q. All right. Let's start with some basics if we can.
The class action complaint filed by Arkansas essentially defined the class as custodial clients of State Street --
THE REPORTER: I'm sorry. Wait, wait. It's too loud almost, and I can't understand him --
MR. SINNOTT: Okay. Hey, Richard, could you hold on? It's not your fault; we've got to just turn down the speaker a little bit.
For some reason we had a burst of energy, and it's overpowering our court reporter.
MR. HEIMANN: Sorry.
BY MR. HEIMANN:
Q. Let's start with some basics, if I may.
The class action complaint filed by the Arkansas Fund essentially defined the class as custodial clients of State Street who had used State Street's indirect FX services, correct?
A. Yes.
Q. And as it turned out, included within that definition were a number of ERISA plans, correct?
A. Yes.

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Q. And ultimately when the case was settled, the settlement class definition tracked the same definition and included a number of ERISA plans, correct?
A. Yes. So it included not only custody customers but trust customers. So the settlement class definition begins custody and trust customers.
Q. All right. But just one settlement class was certified, correct?
A. Correct.
Q. There was no separate class for ERISA plans, correct?
A. Correct.
Q. Or even a subclass, correct?
A. Correct.
Q. Nevertheless, the Department of Labor negotiated essentially a 60-million-dollar earmarked out of the 300-million-dollar settlement specifically for ERISA plans, correct?
A. The ERISA plans and group trusts. So focusing on the ERISA-governed assets within those group trusts.
Q. All right. Did you understand that the Department of Labor's position in that regard --

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that is to say, negotiating that 60-million-dollar earmark -- that it was their view that it was the ERISA lawyers and only the ERISA lawyers who brought about that result as opposed to any efforts on behalf of the customer class counsel?
A. No.
Q. Why is that?
A. Well, the 60 million dollars wouldn't exist unless the 300 million dollars existed. The 300 million dollars existed because of the efforts of customer class counsel and ERISA class -- ERISA counsel.
Q. The Department of Labor also negotiated a cap of some 10.9 million dollars on the fees to be charged against the 60-million-dollar amount that they had negotiated for the ERISA class members, correct?
A. Correct.
Q. And did that negotiated fee apply only to the settlement being allocated to the ERISA plan -- excuse me.
Let me begin again. Did that cap on the fee apply only to the ERISA counsel's fees?
A. No.

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Q. Did it apply to all counsel's fees?
A. Yes.
Q. In your view did the customer class counsel play a role in obtaining a recovery for the ERISA plans?
A. Absolutely.
Q. Would you regard that role characterized fairly as substantial?
A. Yes, I would.
Q. In the course of the work on the case as opposed to most more recent times, did anyone ever suggest that the ERISA counsel deserved 100 percent of the credit for that 60-million-dollar recovery going to the ERISA members of the class?
A. No.
Q. Did any of the ERISA counsel -- I'm talking now about comments made back during the day, not most recent self-serving comments.
Did any of the ERISA counsel ever suggest that?
A. Absolutely not.
Q. And did the DOL, Department of Labor, suggest that?
A. No.

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Q. In fact, did customer counsel actually participate in the negotiations with the Department of Labor about the ERISA allocation?
A. Yes, they did.
Q. It wasn't just Mr. Sarko, for example, who did that?
A. No, it was not. I would characterize Mr. Sarko as a point person and as perhaps a lead negotiator, but he was not the sole communicator.
Q. All right. Thank you. I'm going to switch subjects in a sense here.
In the papers that were presented in connection with the settlement approval process and the fee application, the term "plaintiffs' counsel" was defined to be the three what I'll call main customer counsel, Labaton, Lieff and Thornton, and the three main ERISA counsel, Keller Rohrback, McTigue and Zuckerman Spaeder. Correct?
A. Yes. I'm not looking at the document, but that sounds correct.
Q. I believe Mr. Sinnott actually asked you about the document earlier and focused on the term "plaintiffs' counsel." Do you recall that?
A. Yes.

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Q. But firms on the plaintiffs' side in addition to the three or the six firms actually submitted fee applications, did they not?
A. They did. And, just for the record, I'm looking at the definition of plaintiffs' counsel in the settlement agreement, and what you said is correct.
Q. All right. In fact, the firm by the name of Beins Axelrod in addition to Richardson Patrick from Charleston, South Carolina and Feinberg, Campbell & Zack all submitted fee applications in connection with this matter, right?
A. Right.
Q. And all of those firms were associated or affiliated with the ERISA side of the case, correct?
A. Correct.
Q. Did any of the three main ERISA counsel ever disclose to Judge Wolf the terms or nature of the relationship between them and these three other firms?
A. No.
Q. Did they ever disclose to the Court what allocation they expected would come out of their share to pay any of those three firms?

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 RESPONSE TO COURT'S AUGUST 10, 2018 ORDER

On August 10, 2018, the Court directed the Special Master and the Lawyers to update the court on various issues pertaining to the status of these proceedings. Dkt. # 445. Specifically, the Court ordered that, by August 16, 2018, the Master (a) confer with the Lawyers and propose a schedule for the Master's response to the objections to the Report and any replies; and (b) file for the public record any documents added to the Record by the Master on August 6, 2018.[1] Dkt. 445, ¶¶ 5(a) & (b).

The Special Master has conferred with counsel as to a mutually-agreeable timeline proceeding forward.[2] The Master proposes the following set forth below.

I. The Special Master's Compliance with 5(a) of the Court's Order Proposing a Schedule for Responding to the Objections and Replies thereto.

In light of the ongoing discussions to propose a joint resolution for the Court's consideration, the Special Master proposes delaying the preparation of his response to the objections until those discussions have been completed, or alternatively, proven to be productive, at the latest, by September 6, 2018 (4 weeks from the date of the August 9, 2018 hearing before the Court). When negotiations are complete or have reached their end, by September 6, the Special Master will present a recommended global resolution, if reached, to the Court for its consideration in moving forward with its review of the Master's Report and Recommendations.

[1] On August 3, 2018, the Master filed, under seal, the Special Master's First Submission of Documents to Supplement the Record. Dkt. #415. The same day, the Master submitted a disc to the Court containing the first set of supplemental documents to the Court. Those documents, with two redactions made on page 81 (LBS020590) and pages 286-89 (LBS031599-602) to remove personal information of third parties unrelated to the issues presented in the Master's investigation, are herein attached to this pleading and now available to the public.

[2] At the time of filing, Labaton agrees to, and Keller Rohrback and Zuckerman Spaeder taken no position on, the timeline proposed in Section I, *infra*. Other counsel had not yet responded. Thornton Law Firm objects to the proposed timeline and suggests instead that the Special Master respond to the objections by September 7, 2018, and that Customer Class Counsel reply by September 28, 3018.

If, however, the parties have not yet reached an agreement for joint resolution by September 6, 2018, but believe that global resolution is imminent, such that it may be reached in an additional period of time not to exceed seven (7) days, the Special Master agrees that he will file with the Court a joint motion requesting such additional time (not to exceed 7 days) to complete the resolution process. Because a proposed joint resolution among the parties and the Special Master may limit, and potentially obviate, the Special Master's obligation to respond to the Law Firms' objections, the Special Master proposes that the "clock" for responding to the Law Firms' objections not run until the later of the following: (i) the date, prior to September 6, when the efforts at negotiating a joint resolution prove unsuccessful; (ii) the Court definitively rules, either rejecting or accepting the proposed resolution; or (iii) the Court provides additional direction to the parties. From the date of this determination, the Special Master requests eight (8) weeks to file his response to the objections and any additional documents relevant to that response to further supplement the Record. Pursuant to the Parties' Protocol (Dkt. # 259) and the Court's August 10 Order, any documents in the Special Master's response that are not already in the Record will be filed under seal and released publicly with any appropriate redactions within 14 days of that filing, after the parties have had an opportunity to confer about the appropriate redactions.

Thornton has proposed that Customer Class Counsel have twenty-one (21) days[3] to file a reply to the Master's response to the objections.

[3] As indicated above, Thornton proposes that the Customer Class Counsel file a reply by September 28, 2018, three weeks, or 21 days, after its proposed deadline for the Special Master's response to the objections.

II. The Special Master's Compliance with ¶ 5(b) Concerning the Status of Documents Filed in the Master's First Submission of Documents to Supplement the Record.

Per paragraph 5(b) of the Court's Order, the Special Master herein files the documents added to the record in the Special Master's First Submission of Documents to Supplement the Record filed with the Court, under seal, on August 3, 2018.[4] So far, the only requests for redactions, to which the Special Master is agreeable, is the redaction of Tim Herron's daughter's resume and law school transcript.

Dated: August 16, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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CERTIFICATE OF SERVICE

I hereby certify that this foregoing document was filed electronically on August 16, 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

[4] Access to an electronic database containing these documents was given to the Law Firms, through their counsel, contemporaneously with serving those documents on the Court.

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Monday, March 5, 2007 11:12 AM
To:	'kamran@cmhllp.com'
Cc:	'damon@cmhllp.com'; 'tim@hkhlaw.com'; Rado, Andrei <ARado@labaton.com>; Chan, Cindy <CChan@labaton.com>
Subject:	Re:

Its yours. I didn't know you had interest it local counsel positions. We may be filing another one in TX, in addition to [redacted], and I will let you lknow as we get closer to filing. Just so you, since there will be a lead plaintiff contest under the PSLRA, there is no gaurantee we (or you) will be actively litigating the case. Chris

---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Keller, Christopher J.
Cc: Damon Chargois <damon@cmhllp.com>; Tim Herron <tim@hkhlaw.com>
Sent: Mon Mar 05 11:57:24 2007
Subject: RE:

Christopher:

We sent you an email and left a message with your assistant this morning that our firm (Chargois, mashayekh and herron) is interested in being local on the case and wishes to explore what that would entail in this case.

If we still have a shot for being considered, please let us know how best to proceed.

Thank you

k

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Monday, March 05, 2007 10:55 AM
To: ltien@bpblaw.com
Cc: Kamran Mashayekh; Belfi, Eric J.
Subject: Re:

Thanks. I think we will be ok finding an alternate firm I wanted to give you guys first shot at it.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Keller, Christopher J.
Cc: kamran@cmhllp.com <kamran@cmhllp.com>; Belfi, Eric J.
Sent: Mon Mar 05 11:16:03 2007
Subject: RE:

Chris,

My firm probably would not be interested in being local counsel for the [redacted], case but thank you for thinking of us. If Kamran's firm is not interested, then I can probably find some good attorneys for you.

Laurence

> -----Original Message-----
> From: Keller, Christopher J. [mailto:ckeller@labaton.com]
> Sent: Saturday, March 03, 2007 10:58 PM
> To: Laurence Tien
> Cc: kamran@cmhllp.com; Belfi, Eric J.
> Subject: FW:
>
>
> Laurence: I am glad to hear that things are moving forward.
> We are heavy into options backdating cases and are lead
> counsel in over 1/3 of all 10b cases involving options
> backdating. In fact, we are planning on filing a new case
> against [redacted], which is based in Houston. If
> you would like to act as local counsel, please let me know.
> The Google case sounds interesting also. Chris
>
>
>
>
> ----- Original Message -----
> From: Laurence Tien <ltien@bpblaw.com>
> To: Belfi, Eric J.
> Sent: Thu Mar 01 17:22:46 2007
> Subject:
>
> Eric,
>
> Ken just got back from his vacation and I will speak to him
> about the action plan that was forwarded to Damon. Also, is
> your firm doing any shareholder cases involving backdated
> employee stock options? I may be able to get you a few
> hundred names of companies involved in backdating options.
>
> Finally, someone brought to my attention a potential case
> against Google. A friend of mine advertises with Google.
> Google has certain businesses they are pushing like
> classifieds. Their classifieds competes against other

> classifieds who may be paying Google's for top placement.
> Google's top placement ensures a bunch of hits, which ends up
> driving the ad prices for people wanting to advertise for
> classifieds. I don't know what laws they may be violating
> with this practice, but it seems like it would be illegal. I
> included a document showing how Google competes in some of
> their Adwords advertising program. Anyway, you may want to
> look at this. My friend could be a class rep for their classifieds.
>
> Laurence Tien
>
> Bailey Perrin Bailey LLP
> The Lyric Centre
> 440 Louisiana, Suite 2100
> Houston, TX 77002
>
>
> * Telephone (713) 425-7100
> * Direct (713) 425-7264
> * Toll-Free (866) 716-8300
> * Fax: (713) 425-7101
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From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Wednesday, March 7, 2007 3:36 PM
To:	Belfi, Eric J. <EBelfi@labaton.com>
Subject:	Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

What is bird dogging?

Christopher J. Keller, Esq.
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www.Labaton.com

From: Belfi, Eric J.
Sent: Wednesday, March 07, 2007 3:18 PM
To: Keller, Christopher J.
Subject: FW: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

To keep you in loop on the South.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Wednesday, March 07, 2007 3:16 PM
To: Belfi, Eric J.; Kamran Mashayekh
Cc: Tim Herron
Subject: RE: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

I am bird-dogging.

Damon J. Chargois

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From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, March 07, 2007 2:04 PM
To: Kamran Mashayekh
Cc: Tim Herron; Damon Chargois
Subject: RE: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

Not yet. We are waiting for a response from Laurence.

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Wednesday, March 07, 2007 3:02 PM
To: Belfi, Eric J.
Cc: Tim Herron; Damon Chargois
Subject: RE: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

You are welcome and I will be getting with Aubochon to see where he is relative to his efforts in securing a client for us. Thank you also for the [redacted] case which our firm will be local counsel on.

Is there a meeting scheduled with Ken Bailey's firm relative to securing union reps?

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, March 07, 2007 1:47 PM
To: Kamran Mashayekh
Subject: RE: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

Thanks for the update.

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, March 06, 2007 9:28 PM
To: Belfi, Eric J.
Cc: Tim Herron; Damon Chargois
Subject: Eric- this email is from Mark Aubochon who is willing to assist on the new potential price fixing case

Hi Kamran,
It's probably on the same degree of difficulty as DRAM and easier than SRAM. Almost any device that "remembers" its settings after it shut off has flash memory or SRAM. Of course the trick will be finding a company small enough, but with a high enough volume of flash to care. The USB drive manufacturers would be where I'd target first. There are a several of them out there and at least to my knowledge they are relatively small companies.

Actually, the company that I'm doing the contract work for SanDisk through has a PDA that uses flash that they supply to Disney. They took a iPAQ PDA and modified the design to be "rugged" enough for the Disney theme park use. They may not have purchased the flash directly from one of the guys listed below, but maybe they did. I can ask the owner the next time I talk to him. He's in Russia at the moment but he'll be back by next week.

Mark

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From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Friday, March 23, 2007 3:39 PM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: potential case against bear sterns

---

pretty much, except for intraday

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 23, 2007 3:05 PM
To: Keller, Christopher J.
Subject: Re: potential case against bear sterns

I will check with him on my reply email - aren't you grounded now?

Eric J. Belfi
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www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Mar 23 15:03:23 2007
Subject: RE: potential case against bear sterns

always interested in new cases, but I was really hoping the next email from him was going to be one setting meetings with potential clients.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 23, 2007 2:55 PM
To: Keller, Christopher J.; Szydlowski, Alan; Rado, Andrei
Subject: Re: potential case against bear sterns

Let me know when you are available on Monday and Tuesday and I will arrange the call.

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.; Szydlowski, Alan; Rado, Andrei
Sent: Fri Mar 23 14:53:57 2007
Subject: Re: potential case against bear sterns

Andrei and alan will handle.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Szydlowski, Alan; Rado, Andrei
Sent: Fri Mar 23 14:46:16 2007
Subject: Re: potential case against bear sterns

I think we should talk to this guy let me know when you would be available on Monday.

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Szydlowski, Alan
Sent: Fri Mar 23 14:42:29 2007
Subject: Fw: potential case against bear sterns

Eric J. Belfi
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ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Belfi, Eric J.
Cc: Tim Herron <tim@hkhlaw.com>; Damon Chargois <damon@cmhllp.com>
Sent: Fri Mar 23 14:39:19 2007
Subject: potential case against bear sterns

Eric:

We have a client who is a fund manager in CA and he sent me the following email regarding New Century for he knows that our firm has an FCRA case against them. If your firm already has a client who has sued NC on a securities case, perhaps Bear Sterns can be brought in as a culpable party. I welcome your thoughts and if you wish to speak to our client who forwarded this info, I will be glad to arrange for a call. I am also going to follow up on the Shell matter for you next week with my European contact.

Thanks

K

Another thought in finding deep pockets is the analyst that touted these companies as "buys" For example Bear Stearns upgraded the stock of New Century a week or 10 days before NC fell apart. Oh, by the way, BS was one of the biggest packagers of NC's MBS. Think they had an ulterior motive that wasn't criminal?

.

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Wednesday, June 6, 2007 5:27 PM
To:	Tetefsky, Jennifer <JTetefsky@labaton.com>; Belfi, Eric J. <EBelfi@labaton.com>
Cc:	Chan, Cindy <CChan@labaton.com>
Subject:	Unions

Jen did you circulate the rpt showing we get most in securities bar 2 yrs running?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tetefsky, Jennifer
To: Belfi, Eric J.; Keller, Christopher J.
Sent: Wed Jun 06 17:15:28 2007
Subject: Re: Unions

Get em while they are hot

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Cc: Tetefsky, Jennifer
Sent: Wed Jun 06 16:02:01 2007
Subject: FW: Unions

There is life in Texas.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, June 06, 2007 3:42 PM
To: Belfi, Eric J.; Kamran Mashayekh
Cc: Tim Herron
Subject: Re: Unions

His son's name is Camp and I know him. He's a young lawyer who is very personable. He was an associate at Wiiliams Bailey and now works for his dad.

Can I call you in about an hour?
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Wed, 6 Jun 2007 14:51:16
To:<damon@cmhllp.com>,"Kamran Mashayekh" <kamran@cmhllp.com> Cc:"Tim Herron" <tim@hkhlaw.com>
Subject: RE: Unions

It sounds very encouraging. Do you know Ken's son?

Also, if you have time to talk today, it may be worth having a 5 minute call to update you on the securities market.

Eric

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, June 06, 2007 2:44 PM
To: Kamran Mashayekh; Belfi, Eric J.
Cc: Tim Herron
Subject: Re: Unions

Great.
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Kamran Mashayekh" <kamran@cmhllp.com>

Date: Wed, 6 Jun 2007 12:25:30
To:"Belfi, Eric J." <EBelfi@labaton.com> Cc:"Damon Chargois" <damon@cmhllp.com>,"Tim Herron" <tim@hkhlaw.com>
Subject: RE: Unions

Got a response back from bailey's office that bailey's son also wants to get involved in whatever it is that will be up for discussion. The ball is still in their court to get back to us with a date. We will just keep pushing.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, June 06, 2007 12:25 AM
To: kbailey@bpblaw.com
Cc: Kamran Mashayekh
Subject: Unions

Dear Ken:

It has been a couple of months since we met with you in your office and I wanted to follow up with you to see how you were doing with the Redacted

I have travel commitments over the next two weeks. However, from June 25 forward, I will be available to go and meet with the Redacted or any funds that you think make sense for us to meet.

If there is any that you need from us, do not hesitate to contact me.

Best regards,

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From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Monday, August 13, 2007 6:12 PM
To: Chan, Cindy <CChan@labaton.com>
Subject: Potential Antitrust Case Advisory: Sodium Chlorate

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e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Thursday, August 09, 2007 1:46 PM
To: Tetefsky, Jennifer
Cc: Keller, Christopher J.
Subject: FW: Potential Antitrust Case Advisory: Sodium Chlorate

Jennifer:

Can you have Giancarlo find out information for us on Senator Farris in Arkansas. Our meeting is next Wednesday so we need it as soon as possible.

Eric

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Thursday, August 09, 2007 1:09 PM
To: Belfi, Eric J.
Subject: RE: Potential Antitrust Case Advisory: Sodium Chlorate

Eric, Senator Farris is on for meeting in our Little Rock office at 11:00 am on Wednesday of next week. We are having food brought in. The senator is prepped to have a private meeting with us so that there are no distractions. He is prepared to hear you out and take necessary steps after you do your thing. There will most likely have to be a subsequent meeting with Senator Farris and the Governor or Attorney General after you have impressed the senator with your firm's credentials.

Damon J. Chargois

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, August 08, 2007 2:33 PM
To: Belfi, Eric J.
Subject: Potential Antitrust Case Advisory: Sodium Chlorate

Our firm is investigating whether potential anticompetitive activity involving European manufacturers of sodium chlorate may have extended to the US and injured purchasers in the domestic US market. I have included some background information about the matter below. Please give me a call when you can to discuss whether your contacts may be of value in connection with our investigation. Thank you.

Background

Sodium chlorate is used primarily, but not exclusively, to create a bleaching agent (chlorine dioxide) used in the manufacturing of paper and pulp (a suspension of water and cellulose (wood fibers) that is processed to make paper).

Direct purchasers of sodium chlorate may include:

- Pulp mills
- Paper mills
- Herbicide manufacturers
- Mining operations
- Bulk chemical suppliers/distributors

- European Commission is investigating possible cartel by manufacturers of sodium chlorate;

- Targeted European manufacturers also manufacture and/or supply sodium chlorate in the US;

- Two of the three targeted companies are among the world leaders in sodium chlorate production.

European Commission antitrust regulators sent statements of objections to manufacturers of sodium chlorate in the European Union on August 2, 2007, to investigate concerns that companies participated in a price-fixing cartel. Per its policy, the EC did not name the companies involved nor the member states where they are based. While there may be additional recipients yet to be identified, three companies have confirmed that they have received statements of objections relating to anticompetitive activities. They are:

- Arkema, of France,
- Finnish Chemicals Oy, a subsidiary of Finland's Kemira Oyi, and
- Eka Chemicals, a unit of Netherlands based Akzo Nobel NV.

During the past decade or more there has been a fair degree of consolidation or other corporate shuffling

within the industry, so manufacturer names may have changed over time (*e.g.*, Arkema is a former subsidiary of Elf-Total and is also formerly known as Atofina). Two of the companies have confirmed that the EC's inquiry concerned the period 1994 to 2000; our inquiry includes but extends beyond that timeframe and may extend to othermanufacturers.Accordingly, please do not assume that purchases from onlythe companies identified above are relevant to our inquiry.

We are not aware of any parallelantitrust enforcement activity by the US Department of Justiceat this time.However,we do knowthat each of the companies targeted by the EC also have operations in theUS, and that Eka and FinnChem are among the worldleaders in sodium chlorate production.Other major sodium chloratemanufacturers include ERCO Worldwide and Canexus (both based in Canada) andTronox Inc. (based in Oklahoma City).

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www.labaton.com

From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Monday, August 13, 2007 6:13 PM
To: Chan, Cindy <CChan@labaton.com>
Subject: Arkansas Targets

Christopher J. Keller, Esq.
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e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Thursday, August 09, 2007 11:47 PM
To: damon@cmhllp.com; tim@cmhllp.com
Cc: Keller, Christopher J.
Subject: Arkansas Targets

Damon & Tim:

Here is a list of the targets in Arkansas:

1 Arkansas Teachers Retirement Little Rock AR $7,700.0

Redacted

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Partner

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ebelfi@labaton.com
www.labaton.com

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Friday, August 17, 2007 7:01 AM
To:	Sucharow, Lawrence <LSucharow@labaton.com>; Belfi, Eric J. <EBelfi@labaton.com>
Cc:	Tetefsky, Jennifer <JTetefsky@labaton.com>
Subject:	Faris

Any word on rds?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Sucharow, Lawrence
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Tetefsky, Jennifer
Sent: Fri Aug 17 01:44:18 2007
Subject: Re: Faris

Verry nice.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Sucharow, Lawrence
Cc: Tetefsky, Jennifer
Sent: Thu Aug 16 22:34:26 2007
Subject: Faris

FYI.
-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Thursday, August 16, 2007 9:26 AM
To: Belfi, Eric J.; tim@cmhllp.com
Subject: Re: Little Rock

You guys did well. Tim and I both feel very optimistic about Labaton firm's doing a lot of good things in Arkansas. This is thanks to you and Chris representing the firm very well. Take care, bro.

Sent via BlackBerry by AT&T

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Wednesday, September 26, 2007 8:25 PM
To:	Belfi, Eric J. <EBelfi@labaton.com>
Cc:	Sucharow, Lawrence <LSucharow@labaton.com>; Tetefsky, Jennifer <JTetefsky@labaton.com>
Subject:	Brent Hatch

Awesome.

-----Original Message-----
From: Belfi, Eric J.
Sent: Wednesday, September 26, 2007 8:23 PM
To: Keller, Christopher J.
Cc: Sucharow, Lawrence; Tetefsky, Jennifer
Subject: Fw: Brent Hatch

FYI.

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----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Belfi, Eric J.
Sent: Wed Sep 26 19:53:10 2007
Subject: Re: Brent Hatch

The good senator is finalizing with Paul Doan on Friday. Everybody wants something sometimes. Specifically, the Labaton firm will represent the pension fund. Please be discreet and act surprised when it happens.

Sent via BlackBerry by AT&T

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Wed, 26 Sep 2007 17:56:51
To:<damon@cmhllp.com>
Subject: Brent Hatch

We have lunch with Brent on Tuesday.

I emailed Elaine and Sara to make the necessary arrangements.

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From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Saturday, October 20, 2007 10:05 AM
To: Tetefsky, Jennifer <JTetefsky@labaton.com>
Subject: Update

Want to change bio to include [redacted]

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tetefsky, Jennifer
To: Belfi, Eric J.; Sucharow, Lawrence
Cc: Keller, Christopher J.
Sent: Sat Oct 20 09:51:18 2007
Subject: Re: Update

Monday

----- Original Message -----
From: Belfi, Eric J.
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Sat Oct 20 07:49:27 2007
Subject: Re: Update

When does jury selection begin?

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----- Original Message -----

From: Sucharow, Lawrence
To: Belfi, Eric J.
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Sat Oct 20 07:35:13 2007
Subject: RE: Update

Eric, GREAT job. Don't know how you keep the [redacted] straight from the [redacted]. Need to discuss th[redacted] project request. Way too rich a request, but can't judge without seeing a list of what you think he can realistically accomplish (deliver) and what size of those funds really are (and in US equities).

Keep up great work.
I am uexpectedly going out to oserve [redacted] trial for this coming week; we willneed to arrange to speak by phone to move things along.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, October 19, 2007 7:27 PM
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Subject: Update

Larry:

A quick summary of the trip.

In Oklahoma, we had good meetings with the [redacted] and the [redacted] Damon thinks we will get in both.

[redacted] currently has Litowitz but certainly understands the values of multiple firms (ie conflicts).

[redacted] currently does not have any attorneys and is interested in setting a monitoring system - they should get back to us soon.

In Texas, we met with Steve Kherkher of William & Kherkher - formally of Williams & Bailey and they are going to introduce us to their union clients. They made big money in tobacco and asbestos with the unions.

Here is a list from their website:

Paper, Allied-Industrial, Chemical & Energy Workers Union (PACE) Local 4-6000 United Steelworkers (USW) 13-227 USW 13-2001 Int'l Brotherhood of Electrical Workers (IBEW) 66 IBEW 716 Int'l Union of Operating Engineers (IUOE) 450 IUOE 564 IUOE 351 In'tl Association of Machinists & Aerospace Workers (IAM & AW) 37 Millwrights 2232 Ironworkers 84 Plumbers 68 Sheetmetal Workers 54 Pipefitters 211

We will start this project hopefully in about 2 to 3 weeks.

They will also help us with some of the public pension funds in Texas.

For lunch, one of Damon's classmates at law school and good buddies - Scott Lemond - set up an appointment the head of the [redacted] - the guy is very bright and the meeting went awesome - I think we will be in there shortly.

Scott is going to get us in to the [redacted] next time we are town.

Damon's plans are to expand the Oklahoma operation, work on the [redacted] (he is good friends with the mayor) and start working in Alabama at the municipal level - they are very tied in Alabama.

Tim is making sure that we complete Arkansas and he is opening the Tennessee front - I hope to go there on the next road trip.

We will be getting some traffic through office during the week of November 5 - Senator Farris, Tim Herron, Damon, and Steve KherKher and possibly Camp Bailey of Bailey (they are the link to the [redacted] and many other union funds).

Lastly the [redacted] project - I went to Foxwoods and met with Mohegan Sun and The Saginaw Chippewa Indian Tribe (who interestling filed an AOL proof of claim and received $3 million which I estimate that they lost $50 million which means tha they are a real fund), Buz Barlow, a lawyer from Dallas, with Jabez Capital (an Indian Fund) and few other contacts but nothing of note.

One issue we have with the [redacted] project is that consultant sees that he is making progress and he wants to receive a monthly retainer of $12,000 a month going forward for him to keep doing the work. Unfortunately, he is doing a good job and seems to know everyone so I am not sure what to do.

We are also working Damon's lawyer friend Gary Pitchlynn - also an Indian - and he thinks he can deliever the Mississippi Band of [redacted] and the [redacted] to start and has a number of other contacts.

Lots of follow up necessary.

Eric

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From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Thursday, November 8, 2007 7:44 PM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: Carribean Meeting

I agree. What about South Beach instead? It's a lot easier for most to say they're going to Florida for a conference.

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e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

From: Belfi, Eric J.
Sent: Sunday, November 04, 2007 8:27 PM
To: Keller, Christopher J.
Subject: FW: Carribean Meeting

Looks like we are set for the Carribean - we should start getting it organized.

From: Chris D'Amato [mailto:CDAMATO@parkstrategies.com]
Sent: Saturday, November 03, 2007 10:49 AM
To: Belfi, Eric J.; Chris D'Amato; Sean King
Subject: RE: Carribean Meeting

Eric,
I'm glad we were able to get together for lunch yesterday--sorry i had to run out so fast.
It was good to sit with you guys to both discuss business opportunities and bs a little. I think the more comfortable we are with each other the more successful our relationship will become.
I suggest we speak Monday or Tuesday to confirm next steps on that and update you on outreach in DE, AL, ND, and CA.

I'll put a hold on our schedule for those dates in January.

Have a great weekend.
Speak to you soon,
Chris

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

To: "Chris D'Amato" <CDAMATO@parkstrategies.com>; "Sean King" <sking@parkstrategies.com>
Sent: 11/2/2007 8:22 PM
Subject: Carribean Meeting

Chris & Sean:

We were working on dates for our meeting down south (we are working on the location).

Please let me know if you are free from Sunday, January 13 - Tuesday, January 15.

Also, Damon Chargois (the Texas lawyer) is in town next Thursday evening (Nebraska's night) and we will be going out with him and a State Senator from Arkansas that we work very closely with if you are able to join us.

Sean, I will send you the information for North Dakota over the weekend.

I received copies of the Chinese Bonds from the prospective client today which I will forward to you later so you can see if the certificates were manufactured in Nigeria.

Have a good weekend and thank you for lunch.

Regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Tuesday, December 4, 2007 7:19 PM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: Texas

What's he going to say???

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Tue Dec 04 19:10:38 2007
Subject: Texas

Spoke to Damon and he going to Jarvis about the lt governor.

Eric J. Belfi
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Facsimile: +1.212.883.7078
ebelfi@labaton.com
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From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Saturday, December 22, 2007 3:30 PM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: New funds

Just sitting back and taking it all in now. This is really great news. Excellent work.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, December 14, 2007 8:18 AM
To: Keller, Christopher J.
Subject: Fw: New funds

FYI.

Eric J. Belfi
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Facsimile: +1.212.883.7078
cbelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Tim Herron <Tim@hkhlaw.com>
To: Belfi, Eric J.
Cc: Damon Chargois <damon@cmhllp.com>
Sent: Fri Dec 14 08:02:27 2007
Subject: New funds

The senator just called me. He has the [redacted] pension funds lined up in arkansas. He wants copies several, of the information you gave him in ny. Hje gave his only copy to doane. Can you e mail fax or overnight it to me. He plans to get you guys the top five plans in arkansas. He said he will use me a point person be cause it is easier for him.

He said doane will be totally on board shortly. He and I are planning a trip to north carolina after the first of the year to work on that state for you guys.

Sent via BlackBerry from Tim Herron

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Sunday, April 13, 2008 11:25 PM
To:	Belfi, Eric J. <EBelfi@labaton.com>
Subject:	Arkansas Teachers

Right but when is it? Are we going to be only one? They have passed 5 in 3

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Sun Apr 13 23:23:38 2008
Subject: FW: Arkansas Teachers

FYI.

-----Original Message-----
From: tim@cmhllp.com [mailto:tim@cmhllp.com]
Sent: Sunday, April 13, 2008 11:06 PM
To: Belfi, Eric J.
Subject: Re: Arkansas Teachers

The senator called me last week and said it was coming up and our friend has mentioned it to him several times. It is a done deal he says.

Sent via BlackBerry by AT&T

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Sun, 13 Apr 2008 22:39:20
To:<tim@cmhllp.com>
Cc:<damon@cmhllp.com>
Subject: Arkansas Teachers

Dear Tim:

We have been looking for the RFP and have not seen anything - have you heard anything recently?

Eric J. Belfi
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www.labaton.com <http://www.labaton.com/>

From: Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent: Thursday, April 24, 2008 10:55 AM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: Re: Arkansas

That's great don't get me wrong, I'm just sitting here about to burst if silk gets another case with ark teach. I mean they have moved with them like 10 times in last 4 months and have 6 cases. We will have a toxic waste dump client by the time they hire us.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Apr 24 11:26:41 2008
Subject: Fw: Arkansas

Eric J. Belfi
Partner
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140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Tim Herron <tim@cmhllp.com>
To: Belfi, Eric J.
Sent: Thu Apr 24 11:12:25 2008
Subject: RE: Arkansas

Called senator he will call me back. He assured me that this was a sure thing but would check on the dates for the RFP

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thursday, April 24, 2008 5:05 AM
To: Tim Herron
Cc: Keller, Christopher J.
Subject: Arkansas

Tim:

Anything new from the Senator on when they are issuing a RFP?

Our understanding is that they may be moving in another case with the other firm.

Eric

Eric J. Belfi
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P Before printing, please think about the environment.

From: Weiss, Sara </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=WEISSS> on behalf of Belfi, Eric J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE>

Sent: Friday, November 7, 2008 10:08 AM

To:

Cc: Belfi, Eric J. <EBelfi@labaton.com>

Bcc: Adolfo del Cueto <adelcueto@bulltick.com>; Alejandro Creixell <acreixell@bulltick.com>; Anthony Campbell <TCAMPBELL3@BLOOMBERG.NET>; Armi Easterby <aeasterby@williamskherkher.com>; Art Coia <aec@hgk.com>; Arthur Don <adon@seyfarth.com>; Brandon Swim <bswim@chasmlake.com>; Brent O. Hatch <bhatch@hjdlaw.com>; Camp Bailey <cbailey@bpblaw.com>; Carol Ellis <Carol.Ellis@trs.state.tx.us>; Christa Clark <christac@atrs.state.ar.us>; Christopher D'Amato <cdamato@parkstrategies.com>; Christopher Hellmich <CHellmich@PattonBoggs.com>; Damon Chargois <damon@cmhllp.com>; David Kinney <david.kinney@oag.ok.gov>; Deirdre A. Walsh <dwalsh@loomissayles.com>; Erik Christiansen <EChristiansen@parsonsbehle.com>; Fletch Trammell <ftrammell@bpblaw.com>; Greg Hubachek <hubacheklaw@yahoo.com>; Gregory Smith <gsmith@copera.org>; Harris Bogner <harrisb@cadoganmanagement.com>; Ian Rose <ian.rose@brandes.com>; James Wilbanks <james.wilbanks@treasurer.ok.gov>; Jarvis Hollingsworth <jarvis.hollingsworth@bgllp.com>; Jeffrey Caynon <caynonj@sbcglobal.net>; Jim Wyly <jwyly@pattonroberts.com>; Josh Reid <jreid@parsonsbehle.com>; Kamran Mashayekh <kamran@cmhllp.com>; Kenneth Bailey <kbailey@bpblaw.com>; Larry Marchiony <Lmarchiony@tiaa-cref.org>; Laurence Tien <ltien@bpblaw.com>; Lisa Crossley <lcrossley@samipfd.com>; Marilynne Felderman <mfelderman@peak6.com>; Noah Shube <nshube@nsfirm.com>; Richard Frankowski <rfrankowski@bhflegal.com>; Robert L. Maddox <rmaddox@wyattfirm.com>; Scott Lemond <slemond@lemondross.com>; Sean King <sking@parkstrategies.com>; Steve Kherkher <skherkher@williamskherkher.com>; Steve Stidham <sstidham@sneedlang.com>; Steven Paul McSloy <mcsloy@hugheshubbard.com>; Suzanne Peters <speters@bulltick.com>; Tim Herron <tim@cmhllp.com>; Tom Beaver <tcb@trs.state.ok.us>; Tom Gruber <Tom.Gruber@oag.ok.gov>

Subject: Monthly Settlement Report -- November '08

Attach: November 2008 Monthly Report (Domestic and Canada).pdf

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Attached is Labaton Sucharow's Monthly Report for November '08. The Report contains the following information:

- Latest developments
- "Top Cases"
- Settlements Announced in October 2008
- All other pending Settlements

If you have any questions, please feel free to contact me.

Regards,

Eric J. Belfi

Case & Settlement Report
November 2008

Labaton Sucharow

In This Issue

The credit crisis and extreme volatility in the markets continue. Even before the high profile collapse of Lehman Brothers and the numerous bailouts occurring on Wall Street, a recent report by the Stanford Law School Securities Class Action Clearinghouse showed an increase in filings for the first half of the year of over 100% for the same period a year ago. Below are some recently filed cases that we would like to highlight.

Carter's, Inc.

A lawsuit was filed against Carter's and certain officers and directors on September 18, 2008. The complaint alleges that Defendants issued materially false and misleading statements about their ability to turn the operations of acquired company Oshkosh B'Gosh around.

On July 24, 2007, Carter's announced that it was taking a large write-down of $142.9 million on the tangible assets/goodwill of its Oshkosh subsidiary. The Carters shares reacted negatively to the news, and fell from $24.87 to $22.75 per share by the end of trading on July 25, 2007, representing an 8.5% decline in value. In total, the shares dropped 66% during the class period from February 21, 2006, to July 24, 2007.

Fannie Mae

A securities class action complaint has been filed against officers of Federal National Mortgage Association. The complaint alleges that the Defendants did not disclose the Company's true capital needs, falsely assured the investment public that the Company was well capitalized, and released financial results that misrepresented the financial condition of the Company.

Further, because Fannie Mae is a quasi-governmental enterprise, some investors were told by their full-service brokers that if Fannie Mae defaulted on the preferred shares, then the United States government would insure their losses and make them whole. This information, however, was inaccurate. Holders of Fannie Mae preferred shares are not afforded protection or insurance from the federal government.

Several brokerage firms sold various series of Fannie Mae preferred shares, including Series Q (NYSE: FNM-PQ), Series R (NYSE: FNM-PR), Series S (NYSE: FNM-PS), and Series T (NYSE: FNM-PT), as safe, stable fixed-income investments. Fannie Mae preferred shares were sold to both retail and institutional accounts looking to generate income. However, many of these clients were not advised of the risks associated with preferred shares. Additionally, several brokers and financial advisors purchased an unsuitable amount of Fannie Mae preferred shares in their clients' accounts, thereby creating a significant over-concentration in a single security or sector.

As the truth emerged during the class period, it became evident Fannie Mae did not sustain adequate capital levels necessary to continue as a going concern. As a result, federal regulators were forced to seize control of the Company, place the publicly traded entity into a conservatorship, and allow shares to trade at diminutive levels. Over the course of the class period, shareholders lost 98% of their value in Fannie Mae stock – down to $0.73 per share from a class period high of $40 per share.

Top Cases

The cases listed in this section have been recently filed in a U.S. Court. Our analysis of these "Top Cases" indicates that the claims have merit and therefore represent possible future settlement recoveries for investors. However, investors with significant losses who wish to be involved in the litigation now may do so by moving for lead plaintiff before the deadline listed below.

Federal National Mortgage Association a/k/a Fannie Mae (FNM)
Cusip 313586109 / ISIN US3135861090
Market Capitalization: $818 million / Stock Drop: 89.0%
- Company failed to disclose its true capital needs as it assured the investment public that it was adequately capitalized, alleged to have overstated its capital base through numerous accounting manipulations
- On September 7, 2008, the Treasury seized the Company and placed it into a conservatorship
- Shareholders lost 98% of their value in Fannie Mae stock

Class Period: November 16, 2007 – September 5, 2008
Lead Plaintiff Deadline: November 7, 2008

Harris Stratex Networks, Inc. (HSTX)
Cusip 41457P106 / ISIN US41457P1066
Market Capitalization: $431 million / Stock Drop: 34.6% / 34.3%
- Company announced that it had discovered accounting errors that will result in restated earnings reports from 2005 through present, which will result in an estimated restatement of $18 million to $25 million over the affected periods
- Previous financial statements no longer reliable
- Section 11 claims pursuant to the registration statement of the merger of Harris Microwave Communications Division and Stratex Networks, Inc.

Class Period: January 29, 2007 – July 30, 2008
Lead Plaintiff Deadline: November 14, 2008

Canadian Imperial Bank of Commerce a/k/a CIBC (CM)
Cusip 136069101 / ISIN CA1360691010
Market Capitalization: $22.2 billion / Stock Drop: 2.0% / 11.2%
- Company misled investors by falsely representing that its exposure to subprime CDOs was not a major risk issue and failing to accurately describe its total exposure to the U.S. subprime mortgage market
- On December 6, 2007, the Company announced that its write-downs have reached $1 billion, and warned of significantly higher losses in the future related to its $9.8 billion in hedged exposure to the subprime mortgage and CDO market
- On May 29, 2008, the Company disclosed a second-quarter loss as it took a $2.51 billion loss related to its structured credit activities and analysts said the potential for more write-downs looms even though the bank has taken charges totaling approximately $6 billion in the past year

Class Period: May 31, 2007 – May 28, 2008
Lead Plaintiff Deadline: November 18, 2008

Top Cases (continued)

Carter's Inc. (CRI)
Cusip 146229109 / ISIN US1462291097
Market Capitalization: $1.1 billion / Stock Drop: 8.5% / 24.7%
- Company made false & misleading statements about the progress of the integration of its OshKosh B'Gosh subsidiary
- Carter's disclosed in its 2007 Annual Report that is missed the "sweet sport" with OshKosh
- On July 24, 2007, Carter's announced that it was taking a larger write-down ($142.9 million) on the tangible assets/goodwill of its OshKosh subsidiary
- Insiders sold 1.6 million shares during the class period for proceeds of $44.5 million

Class Period: February 21, 2006 – July 24, 2007
Lead Plaintiff Deadline: November 18, 2008

Oshkosh Corp. (OSK)
Cusip 688239201 / ISIN US6882392011
Market Capitalization: $899.2 million / Stock Drop: 33.5% / 7.15%
- Company made false and misleading statements relating to the health of the European refuse collection business prior to a surprising write-down, as well as failing to write down this business due to impairment
- On June 26, 2008, the Company's shares plunged 34% following its fiscal 3Q 2008 pre-announcement and accompanying lower sales forecast
- The expected loss relates to a non-cash charge ($175 million, or $2.32/share) for the impairment of goodwill to be recorded in connection with the Company's European refuse collection vehicle manufacturer, the Geesink Norba Group
- Insider sales: CEO Robert Bohn sold 13% of his shares during the class period

Class Period: February 02, 2007 – June 25 2008
Lead Plaintiff Deadline: November 18, 2008

The Spectranetics Corp. (SPNC)
Cusip 84760C107 / ISIN US84760C1071
Market Capitalization: $151 million / Stock Drop: 47.4% / 46.9%
- Company served with search warrant by the Food and Drug Administration and U.S. Immigration and Customs Enforcement
- Whistleblower complaint alleged that the Company illegally marketed its products that were not approved by the FDA and failed to report adverse results of clinical trials
- Federal investigation related to use, testing, promotion, and sales of certain products and payments made to medical personnel, as well as compensation packages for certain employees

Class Period: March 16, 2007 – September 4, 2008
Lead Plaintiff Deadline: November 24, 2008

Cadence Design Systems (CDNS)
Cusip 127387108 / ISIN US1273871087
Market Capitalization: $908 million / Stock Drop: 25.23% / 19%
- Company announced restatement of earnings for the first half of 2008 and postponement of third quarter results
- Preliminary results revealed that the Company had incorrectly recorded $24 million in contract sales in the first quarter yet the revenue should have been recorded over the duration of the contracts starting in the second quarter
- On October 15, 2008, four executives, including the CEO, resigned

Class Period: April, 23, 2008 – October 22, 2008
Lead Plaintiff Deadline: December 29, 2008

Settlements Announced in October 2008

Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Transac-tions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Transac-tional and Holdings Information Required for Time Periods
CIB Marine Bancshares, Inc.	CIBH	12542L103	US12542L1035	14-Nov-08	31-Oct-08	$ 4,418,000.00	21-Jan-00	12-Apr-04	21-Jan-00 through 12-Apr-04
Vesta Insurance Group, Inc. (Partial Settlement) [1]	VTA	925391104	US9253911047	1-Dec-08	17-Nov-08	$ 1,950,000.00	2-Jun-95	1-Jun-98	02-Jun-95 through 30-Jun-98
Cardinal Health, Inc. (SEC) [2]	CAH	14149Y108	US14149Y1082	23-Dec-08	9-Dec-08	$ 35,000,000.00	24-Oct-00	26-Jul-04	23-Oct-00 through 26-Oct-04
MBIA, Inc. (SEC)	MBI	55262C100	US55262C1009	29-Dec-08	15-Dec-08	$ 50,000,001.00	11-Sep-98	22-Nov-04	10-Sep-98 through 22-Nov-04
American Business Financial Services, Inc. (Notes)	n/a	02476BAA4 02476BAB2 02476BAC0	US02476BAA44 US02476BAB27 US02476BAC00	2-Jan-09	19-Dec-08	$ 16,767,500.00	18-Jan-02	20-Jan-05	21-Jan-05
Syncor International Corp.	SCOR	87157J106	US87157J1060	5-Jan-09	22-Dec-08	$ 15,500,000.00	9-Mar-98	5-Nov-02	09-Mar-98 through 31-Dec-02
Monster Worldwide, Inc. (options included)	MNST	611742107	US617421072	5-Jan-09	22-Dec-08	$ 47,500,000.00	6-May-05	9-Jun-06	06-May-05 through 13-June-06
Xylogics, Inc. (SEC)	XLGX	984152108	US9841521084	9-Jan-09	26-Dec-08	$ 1,802,108.42	1-Sep-95	5-Sep-95	31-Aug-95 through 05-Sep-95
American International Group, Inc. (PwC partial settlement) (options included)	AIG HSB AGC	026874107 40428N109 026351106 026874AN7 026874AP2 026874AQ0 026874AR8 026874AS6 026874AT4 02687QBB3 U02687AC2 U02687AB4	US0268741073 US40428N1090 US0263511067 US026874AN76 US026874AP25 US026874AQ08 US026874AR80 US026874AS63 US026874AT47 US02687QBB32 USU02687AC21 USU02687AB48	28-Jan-09	14-Jan-09	$ 97,500,000.00	28-Oct-99	1-Apr-05	28-Oct-99 through 29-Jun-05
Greenfield Online Inc.	SRVY	395150105	US3951501051	2-Feb-09	19-Jan-09	$ 4,000,000.00	9-Feb-05	29-Sep-05	09-Feb-05 through 29-Sep-05
Loral Space & Communications, Ltd.	LRLSQ	G56462107 G56462198	BMG564621073 BMG564621982	3-Feb-09	20-Jan-09	$ 3,450,000.00	31-Jul-02	29-Jun-03	31-Jul-02 through 14-Oct-03
LaBranche & Co., Inc.	LAB	505447102	US5054471025	4-Feb-09	21-Jan-09	$ 13,000,000.00	19-Aug-99	15-Oct-03	18-Aug-99 through 15-Oct-03
Allos Therapeutics, Inc.	ALTH	019777101	US0197771019	5-Feb-09	22-Jan-09	$ 2,000,000.00	29-May-03	29-Apr-04	28-May-03 through 29-Jul-04
General Motors Corp. (options included) [3]	GM	Various	Various	6-Mar-09	20-Feb-09	$303,000,000.00	13-Apr-00	30-Mar-06	13-Apr-00 through 27-Jun-06

Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Transac-tions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Transac-tional and Holdings Information Required for Time Periods
Bridgestone Corporation	BRDCY 5108 BGT BRDCF BRO	108441205 n/a	US1084412055 JP3830800003	21-Apr-09	7-Apr-09	$ 30,000,000.00	30-Mar-00	31-Aug-00	29-Mar-00 through 31-Aug-00

[1] If you previously submitted a claim form in this action in connection with the prior settlements, you do not have to complete and submit another one.

[2] If you have already submitted a claim in the Cardinal Health Securities Litigation, United States District Court for the Southern District of Ohio, you do not need to submit another claim to participate in the SEC Fair Fund distribution.

[3] See Appendix A for list of eligible securities

All Other Pending Settlements

Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Trans-actions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Trans-actional and Holdings Information Required for Time Periods
Heritage Municipal Bonds (SEC) [1]	n/a	Various	Various	8-Oct-08	ASAP	$ 5,233,970.00	1-Feb-96	31-Aug-99	01-Feb-96 through the date the Proof of Claim Form is Signed
Lumenis, Ltd. (options included)	LUME	n/a	IL0010824782	9-Oct-08	ASAP	$ 20,100,000.00	2-Oct-00	7-Mar-06	2-Oct-00 through 25-Apr-06
First Horizon Pharmaceutical Corp.	FHRX	32051K106	US32051K1060	10-Oct-08	ASAP	$ 4,650,000.00	24-Apr-02	29-Apr-03	23-Apr-02 through 25-Jul-03
Paincare Holdings, Inc.	PRZ	69562E104	US69562E1047	14-Oct-08	ASAP	$ 2,000,000.00	24-Mar-03	15-Mar-06	21-Mar-03 through 15-Mar-06
Restoration Hardware, Inc. [2]	RSTO	760981100	US7609811002	14-Oct-08	ASAP	$ 3,700,000.00	18-Jun-08	18-Jun-08	n/a
Xerox Corp. [3]	XRX	Various	Various	15-Oct-08	ASAP	$750,000,000.00	17-Feb-98	27-Jun-02	16-Feb-98 through 27-Sep-02
Career Education Corporation (options included)	CEC	141665109	US1416651099	17-Oct-08	ASAP	$ 4,900,000.00	22-Apr-02	15-Feb-05	22-Apr-02 through 15-May-05
R&G Financial Corp.	RGFC	749136107 749136206 749136305 749136404 74976G208	PR7491361072 PR7491362062 PR7491363052 PR7491364043 PR74976G2086	24-Oct-08	ASAP	$ 51,000,000.00	21-Jan-03	2-Nov-07	20-Jan-03 through 1-Feb-08
Team Telecom International Ltd	TTIL	n/a	IL0010823875	25-Oct-08	ASAP	$ 4,300,000.00	6-Feb-02	14-Nov-02	06-Feb-02 through 11-Feb-03
U.S. Auto Parts Network, Inc.	PRTS	90343C100	US90343C1009	29-Oct-08	ASAP	$ 10,000,000.00	9-Feb-07	20-Mar-07	09-Feb-07 through 20-Mar-07
Tommy Hilfiger Corp.	TOM	G8915Z102	VGG8915Z1027	29-Oct-08	ASAP	$ 16,000,000.00	3-Nov-99	24-Sep-04	11/2/1999 through 24-Sept-04
FARO Technologies, Inc. (options included)	FARO	311642102	US3116421021	30-Oct-08	ASAP	$ 6,875,000.00	15-Apr-04	15-Mar-06	15-Apr-04 through 13-Jun-06
Tenet Healthcare Corp. KPMG Settlement (options included) [4]	THC	88033G100 88033GAP5 88033GAR1 88033GAT7 88033GAV2 88033GAW0	US88033G1004 US88033GAP54 US88033GAR11 US88033GAT76 US88033GAV23 US88033GAW06	30-Oct-08	ASAP	$ 65,000,000.00	15-Aug-00	7-Nov-02	14-Aug-00 through 07-Nov-02
Chiron Corp.	CHIR	170040109	US1700401094	1-Nov-08	ASAP	$ 30,000,000.00	23-Jul-03	5-Oct-04	22-Jul-03 through 06-Oct-04

November 2008

Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Trans-actions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Trans-actional and Holdings Information Required for Time Periods
Exodus Communications, Inc. (options included)	EXDSQ	302088109 302088AB5 302088AE9 302088AH2 302088AJ8 302088AL3 302088AN9 302088AP4 n/a	US3020881096 US302088AB51 US302088AE90 US302088AH22 US302088AJ87 US302088AL34 XS0121417694 US302088AP48 XS0108551366	5-Nov-08	ASAP	$ 5,000,000.00	20-Apr-00	25-Sep-01	19-Apr-00 through 25-Sep-01
Levi Strauss & Co. [5]	n/a	52736RAK8 52736RAL6 52736RAN2	US52736RAK86 XS0125847508 US52736RAN26	7-Nov-08	ASAP	$ 5,000,000.00	6-Apr-01	16-Jun-03	06-Apr-01 through 20-Feb-04
Merge Technologies, Inc. (Partial Settlement - options included)	MRGE	589981109	US5899811096	12-Nov-08	ASAP	$ 16,000,000.00	25-Apr-02	3-Jul-06	24-Apr-02 through 03-Jul-06
BUCA, Inc.	BUCA	117769109	US1177691094	14-Nov-08	ASAP	$ 1,600,000.00	6-Feb-01	11-Mar-05	05-Feb-01 through 11-Mar-05
PETCO Animal Supplies, Inc.	PETC	716016209	US7160162092	14-Nov-08	ASAP	$ 20,250,000.00	18-Nov-04	15-Apr-05	18-Nov-04 through 23-Jun-05
The Tube Media Corp.	TUBM	898561105	US8985611057	17-Nov-08	3-Nov-08	$ 600,000.00	19-Aug-05	21-Nov-06	18-Aug-05 through 21-Nov-06
Iridium World Communications, Ltd (options included)	IRID	G49398103 462691AB2 46268KA19 46268KAK1 46268KAJ4 46268KAC9 46268KAB1	BMG493981036 US462691AB29 US46268KAL98 US46268KAK16 US46268KAJ43 US46268KAC99 US46268KAB17	17-Nov-08	3-Nov-08	$ 43,100,000.00	8-Sep-98	13-May-99	07-Sep-98 through 17-Nov-08
Royal Dutch Petroleum Company/The Shell Transport and Trading Company PLC (options included) [6]	RD RD.AS SC SHEL.L	780257804 n/a 822703609 n/a	US7802578044 NL0000009470 US8227036097 GB0008034141	18-Nov-08	4-Nov-08	$ 89,508,000.00	8-Apr-99	18-Mar-04	7-Apr-99 through 16-Jun-04
Royal Dutch Petroleum / Shell Transport (SEC)	RD RD.AS SC SHEL.L	780257804 n/a 822703609 n/a	US7802578044 NL0000009470 US8227036097 GB0008034141	18-Nov-08	4-Nov-08	$120,000,000.00	8-Apr-99	17-Mar-04	7-Apr-99 through 16-Jun-04
Viseon, Inc.	VSNI	928297100	US9282971004	19-Nov-08	5-Nov-08	$ 550,000.00	3-Nov-04	15-May-06	02-Nov-04 through 11-Aug-08
Harmonic Inc. [7]	HLIT CUBE	413160102 125015107	US4131601027 US1250151073	20-Nov-08	6-Nov-08	$ 15,000,000.00	23-Mar-00	26-Jun-00	02-May-00 through 28-Jun-00
The Coca-Cola Company	KO	191216100	US1912161007	21-Nov-08	7-Nov-08	$137,500,000.00	21-Oct-99	6-Mar-00	20-Oct-99 through 06-Apr-00
Vitesse Semiconductor Corp. (KPMG Partial Settlement) [8]	VTSS	928497106 928497205	US9284971069 US9284972059	24-Nov-08	10-Nov-08	$ 7,750,000.00	27-Jan-03	27-Apr-06	27-Jun-03 through 27-Apr-06
Bayer AG [9]	BAY	072730302 001114506	US0727303028 DE0005752000	25-Nov-08	11-Nov-08	$ 18,500,000.00	4-Aug-00	21-Feb-03	03-Aug-00 through 22-May-03

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Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Trans-actions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Trans-actional and Holdings Information Required for Time Periods
Arch Leasing Corporation Trust (Ser. 1 Coll. Tr. Bonds)	N/A	039387AA1 039387AA2 039387AA3	US039387AA17 US039387AA25 US039387AA33	26-Nov-08	12-Nov-08	$ 2,100,000.00	19-May-95	1-Jan-01	19-May-95 through Date Proof of Claim Form is Signed
Mercury Interactive Corp. (options included)	MERQE	589405109 589405208 589405AA7 589405AB5 589405AC3 589405AD1	US5894051094 US5894052084 US589405AA76 US589405AB59 US589405AC33 US589405AD16	29-Nov-08	15-Nov-08	$117,500,000.00	8-Sep-01	3-Jul-06	07-Sep-01 through 03-Jul-06
Converium Holding AG [10]	CHR CHRN	21248N107 n/a	US21248N1072 CH0012997711	9-Dec-08	25-Nov-08	$ 84,600,000.00	7-Jan-02	2-Sep-04	06-Jan-02 through 02-Dec-04
MCSI, Inc.	MCSI 55270M108	 US55270M1080	11-Dec-08	27-Nov-08	$ 2,250,000.00	24-Jul-01	26-Feb-03	24-Jul-01 through 27-May-03
Magma Design Automation, Inc. (options included)	LAVA	559181102 559181AA0 559181AB8	US5591811022 US559181AA04 US559181AB86	17-Dec-08	3-Dec-08	$ 13,500,000.00	23-Oct-02	12-Apr-05	22-Oct-02 through 11-Jul-05
Wireless Facilities, Inc. (options included)	WFII	97653A103	US97653A1034	22-Dec-08	8-Dec-08	$ 12,000,000.00	5-May-03	4-Aug-04	04-May-03 through 04-Aug-04
Wireless Facilities, Inc. II (options included)	WFII	97653A103	US97653A1034	22-Dec-08	8-Dec-08	$ 4,500,000.00	19-Mar-02	12-Mar-07	18-Mar-02 through 12-Mar-07
Nvidia Corporation (SEC)	NVDA	67066G104	US67066G1040	27-Dec-08	13-Dec-08	$ 596,000.00	16-May-00	14-Aug-00	15-May-00 through 14-Aug-00
Escala Group, Inc.	ESCL	29605W107	US29605W1071	29-Dec-08	15-Dec-08	$ 18,000,000.00	5-Sep-03	8-May-06	04-Sep-03 through 04-Aug-06
Parmalat Finanziaria, S.P.A. (Partial Settlment) [11]	PARAF PMLFF PRF	Various	Various	12-Jan-09	29-Dec-08	10,500,000 shares	5-Jan-99	18-Dec-03	05-Jan-99 through 18-Dec-03
Scottish Re Group, Ltd.	SCT	G73537410 G73537402 G7885T104 G73537105	KYG735374103 KYG735374020 KYG7885T1040 KYG735371059	24-Jan-09	10-Jan-09	$ 37,500,000.00	17-Feb-05	20-Feb-07	16-Feb-05 through 21-May-07
American Pharmaceutical Partners, Inc. [12]	ABBI APPX	00202H108 00383E106 00383Y102 02886P109	US00202H1086 US00383E1064 US00383Y1029 US02886P1093	29-Jan-09	15-Jan-09	$ 14,300,000.00	27-Nov-05	10-Sep-08	10-Sep-08
Atlas Cold Storage Holdings Inc. (Canada)	FZRU	049241102	CA0492411024	2-Mar-09	16-Feb-09	$ 40,000,000.00	1-Mar-02	29-Aug-03	01-Mar-02 through the Date the Proof of Claim Form is Signed
Cablevision Systems Corp (Rainbow Media Group) [13]	RMG	12686C844	US12686C8441	n/a	n/a	$ 8,250,000.00	n/a	n/a	n/a
American Express Financial Advisors, Inc. (SEC) [14]	n/a	n/a	n/a	n/a	n/a	$ 30,000,000.00	1-Jan-01	31-Aug-04	n/a

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Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Trans-actions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Trans-actional and Holdings Information Required for Time Periods
Invesco Funds (SEC) [14]	FLRFX FIEGX ISPIX FSFSX IIBCX FSFLX	46127G105 46127G501 46127G709 46127J703 46127X504 46128W307	US46127G1058 US46127G5018 US46127G7097 US46127J7037 US46127X5041 US46128W3079	n/a	n/a	$325,000,000.00	1-Jan-01	30-Sep-03	n/a
Alliance Capital Management L.P. (SEC) [14]	ANAGX CABDX AHHBX CHCYX APGAX QUASX AGRFX ALTFX ADGAX ABBSX	01853W105 018597104 01860E205 018636407 01877C101 01877E107 01877F401 018780106 01879K101 018914200	US01853W1053 US0185971043 US01860E2054 US0186364073 US01877C1018 US01877E1073 US01877F4019 US0187801065 US01879K1016 US0189142005	n/a	n/a	$250,000,000.00	1-Jan-01	30-Sep-03	n/a
AIM Advisors, Inc. / AIM Distributors, Inc. (SEC) [15]	Various	Various	Various	n/a	n/a	$ 50,000,000.00	1-Jan-01	30-Sep-03	n/a
Crocus Investment Fund (Canada) [16]	n/a	n/a	n/a	n/a	n/a	$ 2,850,000.00	n/a	n/a	n/a

[1] If you submitted a claim form and received a settlement payment in the In re Heritage Bond Litigation, you do not need to do anything further to submit a claim under the Distribution Plan.
Please see Appendix B for a list of eligible securities

[2] Class Definition: On behalf of all persons who held Restoration Hardware, Inc. common stock as of the closing of the acquisition of Restoration Hardware by Catterton Partners on June 18, 2008

[3] Eligible CUSIP numbers in Xerox Settlement: 984121103, 984121AQ6, 984121AU7, 984121AW3, 984121AY9, 984121BE2, 984121AT0, 98412JAF1, 98412JAG9, 98412JAK0, 98412JAM6, 98412JAS3, 98412JAY0, 98412JAZ7, 98412JBA1, 98412JBB9, 98412JBC7, 98412JBK9, 98412JBM5, 98412JBN3, 98412JBP8, 98412JBQ6, 98412JBR4, 98412JBS2, 98412JBT0, 98412JBU7, 98412JBW3, 98412JBX1, 98412JBY9, 98412JBZ6, 984121BH5
Eligible ISIN numbers in Xerox Settlement: US9841211033, US984121AQ66, US984121AU78, US984121AW35, US984121AY90, US984121BE28, US984121AT06, US98412JAF12, US98412JAG94, US98412JAK07, US98412JAM62, US98412JAS33, US98412JAY01, US98412JAZ75, US98412JBA16, US98412JBB98, US98412JBC71, US98412JBK97, US98412JBM53, US98412JBN37, US98412JBP84, US98412JBQ67, US98412JBR41, US98412JBS24, US98412JBT07, US98412JBU79, US98412JBW36, US98412JBX19, US98412JBY91, US98412JBZ66, XS0051643970, XS0058230300, XS0058921551, XS0072175101, XS0118346120, XS0141783844, DE0002914603

[4] If you wish to participate in the KPMG Settlement, you will automatically be included if you already submitted a valid Proof of Claim and Release form in connection with the Tenet Settlement.

[5] Class Definition: On behalf of all persons and entities who purchased or otherwise acquired Levi Strauss & Co. 11-5/8% or 12-1/4% registered bonds in the market traceable to the April 6, 2001 prospectus and registration statement or June 16, 2003 prospectus and registration statement

[6] Class Definition: All persons or entities who purchased stock or stock equivalents including ADRs issued by the Royal Dutch Petroleum Company or The Shell Transport and Trading Company, Shell call options, or Shell put options on a United States exchange or market and/or stock or stock equivalents issed by Shell, Shell call options, or Shell put options on one or more exchanges or markets outside of the United States and, at the time of purchase, were residents or citizens of, or were incorporated in or created unter the laws of the United States (including its states, territories and possessions)

[7] Class Definition: all persons and entities who (1) were shareholders of C-Cube, and, as part of the May 3, 2000 merger of Harmonic and C-Cube, exchanged shares of C-Cube for Harmonic shares that were issued pursuant to the Form S-4 Registration Statement and Joint Proxy Statement/Prospectus filed with the Securities and Exchange Commission on March 23, 2000, or (2) on or before June 26, 2000, purchased or otherwise acquired Harmonic shares that are traceable to shares issued pursuant to the Form S-4.

[8] If you are a Class Member who previously filed a valid Proof of Claim and Release in connection with the Vitesse Settlement and you do not validly and timely request exclusion from the KPMG Settlement, you will automatically participate in the KPMG Settlement and need not file an additional Proof of Claim and Release because your previously filed Proof of Claim will be utilized to calculate your claim.

[9] Non US purchasers of Bayer AG ordinary shares on Non-US exchanges are precluded from the class

[10] Class Definition: On behalf all persons, entities, or legal beneficiaries or participants in any entities who, during the period from January 7, 2002 through September 2, 2004, inclusive, (i) were U.S. residents who purchased or otherwise acquired Converium common stock on the SWX and/or (ii) purchased or otherwise acquired Converium ADS on the NYSE, regardless of country of residency.
Please be advised that you are not eligible if you are a non-U.S. foreign investor who only purchased shares of Converium Holding AG on the SWX Swiss Exchange.

[11] Please see Appendix C for a list of eligible securities

[12] Class Definition: On behalf of all record or beneficial owners of common stock of American Pharmaceutical Partners, Inc. on November 27, 2005, and their transferees, successors and assigns, including all persons who, as of the time immediately prior to the consummation of the acquisition of APP Pharmaceuticals, Inc. by Fresenius Kabi on September 10, 2008, owned common shares of Abraxis Bioscience, Inc. or APP.

Case Name	Ticker	CUSIP	ISIN	Claim Deadline	Please Submit Trans-actions and Holdings By:	Total Settlement Amount	Class Period Beginning Date	Class Period Ending Date	Trans-actional and Holdings Information Required for Time Periods

[13] Class Definition: On behalf of all record holders and beneficial owners of Rainbow Media Group tracking stock on August 20, 2002.

[14] Note: Class Members will not need to file a claim to receive a FAIR Fund distribution.

[15] Eligible CUSIPs for AIM Advisors, Inc. / AIM Distributors, Inc. (SEC): 001413103, 001413301, 001413616, 001413657, 001413681, 001413749, 001413863, 001413871, 001419506, 00141M408, 00141M572, 00141M705, 00141M770, 00141M812, 00141T577, 00141T643, 00142C300, 00142C433, 00142C565, 00142C706, 008879496, 008879850, 008882102, 008882201, 008882300, 008882409, 008882854, 008882888
Eligible ISINs for AIM Advisors, Inc. / AIM Distributors, Inc. (SEC): US0014131033, US0014133013, US0014136164. US0014136578, US0014136818, US0014137493, US0014138632, US0014138715, US0014195061, US00141M4087, US00141M5720, US00141M7056, US00141M7700, US00141M8120, US00141T5772, US00141T6432, US00142C3007, US00142C4336, US00142C5655, US00142C7065, US0088794963, US0088798501, US0088821022, US0088822012, US0088823002, US0088824091, US0088828548, US0088828886
Class Members will not need to file a claim to receive a FAIR Fund distribution

[16] To be eligible to receive compensation, it is not necessary for you to take any steps, other than make sure that the Administrator has your correct mailing address.

Appendix A – General Motors Securities

Eligible Securities in General Motors Corp. Securities Litigation

Type	CUSIP	ISIN	Rate	Maturity	Currency
Common Stock	370442105	US3704421052			
Preferred	370442121	US3704421219	7.5	7/1/2044	USD
Preferred	370442717	US3704427174	6.25	7/15/2033	USD
Preferred	370442725	US3704427257	7.375	5/15/2048	USD
Preferred	370442733	US3704427331	5.25	3/6/2032	USD
Preferred	370442741	US3704427414	4.5	3/6/2032	USD
Preferred	370442758	US3704427588	7.25	2/15/2052	USD
Preferred	370442766	US3704427661	7.375	10/1/2051	USD
Preferred	370442774	US3704427745	7.25	7/15/2041	USD
Preferred	370442816	US3704428164	7.25	4/15/2041	USD
Debt	370442AJ4	US370442AJ44	8.8	3/1/2021	USD
Debt	370442AN5	US370442AN55	9.4	7/15/2021	USD
Debt	370442AR6	US370442AR69	7.4	9/1/2025	USD
Debt	370442AS4	US370442AS43	7.1	3/15/2006	USD
Debt	370442AT2	US370442AT26	7.75	3/15/2036	USD
Debt	370442AU9	US370442AU98	7.7	4/15/2016	USD
Debt	370442AV7	US370442AV71	8.1	6/15/2024	USD
Debt	370442AX3	US370442AX38	6.25	5/1/2005	USD
Debt	370442AY1	US370442AY11	6.375	5/1/2008	USD
Debt	370442AZ8	US370442AZ85	6.75	5/1/2028	USD
Debt	370442BB0	US370442BB09	7.2	1/15/2011	USD
Debt	370442BQ7	US370442BQ77	7.375	5/23/1948	USD
Debt	370442BS3	US370442BS34	7.125	7/15/2013	USD
Debt	370442BT1	US370442BT17	8.375	7/15/2033	USD
Debt	370442BW4	US370442BW46	8.25	7/15/2023	USD
Debt	370448AA0	US370448AA05	6.85	10/15/2008	USD
Debt	37045EAG3	US37045EAG35	9.4	7/15/2021	USD
Debt	37045EAS7	US37045EAS72	9.45	11/1/2011	USD
Debt	37045GAB9	US37045GAB95	8.95	7/2/2009	USD
Debt	n/a	XS0171908063	8.875	7/10/2023	GBP
Debt	n/a	XS0171922643	8.375	12/7/2015	GBP
Debt	n/a	XS0171942757	7.25	7/3/2013	EUR
Debt	n/a	XS0171943649	8.375	7/5/2033	EUR
Put/Call Options					

Appendix B – Heritage Municipal Bonds Securities

Eligible Securities in the Heritage Municipal Bonds SEC Settlement

CUSIP	ISIN	ISSUER	Coupon	Maturity
16753AAA0	US16753AAA07	CHICAGO ILL HEALTH FACS REV	5	7/1/1999
16753AAB8	US16753AAB89	CHICAGO ILL HEALTH FACS REV	5.25	7/1/2000
16753AAC6	US16753AAC62	CHICAGO ILL HEALTH FACS REV	5.5	7/1/2001
16753AAD4	US16753AAD46	CHICAGO ILL HEALTH FACS REV	5.75	7/1/2002
16753AAE2	US16753AAE29	CHICAGO ILL HEALTH FACS REV	6	7/1/2003
16753AAF9	US16753AAF93	CHICAGO ILL HEALTH FACS REV	6.3	7/1/2004
16753AAG7	US16753AAG76	CHICAGO ILL HEALTH FACS REV	6.5	7/1/2005
16753AAH5	US16753AAH59	CHICAGO ILL HEALTH FACS REV	6.7	7/1/2006
16753AAJ1	US16753AAJ16	CHICAGO ILL HEALTH FACS REV	6.875	7/1/2007
16753AAK8	US16753AAK88	CHICAGO ILL HEALTH FACS REV	7	7/1/2008
16753AAL6	US16753AAL61	CHICAGO ILL HEALTH FACS REV	7.1	7/1/2009
16753AAM4	US16753AAM45	CHICAGO ILL HEALTH FACS REV	7.2	7/1/2010
16753AAN2	US16753AAN28	CHICAGO ILL HEALTH FACS REV	7.3	7/1/2011
16753AAP7	US16753AAP75	CHICAGO ILL HEALTH FACS REV	7.375	7/1/2012
16753AAQ5	US16753AAQ58	CHICAGO ILL HEALTH FACS REV	7.625	7/1/2028
16753AAR3	US16753AAR32	CHICAGO ILL HEALTH FACS REV	9	7/1/2001
16753AAS1	US16753AAS15	CHICAGO ILL HEALTH FACS REV	9.75	7/1/2004
16753AAT9	US16753AAT97	CHICAGO ILL HEALTH FACS REV	9.875	7/1/2005
16753AAU6	US16753AAU60	CHICAGO ILL HEALTH FACS REV	10	7/1/2006
236141AA5	US236141AA57	DANFORTH TEX HEALTH FACS CORP	4.75	12/1/1998
236141AB3	US236141AB31	DANFORTH TEX HEALTH FACS CORP	5	12/1/1999
236141AC1	US236141AC14	DANFORTH TEX HEALTH FACS CORP	5.25	12/1/2000
236141AD9	US236141AD96	DANFORTH TEX HEALTH FACS CORP	5.5	12/1/2001
236141AE7	US236141AE79	DANFORTH TEX HEALTH FACS CORP	5.75	12/1/2002
236141AF4	US236141AF45	DANFORTH TEX HEALTH FACS CORP	6	12/1/2003
236141AG2	US236141AG28	DANFORTH TEX HEALTH FACS CORP	6.1	12/1/2004
236141AH0	US236141AH01	DANFORTH TEX HEALTH FACS CORP	6.25	12/1/2005
236141AJ6	US236141AJ66	DANFORTH TEX HEALTH FACS CORP	6.5	12/1/2006
236141AK3	US236141AK30	DANFORTH TEX HEALTH FACS CORP	6.75	12/1/2007
236141AL1	US236141AL13	DANFORTH TEX HEALTH FACS CORP	7	12/1/2008
236141AM9	US236141AM95	DANFORTH TEX HEALTH FACS CORP	7.25	12/1/2009
236141AN7	US236141AN78	DANFORTH TEX HEALTH FACS CORP	7.4	12/1/2010
236141AP2	US236141AP27	DANFORTH TEX HEALTH FACS CORP	7.6	12/1/2011
236141AQ0	US236141AQ00	DANFORTH TEX HEALTH FACS CORP	8.125	12/1/2026
236141AR8	US236141AR82	DANFORTH TEX HEALTH FACS CORP	9.25	12/1/2000
236141AS6	US236141AS65	DANFORTH TEX HEALTH FACS CORP	9.5	12/1/2004
236141AT4	US236141AT49	DANFORTH TEX HEALTH FACS CORP	5.25	3/1/1999
236141AU1	US236141AU12	DANFORTH TEX HEALTH FACS CORP	5.5	3/1/2000
236141AV9	US236141AV94	DANFORTH TEX HEALTH FACS CORP	5.75	3/1/2001

CUSIP	ISIN	ISSUER	Coupon	Maturity
236141AW7	US236141AW77	DANFORTH TEX HEALTH FACS CORP	6	3/1/2002
236141AX5	US236141AX50	DANFORTH TEX HEALTH FACS CORP	6.2	3/1/2003
236141AY3	US236141AY34	DANFORTH TEX HEALTH FACS CORP	6.4	3/1/2004
236141AZ0	US236141AZ09	DANFORTH TEX HEALTH FACS CORP	6.6	3/1/2005
236141BA4	US236141BA49	DANFORTH TEX HEALTH FACS CORP	6.75	3/1/2006
236141BB2	US236141BB22	DANFORTH TEX HEALTH FACS CORP	7	3/1/2007
236141BC0	US236141BC05	DANFORTH TEX HEALTH FACS CORP	7.2	3/1/2008
236141BD8	US236141BD87	DANFORTH TEX HEALTH FACS CORP	7.4	3/1/2009
236141BE6	US236141BE60	DANFORTH TEX HEALTH FACS CORP	7.6	3/1/2010
236141BF3	US236141BF36	DANFORTH TEX HEALTH FACS CORP	7.8	3/1/2011
236141BG1	US236141BG19	DANFORTH TEX HEALTH FACS CORP	8	3/1/2012
236141BH9	US236141BH91	DANFORTH TEX HEALTH FACS CORP	8.25	3/1/2027
236141BJ5	US236141BJ57	DANFORTH TEX HEALTH FACS CORP	10	3/1/2001
236141BK2	US236141BK21	DANFORTH TEX HEALTH FACS CORP	10	3/1/2005
236141BL0	US236141BL04	DANFORTH TEX HEALTH FACS CORP	10	3/1/1999
236141BM8	US236141BM86	DANFORTH TEX HEALTH FACS CORP	10	3/1/2000
236141BN6	US236141BN69	DANFORTH TEX HEALTH FACS CORP	10	3/1/2002
236141BP1	US236141BP18	DANFORTH TEX HEALTH FACS CORP	10	3/1/2003
236141BQ9	US236141BQ90	DANFORTH TEX HEALTH FACS CORP	10	3/1/2004
25041LAA9	US25041LAA98	DESERT HOT SPRINGS CALIF PUB	5	8/1/1999
25041LAB7	US25041LAB71	DESERT HOT SPRINGS CALIF PUB	5.2	8/1/2000
25041LAC5	US25041LAC54	DESERT HOT SPRINGS CALIF PUB	5.4	8/1/2001
25041LAE1	US25041LAE11	DESERT HOT SPRINGS CALIF PUB	5.7	8/1/2003
25041LAF8	US25041LAF85	DESERT HOT SPRINGS CALIF PUB	5.8	8/1/2004
25041LAG6	US25041LAG68	DESERT HOT SPRINGS CALIF PUB	5.9	8/1/2005
25041LAH4	US25041LAH42	DESERT HOT SPRINGS CALIF PUB	6	8/1/2006
25041LAJ0	US25041LAJ08	DESERT HOT SPRINGS CALIF PUB	6.1	8/1/2007
25041LAK7	US25041LAK70	DESERT HOT SPRINGS CALIF PUB	6.15	8/1/2008
25041LAL5	US25041LAL53	DESERT HOT SPRINGS CALIF PUB	6.2	8/1/2009
25041LAM3	US25041LAM37	DESERT HOT SPRINGS CALIF PUB	6.25	8/1/2010
25041LAN1	US25041LAN10	DESERT HOT SPRINGS CALIF PUB	6.3	8/1/2011
25041LAP6	US25041LAP67	DESERT HOT SPRINGS CALIF PUB	6.35	8/1/2012
25041LAQ4	US25041LAQ41	DESERT HOT SPRINGS CALIF PUB	6.4	8/1/2013
25041LAR2	US25041LAR24	DESERT HOT SPRINGS CALIF PUB	6.45	8/1/2014
25041LAS0	US25041LAS07	DESERT HOT SPRINGS CALIF PUB	6.5	8/1/2015
25041LAT8	US25041LAT89	DESERT HOT SPRINGS CALIF PUB	6.55	8/1/2016
25041LAU5	US25041LAU52	DESERT HOT SPRINGS CALIF PUB	6.6	8/1/2017
25041LAV3	US25041LAV36	DESERT HOT SPRINGS CALIF PUB	6.5	8/1/2028
25041LAW1	US25041LAW19	DESERT HOT SPRINGS CALIF PUB	8	8/1/1999
25041LAX9	US25041LAX91	DESERT HOT SPRINGS CALIF PUB	8.25	8/1/2000
25041LAY7	US25041LAY74	DESERT HOT SPRINGS CALIF PUB	8.5	8/1/2001
25041LAZ4	US25041LAZ40	DESERT HOT SPRINGS CALIF PUB	8.75	8/1/2002
25041LBA8	US25041LBA89	DESERT HOT SPRINGS CALIF PUB	9	8/1/2003
25041LBB6	US25041LBB62	DESERT HOT SPRINGS CALIF PUB	9.125	8/1/2004

CUSIP	ISIN	ISSUER	Coupon	Maturity
25041LBC4	US25041LBC46	DESERT HOT SPRINGS CALIF PUB	9.25	8/1/2005
25041LBD2	US25041LBD29	DESERT HOT SPRINGS CALIF PUB	9.375	8/1/2006
25041LBE0	US25041LBE02	DESERT HOT SPRINGS CALIF PUB	9.5	8/1/2007
25041LBF7	US25041LBF76	DESERT HOT SPRINGS CALIF PUB	9.5	8/1/2008
25041LBG5	US25041LBG59	DESERT HOT SPRINGS CALIF PUB	10	8/1/2017
59283TAA8	US59283TAA88	MEXICO BEACH FLA PUB SVC FACS	6	12/1/1999
59283TAB6	US59283TAB61	MEXICO BEACH FLA PUB SVC FACS	6.25	12/1/2000
59283TAC4	US59283TAC45	MEXICO BEACH FLA PUB SVC FACS	6.5	12/1/2001
59283TAD2	US59283TAD28	MEXICO BEACH FLA PUB SVC FACS	6.75	12/1/2002
59283TAE0	US59283TAE01	MEXICO BEACH FLA PUB SVC FACS	7	12/1/2003
59283TAF7	US59283TAF75	MEXICO BEACH FLA PUB SVC FACS	7.1	12/1/2004
59283TAG5	US59283TAG58	MEXICO BEACH FLA PUB SVC FACS	7.2	12/1/2005
59283TAH3	US59283TAH32	MEXICO BEACH FLA PUB SVC FACS	7.3	12/1/2006
59283TAJ9	US59283TAJ97	MEXICO BEACH FLA PUB SVC FACS	7.4	12/1/2007
59283TAK6	US59283TAK60	MEXICO BEACH FLA PUB SVC FACS	7.5	12/1/2008
59283TAL4	US59283TAL44	MEXICO BEACH FLA PUB SVC FACS	7.6	12/1/2009
59283TAM2	US59283TAM27	MEXICO BEACH FLA PUB SVC FACS	7.7	12/1/2010
59283TAN0	US59283TAN00	MEXICO BEACH FLA PUB SVC FACS	7.8	12/1/2011
59283TAP5	US59283TAP57	MEXICO BEACH FLA PUB SVC FACS	7.9	12/1/2012
59283TAQ3	US59283TAQ31	MEXICO BEACH FLA PUB SVC FACS	8	12/1/2027
59283TAR1	US59283TAR14	MEXICO BEACH FLA PUB SVC FACS	9	12/1/1999
59283TAS9	US59283TAS96	MEXICO BEACH FLA PUB SVC FACS	10	12/1/2005
59283TAT7	US59283TAT79	MEXICO BEACH FLA PUB SVC FACS	10	12/1/2006
59283TAU4	US59283TAU43	MEXICO BEACH FLA PUB SVC FACS	5	12/1/1999
59283TAV2	US59283TAV26	MEXICO BEACH FLA PUB SVC FACS	5.2	12/1/2000
59283TAW0	US59283TAW09	MEXICO BEACH FLA PUB SVC FACS	5.4	12/1/2001
59283TAX8	US59283TAX81	MEXICO BEACH FLA PUB SVC FACS	5.6	12/1/2002
59283TAY6	US59283TAY64	MEXICO BEACH FLA PUB SVC FACS	5.8	12/1/2003
59283TAZ3	US59283TAZ30	MEXICO BEACH FLA PUB SVC FACS	6	12/1/2004
59283TBA7	US59283TBA79	MEXICO BEACH FLA PUB SVC FACS	6.2	12/1/2005
59283TBB5	US59283TBB52	MEXICO BEACH FLA PUB SVC FACS	6.4	12/1/2006
59283TBC3	US59283TBC36	MEXICO BEACH FLA PUB SVC FACS	6.6	12/1/2007
59283TBD1	US59283TBD19	MEXICO BEACH FLA PUB SVC FACS	6.8	12/1/2008
59283TBE9	US59283TBE91	MEXICO BEACH FLA PUB SVC FACS	8	12/1/1999
59283TBF6	US59283TBF66	MEXICO BEACH FLA PUB SVC FACS	8.2	12/1/2000
59283TBG4	US59283TBG40	MEXICO BEACH FLA PUB SVC FACS	8.4	12/1/2001
59283TBH2	US59283TBH23	MEXICO BEACH FLA PUB SVC FACS	8.6	12/1/2002
59283TBJ8	US59283TBJ88	MEXICO BEACH FLA PUB SVC FACS	7.5	12/1/2028
59283TBK5	US59283TBK51	MEXICO BEACH FLA PUB SVC FACS	10	12/1/2012
59283TBN9	US59283TBN90	MEXICO BEACH FLA PUB SVC FACS	9	12/1/2005
59283TBP4	US59283TBP49	MEXICO BEACH FLA PUB SVC FACS	9.4	12/1/2006
59283TBQ2	US59283TBQ22	MEXICO BEACH FLA PUB SVC FACS	9.6	12/1/2007
59283TBR0	US59283TBR05	MEXICO BEACH FLA PUB SVC FACS	9.8	12/1/2008
59283TSV3		MEXICO BEACH FLA PUB SVC FACS		

CUSIP	ISIN	ISSUER	Coupon	Maturity
87638LBX7	US87638LBX73	TARRANT CNTY TEX HEALTH FACS	7.75	8/1/2018
87638LCH1	US87638LCH15	TARRANT CNTY TEX HEALTH FACS	6.5	5/1/2004
87638LCJ7	US87638LCJ70	TARRANT CNTY TEX HEALTH FACS	10	5/1/2004
87638LDG2	US87638LDG23	TARRANT CNTY TEX HEALTH FACS	5.25	12/1/2000
87638LDH0	US87638LDH06	TARRANT CNTY TEX HEALTH FACS	5.5	12/1/2001
87638LDJ6	US87638LDJ61	TARRANT CNTY TEX HEALTH FACS	6	12/1/2002
87638LDK3	US87638LDK35	TARRANT CNTY TEX HEALTH FACS	6.1	12/1/2003
87638LDM9	US87638LDM90	TARRANT CNTY TEX HEALTH FACS	6.3	12/1/2005
87638LDP2	US87638LDP22	TARRANT CNTY TEX HEALTH FACS	6.5	12/1/2007
87638LDQ0	US87638LDQ05	TARRANT CNTY TEX HEALTH FACS	6.6	12/1/2008
87638LDR8	US87638LDR87	TARRANT CNTY TEX HEALTH FACS	6.7	12/1/2009
87638LDS6	US87638LDS60	TARRANT CNTY TEX HEALTH FACS	6.8	12/1/2010
87638LDT4	US87638LDT44	TARRANT CNTY TEX HEALTH FACS	6.9	12/1/2011
87638LDU1	US87638LDU17	TARRANT CNTY TEX HEALTH FACS	7	12/1/2012
87638LDV9	US87638LDV99	TARRANT CNTY TEX HEALTH FACS	7	12/1/2013
87638LDW7	US87638LDW72	TARRANT CNTY TEX HEALTH FACS	7	12/1/2014
87638LDY3	US87638LDY39	TARRANT CNTY TEX HEALTH FACS	7.5	12/1/2028
87638LEA4	US87638LEA44	TARRANT CNTY TEX HEALTH FACS	8.5	12/1/2000
87638LEB2	US87638LEB27	TARRANT CNTY TEX HEALTH FACS	9	12/1/2001
87638LEC0	US87638LEC00	TARRANT CNTY TEX HEALTH FACS	9.25	12/1/2002
87638LED8	US87638LED82	TARRANT CNTY TEX HEALTH FACS	9.5	12/1/2003
87638LEE6	US87638LEE65	TARRANT CNTY TEX HEALTH FACS	9.75	12/1/2004
87638LEF3	US87638LEF31	TARRANT CNTY TEX HEALTH FACS	9.875	12/1/2005
87638LEG1	US87638LEG14	TARRANT CNTY TEX HEALTH FACS	10	12/1/2006
87638LEH9	US87638LEH96	TARRANT CNTY TEX HEALTH FACS	10	12/1/2007
87638LEJ5	US87638LEJ52	TARRANT CNTY TEX HEALTH FACS	10	12/1/2008
87638LEK2	US87638LEK26	TARRANT CNTY TEX HEALTH FACS	10	12/1/2009
87638LEL0	US87638LEL09	TARRANT CNTY TEX HEALTH FACS	10	12/1/2010
87638LEM8	US87638LEM81	TARRANT CNTY TEX HEALTH FACS	10	12/1/2011
87638LEN6	US87638LEN64	TARRANT CNTY TEX HEALTH FACS	10	12/1/2012
87638LEP1	US87638LEP13	TARRANT CNTY TEX HEALTH FACS	10	12/1/2013
87638LFI6		TARRANT CNTY TEX HEALTH FACS		
87638LFK1	US87638LFK17	TARRANT CNTY TEX HEALTH FACS	8.25	3/1/2000
87638LFL9	US87638LFL99	TARRANT CNTY TEX HEALTH FACS	8.5	3/1/2001
87638LFM7	US87638LFM72	TARRANT CNTY TEX HEALTH FACS	8.75	3/1/2002
87638LFN5	US87638LFN55	TARRANT CNTY TEX HEALTH FACS	9	3/1/2003
87638LFP0	US87638LFP04	TARRANT CNTY TEX HEALTH FACS	9	3/1/2004
87638LFQ8	US87638LFQ86	TARRANT CNTY TEX HEALTH FACS	9.5	3/1/2005
87638LFR6	US87638LFR69	TARRANT CNTY TEX HEALTH FACS	10	3/1/2009
87638LFU9	US87638LFU98	TARRANT CNTY TEX HEALTH FACS	7.25	3/1/2009
87638LFX3	US87638LFX38	TARRANT CNTY TEX HEALTH FACS	10.25	3/1/2012
87638LFY1	US87638LFY11	TARRANT CNTY TEX HEALTH FACS	7.75	3/1/2029
87638LK41		TARRANT CNTY TEX HEALTH FACS		

Appendix C – Parmalat Securities

Eligible Securities in Parmalat Finanziaria, S.p.A. Settlement (10.5 million shares)

Parmalat Securities include any of the securities listed below, as well as any other security issued by Parmalat

CUSIP/ID	ISIN	ISSUER NAME	ISSUE DESCRIPTION
	IT0003826473	PARMALAT SPA	ORDINARY SHARES
073913AB1	US073913AB18	BEATRICE FOODS: PARMALAT FINANZIARIA	
		DAIRY HOLDINGS LTD.	
G3616#AB		FOOD HOLDING LTD	
P7631ZAG	XS0073339433	PARMALAT BRASIL ADMINISTRACAO	NTS
70175KD20	XS0072522690	PARMALAT BRAZIL PARFINO	STRUCTURED NOTE: 9.125% TO Jan 2000 then 9.75%
70175L...	KYG693264064	PARMALAT CAPITAL FINANCE	Issue, 9.375%, Perpetual, Par 1.01
70175L204	KYG693264074	PARMALAT CAPITAL FINANCE	Floating
70175L303	KYG693264084	PARMALAT CAPITAL FINANCE	Floating
70175L402	US70175L4023	PARMALAT CAPITAL FINANCE	144A Issue, 9.375%, Perpetual, Par 1.00
G6932NAB	XS0089553365	PARMALAT CAPITAL FINANCE LTD	NTS. SENIOR
N6863MAA	XS0084903847	PARMALAT CAPITAL NETHERLANDS BV	1 % 1998-21.12.05 CONV. SENIOR
C7196#AA		PARMALAT DAIRY & BAKERY INC.	
C7196#AB		PARMALAT DAIRY & BAKERY INC.	
C7196#AC		PARMALAT DAIRY & BAKERY INC.	
C7196#AD		PARMALAT DAIRY & BAKERY INC.	
C7196#AE		PARMALAT DAIRY & BAKERY INC.	
C7196#AF		PARMALAT DAIRY & BAKERY INC.	
C7196#AG		PARMALAT DAIRY & BAKERY INC.	
C7196#AH		PARMALAT DAIRY & BAKERY INC.	
C7196#AL		PARMALAT DAIRY & BAKERY INC.	
C7196#AM		PARMALAT DAIRY & BAKERY INC.	
9999VF551	XS0135579349	PARMALAT FINANCE CORP BV	
9999VN711	XS0170717184	PARMALAT FINANCE CORP BV	QUARTERLY EUROBO+305BP
9999VND97	XS0100135770	PARMALAT FINANCE CORP BV	4.25% TO 8/01 0.95* 10 YR €CMS Rate Thereafter
9999VSMY1	XS0171287872	PARMALAT FINANCE CORP BV	
9999XQ4K3	XS0171288177	PARMALAT FINANCE CORP BV	
N6863#AA	XS0110650586	PARMALAT FINANCE CORP BV	3.65 % EURO NOTE
N6863#AB		PARMALAT FINANCE CORP BV	

CUSIP/ID	ISIN	ISSUER NAME	ISSUE DESCRIPTION
N6863JAC	XS0083921881	PARMALAT FINANCE CORP BV	NTS
N6863JAD	XS0085752748	PARMALAT FINANCE CORP BV	(NO MIN.) NOTES FLOATING RATE
N6863JAF	XS0098549164	PARMALAT FINANCE CORP BV	NTS. TRANCHE 1
N6863JAG	XS0098549677	PARMALAT FINANCE CORP BV	NTS TRANCHE 2 VAR RATE
N6863JAJ	XS0100837458	PARMALAT FINANCE CORP BV	NTS. TRANCHE 2
N6863JAM	XS0108693077	PARMALAT FINANCE CORP BV	6 1/4 % EURO MEDIUM-TERM NOTES 2000-7.2.05 TRANCHE
N6863JAP	XS0123321068	PARMALAT FINANCE CORP BV	6 % NOTES 2001-6.2.06
N6863JAQ	XS0106583577	PARMALAT FINANCE CORP BV	6 1/4 % NOTES 2000-7.2.05
N6863JAR	XS0111622402	PARMALAT FINANCE CORP BV	NTS
N6863YAA	XS0118659688	PARMALAT FINANCE CORP BV	7 % NOTES 2000-23.10.07
N6863YAB	XS0125198423	PARMALAT FINANCE CORP BV	
N6863YAC	XS0132599175	PARMALAT FINANCE CORP BV	6.8 % EURO MEDIUM-TERM NOTES 2001-25.7.08
N6863YAE	XS0140751941	PARMALAT FINANCE CORP BV	5 7/8 % NOTES 2002-18.1.07 SENIOR
N6863YAG	XS0143261542	PARMALAT FINANCE CORP BV	5 7/8 % NOTES 2002-18.1.07 SENIOR TRANCHE 2
N6863YAL	XS0176831013	PARMALAT FINANCE CORP BV	6 1/8 % EURO MEDIUM-TERM NOTES 2003-29.9.10 SENIOR
N6864YAH	XS0156987058	PARMALAT FINANCE CORP BV	5 1/4 % EURO MEDIUM-TERM NOTES 2002-13.12.04
N686JAE	XS0095639620	PARMALAT FINANCE CORP BV	NTS.
903993PZ0	GB0054047484	PARMALAT FINANZIARIA SPA	
T7439KAD	IT0000960044	PARMALAT FINANZIARIA SPA	BDS
T7439QAA	IT0001157202	PARMALAT FINANZIARIA SPA MILANO	NTS
N6863RAA	XS0124248922	PARMALAT NETHERLANDS BV	7/8 % NOTES 2001-30.6.21 CONV.
N7017#AF		PARMALAT NETHERLANDS BV	
N7017*AB		PARMALAT NETHERLANDS BV	
N7017*AD		PARMALAT NETHERLANDS BV	
		PARMALAT PART. DO BRAZIL LIMITADA	
T7017#AA		PARMALAT S P A	
G3616#AA		PARMALAT S.P.A. (FOOD HOLDINGS) SERIES A	
L7528810	XS0158370121	PARMALAT SOPARFI SA LUXEMBOURG	0 % NOTES 2002-12.12.22 CONV. SENIOR
L75288AA	XS0146388656	PARMALAT SOPARFI SA LUXEMBOURG	6 1/8 % NOTES 2002-23.5.32 CONV. SUBORD. REG-S
		PARMALAT TR II FIRST	
90348#AA		PARMALAT TR II SECOND	
70176#AA		PARMALAT TR III	
90348#AB		PARMALAT TR III	

CUSIP/ID	ISIN	ISSUER NAME	ISSUE DESCRIPTION
90356#AB		USPP 2001 TRUST	
90356#AC		USPP 2001 TRUST	
90356#AA		USPP 2002 TRUST	

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Monday, December 15, 2008 3:12 PM
To:	Stroock, Naomi <nstroock@labaton.com>
Cc:	Ng, Cindy <CNg@labaton.com>; Chan, Cindy <CChan@labaton.com>
Subject:	RE: Overpayment on Garrett Payment for [redacted]

we will have other amounts to pay him and can deduct then

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Stroock, Naomi
Sent: Monday, December 15, 2008 12:13 PM
To: Keller, Christopher J.
Cc: Ng, Cindy
Subject: Overpayment on Garrett Payment for [redacted]

We missed this and did not deduct $10,000 from the payment made to Garrett for [redacted]. Do we owe them anything in the future from which we can deduct the $10k or can we ask them to return the $10,000?

-----Original Message-----
From: Keller, Christopher J.
Sent: Tuesday, July 29, 2008 12:29 PM
To: Ng, Cindy; Belfi, Eric J.
Cc: Chan, Cindy; Lee, Kim; Stroock, Naomi
Subject: RE: Garrett wiring

I approve, and next payment to Garrett will be cut by 10,000.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com

www.Labaton.com

-----Original Message-----
From: Ng, Cindy
Sent: Tuesday, July 29, 2008 12:28 PM
To: Belfi, Eric J.
Cc: Chan, Cindy; Keller, Christopher J.; Lee, Kim; Stroock, Naomi
Subject: RE: Garrett wiring

We only reserved $150,000 for local counsel. The fee calculation to Garrett was base on $150,000, which means we overpay them by $10,000. Should Garrett return $10,000 or perhaps we can deduct this amount from future cases? In addition, we will need to transfer $50,000 from our regular account to IOLA account in order to send the wire to Chargois & Herron. Please approve.

-----Original Message-----
From: Belfi, Eric J.
Sent: Tuesday, July 29, 2008 12:01 PM
To: Chan, Cindy
Cc: Ng, Cindy
Subject: Re: Garrett wiring

$200,000.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
cbelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Chan, Cindy
To: Belfi, Eric J.
Cc: Ng, Cindy
Sent: Tue Jul 29 11:11:43 2008
Subject: RE: Garrett wiring

Hi Eric,

We have the wiring info from Nicole but how much did Damon agree to?

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, July 25, 2008 11:47 AM
To: Zeiss, Nicole; Chan, Cindy; Keller, Christopher J.
Subject: Re: Garrett wiring

I am trying to track down Damon.

Eric J. Belfi
Partner
Labaton Sucharow LLP

140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Zeiss, Nicole
To: Chan, Cindy; Keller, Christopher J.; Belfi, Eric J.
Sent: Fri Jul 25 11:32:21 2008
Subject: Garrett wiring

Do you have his wiring instructions on file? Should Damon chargois get a check or wire? This is for [redacted].

Sent from my BlackBerry Wireless Handheld

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Saturday, February 21, 2009 2:51 AM
To:	'damon@cmhllp.com'; Belfi, Eric J. <EBelfi@labaton.com>
Subject:	Eric Belfi

Damon, sorry for the delay. I'm buried. We are fine with the terms you propose. One point of clarification, the 20% fee you earn should be on what labaton earns (which is total fee awarded less local, or if there is a split with another firm). If you have time feel free to draft, but not necessary since I will get to it next week.

Looking forward to some tropical business development.

Be well.

Chris

Christopher Keller, Esq.
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: Belfi, Eric J.; Keller, Christopher J.
Sent: Thu Feb 19 12:41:04 2009
Subject: FW: Eric Belfi

Guys, do I need to draft letter agreement? I don't mind bc I want to get this off of my todo list. Eric, to address Chris's concern about judges slashing fees, we can add a provision that says CMH's interest falls to 10% if the judge awards a gross attorney fee that falls below 15%. Let me know, boys.

From: Elaine Doyal
Sent: Thursday, February 19, 2009 11:32 AM
To: Damon Chargois
Subject: Eric Belfi

From: Damon Chargois
Sent: Wednesday, February 11, 2009 10:27 AM
To: Belfi, Eric J.; ckeller@labaton.com
Cc: Elaine Doyal
Subject: RE: We are at the pool bar

Great seeing you again, Eric and Chris. Eric, you told me that Chris is working on an agreement in writing, so I am including him on this email. I don't know how formal you guys want to be with this, but you have probably noticed that I am pretty informal and rely more on our mutual trust and respect for each other to carry the day. That said, I think it's important for us to lay out our understanding of our agreement with respect to the gathering of pension fund business.

We have agreed that Chargois & Herron, LLP, shall receive 20% of the gross attorney fees recovered by Labaton Sucharow on any litigation or claims process brought on behalf of the Arkansas Teachers' Retirement Pension Fund. We have also agreed to the same payment terms shall apply to any other pension fund or retirement fund representation that Labaton Sucharow obtains via contacts through Chargois & Herron, LLP. This includes introductions to funds in Atlanta, Richmond and Georgia via Frank Stout, in addition to Chargois & Herron, LLP (CMH), and CMH's contacts.

Eric, much earlier you and I had agreed that CMH would receive 10% of gross attorney fees received by Labaton for any pension fund business that came by way of contacts through Bailey, Bailey & Perrin. While I initially put you guys together, in addition to getting us an audience with poppa Bailey, I haven't kept up with what you are doing with that firm. My experience with that firm is that they would like to make and keep as much of the fees generated through their contacts as possible. Please advise me on whether our deal with you is creating an issue.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, February 10, 2009 12:28 PM
To: acc@hgk.com; Damon Chargois
Subject: We are at the pool bar

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
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Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Saturday, April 4, 2009 5:07 AM
To:	Belfi, Eric J. <EBelfi@labaton.com>; 'tim@cmhllp.com'
Subject:	Re: Colonial BancGroup

Great

Christopher Keller, Esq.
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: tim@cmhllp.com <tim@cmhllp.com>
Cc: Keller, Christopher J.
Sent: Fri Apr 03 23:25:10 2009
Subject: FW: Colonial BancGroup

FYI.

From: George Hopkins [mailto:georgeh@artrs.gov]
Sent: Friday, April 03, 2009 11:16 PM
To: Belfi, Eric J.
Subject: Re: Colonial BancGroup

I gave it to Christa yesterday. You may call her to ensure you get it. I think she was trying to find a copy of the complaint to ensure she could certify she read the complaint. Ghop

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 3 Apr 2009 23:08:02 -0400
To: <georgeh@artrs.gov>
Subject: RE: Colonial BancGroup

Dear George:

I do not believe that I mentioned to you in our call that we need to file the papers on Tuesday, April 7 so if you could have the certification signed on Monday that would be great appreciated.

Thank you and have a good weekend.

Best regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway

New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com <http://www.labaton.com/>

From: Belfi, Eric J.
Sent: Monday, March 30, 2009 11:47 PM
To: georgeh@artrs.gov
Cc: Ching, Natalie
Subject: Colonial BancGroup

Dear George:

I have attached our case report on Colonial BancGroup.

We look forward to the opportunity of representing Arkansas Teachers Retirement System.

As we discussed on the phone, we are have been retained by the [redacted] and they are agreeable to making a joint motion.

In order for us to make the motion on behalf of ATRS, please sign the attached certification and have it scanned and emailed back to us.

If you have any questions, do not hesitate to contact me.

Best regards,

Eric

From: George Hopkins [mailto:georgeh@artrs.gov]
Sent: Monday, March 30, 2009 1:17 PM
To: Belfi, Eric J.
Subject: Re: Call

I have since decided to agree to go on this matter. Did you get that information. Ghop

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Mon, 30 Mar 2009 13:05:08 -0400
To: <georgeh@artrs.gov>
Subject: Call

Dear George:

Thank you for taking the time to speak with Natalie and I last week.

I wanted to provide you with my contact information.

I know that we had discussed meeting at the end of April/early May and I wanted to advise you that I will be at a conference in Little Rock from May 5 to 7 so it would be ideal if we could meet then.

I hope things are going well for you with the legislature.

Best regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

P Please consider the environment before printing this email.

From:	Keller, Christopher J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC>
Sent:	Thursday, April 9, 2009 6:48 PM
To:	=SMTP:damon@cmhllp.com; Belfi, Eric J. <EBelfi@labaton.com>
Cc:	=SMTP:Elaine@cmhllp.com; =SMTP:jeni@cmhllp.com
Subject:	Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Very well done indeed. If I may, I will add some of the usual stuff we have in our agreements and see if you can live with it.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Thursday, April 09, 2009 11:33 AM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Elaine Doyal; Jeni Farrish
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Okay boys. Take a gander and sign if it meets with your approval. Eric, pursuant to our discussion following our business development summit in February, I inserted an attorney fee reduction statement that says CMH only gets 10% of the gross attorney fee if a judge awards less than 15% gross attorney fee to Labaton in cases where the total class award is $25,000,000 or less. Even though the attached letter agreement is perfectly written, please make whatever changes you think appropriate and send back.

From:	Damon Chargois <damon@cmhllp.com>
Sent:	Thursday, April 9, 2009 11:33 AM
To:	Belfi, Eric J. <EBelfi@labaton.com>; Keller, Christopher J. <ckeller@labaton.com>
Cc:	Elaine Doyal <Elaine@cmhllp.com>; Jeni Farrish <jeni@cmhllp.com>
Subject:	Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09
Attach:	Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09.doc

Okay boys. Take a gander and sign if it meets with your approval. Eric, pursuant to our discussion following our business development summit in February, I inserted an attorney fee reduction statement that says CMH only gets 10% of the gross attorney fee if a judge awards less than 15% gross attorney fee to Labaton in cases where the total class award is $25,000,000 or less. Even though the attached letter agreement is perfectly written, please make whatever changes you think appropriate and send back.

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation, brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.

Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

From:	Belfi, Eric J. </O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE>
Sent:	Monday, May 17, 2010 10:32 AM
To:	tim@cmhllp.com; 'damon@cmhllp.com'
Subject:	FW: Follow up

This is one, now we need Goldman.

-----Original Message-----
From: George Hopkins [mailto:georgeh@artrs.gov]
Sent: Sunday, May 16, 2010 3:51 PM
To: Brad Beckworth
Cc: Belfi, Eric J.; ATRS Laura Gilson
Subject: Re: Follow up

I think this is a great plan with a great team. Ghop ------Original Message------
From: Brad Beckworth
To: Ghop
Cc: Eric J. Belfi
Cc: ATRS Laura Gilson
Cc: Ghop
Subject: Re: Follow up
Sent: May 16, 2010 2:37 PM

Thanks George.

Eric and I talked and we are willing to work together. We will get the papers prepared and be in touch.

Have a nice rest of the weekend.

Brad Beckworth
Nix, Patterson & Roach LLP
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333

On May 15, 2010, at 9:33 AM, "George Hopkins" <georgeh@artrs.gov> wrote:

> I think the decision is so close that I cannot make a choice between
> NP and Labaton. The strengths of both firms vary and the combined
> firms has great coverage of all concerns. So I have decided to ask
> the two firms to seek a joint filing on behalf of ATRS. I have added
> both contacts by this email. Let me know if each of you are willing
> to work with the other. Ghop ------Original Message------
> From: Brad Beckworth
> To: Ghop
> Subject: Follow up
> Sent: May 15, 2010 9:23 AM
>
> Hi George,

> It was good seeing you Wednesday. I know you had a busy day and
> appreciate you taking time out for us.
> I wanted to follow up and see where things stand regarding Hartford.
> We are a couple weeks out on the lead plaintiff deadline, so I want to
> make sure we are ready.
> I am available to talk this weekend if you'd like (903-235-7709)----I
> didn't want to call and bother you on a weekend.
>
> Otherwise, I will try you Monday.
>
> Take care,
> Brad
>
>
> Brad Beckworth
> Nix, Patterson & Roach LLP
> 205 Linda Drive
> Daingerfield, Texas 75638
> (903) 645-7333
>
>
>
> ATRS Executive Director

ATRS Executive Director

From:	/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie
Sent:	Friday, February 14, 2014 6:33 PM
To:	'Keller, Christopher J.' <ckeller@labaton.com>
Subject:	BP: Local Counsel for Complaint

I will reach out to Damon.

From: Keller, Christopher J.
Sent: Friday, February 14, 2014 5:02 PM
To: Belfi, Eric J.
Subject: RE: BP: Local Counsel for Complaint

Given how many states we are filing with, there can't be any screw ups. If you're comfortable with Damon, then I am too.

Christopher J. Keller
Partner | Labaton Sucharow LLP
140 Broadway, 34th Fl
New York, NY 10005
Ph. 212-907-0853

From: Belfi, Eric J.
Sent: Friday, February 14, 2014 3:02 PM
To: Keller, Christopher J.
Subject: RE: BP: Local Counsel for Complaint

He said he relationship with Ellison (Judge in the case) is sort of good. He said that he has not spent a lot of time in front of him. Since Arkansas is filing, we will owe him something and this will be a tight margin case so maybe he could do the local cheaply. Also, we are likely doing a lot of following in this case. Do you have someone else in mind?

From: Keller, Christopher J.
Sent: Friday, February 14, 2014 2:28 PM
To: Belfi, Eric J.
Subject: Re: BP: Local Counsel for Complaint

Does he really have the pull he claims? Is he set up for this?

Christopher Keller
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
212-907-0853

On Feb 14, 2014, at 2:05 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

> What do you think about using Damon?

From: Belz, Matthew
Sent: Friday, February 14, 2014 1:53 PM
To: Belfi, Eric J.
Cc: Hoffman, Thomas G.
Subject: BP: Local Counsel for Complaint

Eric,

We will probably need to file the complaint with local counsel in the Houston division of the S.D. Tex., where the MDL is pending. Can you recommend local counsel there? If not, I am happy to email the firm for recommendations.

Thanks,

Matt

Matthew R. Belz
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
(212) 907-0858
mbelz@labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/9/2015 2:35:46 PM
To: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=First Administrative Group/cn=Recipients/cn=belfie]
Subject: Fwd: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09
Attachments: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09.doc; ATT00001..htm

Christopher Keller
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
212-907-0853

Begin forwarded message:

From: Damon Chargois <damon@cmhllp.com>
Date: April 9, 2009 at 11:32:46 AM EDT
To: "Belfi, Eric J." <EBelfi@labaton.com>, "Keller, Christopher J." <ckeller@labaton.com>
Cc: Elaine Doyal <Elaine@cmhllp.com>, Jeni Farrish <jeni@cmhllp.com>
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Okay boys. Take a gander and sign if it meets with your approval. Eric, pursuant to our discussion following our business development summit in February, I inserted an attorney fee reduction statement that says CMH only gets 10% of the gross attorney fee if a judge awards less than 15% gross attorney fee to Labaton in cases where the total class award is $25,000,000 or less. Even though the attached letter agreement is perfectly written, please make whatever changes you think appropriate and send back.

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation, brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.

Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/9/2015 2:39:01 PM
To: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=First Administrative Group/cn=Recipients/cn=belfie]
Subject: Fwd: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)
Attachments: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3).doc; ATT00001..htm

Here was my return draft. Importantly I changed the venue for any dispute to arbitration in Texas or New York. So at least we're out of court.

Christopher Keller
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
212-907-0853

Begin forwarded message:
From: "Keller, Christopher J." <ckeller@labaton.com>
Date: April 22, 2009 at 3:04:08 PM EDT
To: "'damon@cmhllp.com'" <damon@cmhllp.com>
Cc: "Belfi, Eric J." <EBelfi@labaton.com>
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)
Damon, sorry for the long wait. Here are our proposed changes. Hope you are well. Chris

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation ("Clients"), brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

In instances where Clients introduced by CMH serve as sole lead plaintiff or sole class representative, CMH will receive the full 20% fee (the "Fee"). However, there may be instances where one or more clients may be represented by Labaton Sucharow in a particular case and a fee may be owed to other associating counsel. In that event, the amount of the Fee may be reduced commensurate with the contributory losses of the several clients represented by Labaton Sucharow. For instance, if Labaton Sucharow files a motion for the appointment of lead plaintiff with two clients with associating counsel (including a CMH client) with losses totaling $1.5 million, and the CMH client has losses of $1,000,000, then CMH shall receive a Fee of 2/3 of 20%, or 13.35%. Any such arrangement, however, shall be disclosed and agreed to at the inception of the case or at such later date if the need for additional or substitute clients later arises. Labaton Sucharow and CMH are free to discuss other methodologies for an allocation of the Fee under the multiple lead-plaintiff scenario at their mutual discretion.

In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's Fee will fall to ten percent (10%).

It is agreed that CMH will not bare any costs, expenses or payments of any kind whatsoever in relation to the examination or investigation of a potential cause of action, the litigation of the action or any other related costs, expenses or payments.

The parties hereto expressly understand and agree that information exchanged between the firms may contain confidential information, such as client lists, firm strategies, litigation strategies and other sensitive information constitutes confidential and/or privileged information. Each of the parties mutually agree that they shall not use or disclose such confidential information for any purpose other than in the performance of the services under this Agreement.

Any dispute between the parties hereto shall be resolved by arbitration conducted pursuant to the applicable rules of the American Arbitration Association in Galveston County, Texas or New York City, New York. In any such arbitration, the arbitrator is authorized to award attorney's fees to the prevailing party or parties if the arbitrator finds that the position of the other party or parties was maintained in bad faith.

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

Message

on behalf of Belfi, Eric J.
Sent: 9/6/2016 1:17:24 AM
To: Keller, Christopher J. [/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=kellerc]
Subject: Spectrum and Vocera settlement

Perfect. I will be in the office then.

From: Keller, Christopher J.
Sent: Monday, September 05, 2016 9:17 PM
To: Belfi, Eric J. <EBelfi@labaton.com>
Subject: Fwd: Spectrum and Vocera settlement

Let's discuss tomorrow. I'm traveling in the morning but will land around 1130 and then I'll be in the car for an hour. Does that work?

Christopher Keller

Partner || Labaton Sucharow LLP

140 Broadway

New York, NY 10005

212-907-0853

Begin forwarded message:

From: Damon Chargois <damon@cmhllp.com <mailto:damon@cmhllp.com> >
Date: September 2, 2016 at 10:49:17 AM EDT
To: "ckeller@labaton.com <mailto:ckeller@labaton.com> " <ckeller@labaton.com <mailto:ckeller@labaton.com> >
Subject: Spectrum and Vocera settlement

Chris, we will adjust our arrangement with Labaton with respect to the Spectrum Pharmaceuticals and Vocera Communications by lowering our share of the fee from 20% down to 15%, meaning after the 36% loss allocation for ATRS in Vocera is applied to the full fee award (36% of 1,956,564.00), Labaton pays us 15% of that number (15% of 704,363.04). For Spectrum, since ATRS is the only client, Labaton pays us 15% of the fee.

Chris, I have to point out that for every ATRS case settlement since the very beginning of our arrangement, Labaton has called and asked us to take a haircut each time and we have worked with Labaton by agreeing to a reduced amount. The last time-- in the Colonial Bank case-- Eric promised me that if we took a rather sizable haircut in that case, then Labaton would not seek a haircut the next time and that he didn't expect to seek haircuts going forward. Feel free to discuss with Eric if you like. You've explained the changing situation at Labaton and I appreciate your candor, but I need you to understand the position that your request puts me in, especially in light of what I was previously told and what we relied on to our detriment. As you know, we dedicated a ton of money, energy, political favors, time and effort to secure ATRS for Labaton at the start of this thing based on the promise of 20% of Labaton's attorney fees received in any ATRS case where Labaton was appointed lead. With that said and taken into consideration, the 15% is as low as we can go in Spectrum Pharmaceuticals and Vocera.

Sent from my iPhone

Labaton Sucharow

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

Eric J. Belfi
Partner
212 907 0878 direct
212 883 7078 fax
email ebelfi@labaton.com

Damon J. Chargois
Managing Partner
281 444 0604 telephone
281 440 0124 fax
email damon@cmhllp.com

July 30, 2008

VIA FEDERAL EXPRESS

Christa S. Clark
Chief Counsel
Arkansas Teacher Retirement System
1400 West Third Street
Little Rock, AR 72201

Re: Request For Qualifications For Outside Legal Counsel
Securities Litigation, Class Action Monitoring and Advice; Asset Recovery

Dear Ms. Clark:

In response to the above-referenced Request for Qualifications (the "RFQ"), Labaton Sucharow LLP ("Labaton Sucharow") and Chargois & Herron, LLP ("Chargois & Herron") respectfully submit three stapled copies of our response, along with the required forms including: the Contact Data Sheet, the Contract and Grant Disclosure Certification Form, and the State of Arkansas Professional/Consultant Services Contract.

We believe that the resources, knowledge, integrity and experience of Labaton Sucharow and Chargois & Herron, will provide the Arkansas Teacher Retirement System ("ATRS") with outstanding securities litigation representation. We hope that we can be of further assistance to you in this matter. Please do not hesitate to contact us if you have any questions regarding our response to the RFQ.

Very truly yours,

Eric J. Belfi
Partner
Labaton Sucharow LLP

Damon J. Chargois
Managing Partner
Chargois & Herron, LLP

ARKANSAS TEACHER RETIREMENT SYSTEM

CONTACT DATA SHEET FOR

REQUEST FOR PROPOSALS ("RFQ") FOR OUTSIDE COUNSEL

TO BE COMPLETED AND SUBMITTED WITH YOUR RESPONSE.

Full legal firm name: Labaton Sucharow LLP

Name of lead attorney contact: Eric J. Belfi

Lead attorney's telephone no.: 212 907 0878

Lead attorney's facsimile no.: 212 883 7078

Lead attorney's e-mail address: ebelfi@labaton.com

Firm Internet address: www.labaton.com

Firm main switchboard no.: 212 907 0700

Firm main mailing address: 140 Broadway New York, NY 10005

Firm main street address: 140 Broadway New York, NY 10005

Lead attorney's mailing address if different from above: _____

State where lead attorney licensed: Mr. Belfi is admitted to practice in the State of New York

States where attorneys are licensed: Connecticut, Massachussets, New Jersey, New York

Range of hourly rates proposed: Eric Belfi's reduced hourly rate is $350.00

ARKANSAS TEACHER RETIREMENT SYSTEM

CONTACT DATA SHEET FOR

REQUEST FOR PROPOSALS ("RFQ") FOR OUTSIDE COUNSEL

TO BE COMPLETED AND SUBMITTED WITH YOUR RESPONSE.

Full legal firm name: Chargois & Herron, LLP

Name of lead attorney contact: Damon J. Chargois

Lead attorney's telephone no.: 281 444-0604

Lead attorney's facsimile no.: 281 440-0124

Lead attorney's e-mail address: damon@cmhllp.com

Firm Internet address:

Firm main switchboard no.: 281 444-0604

Firm main mailing address: 2201 Timberloch Place, Suite 110, The Woodlands, Tx 77380

Firm main street address: 2201 Timberloch Place, Suite 110, The Woodlands, Texas 77380

Lead attorney's mailing address if different from above: N/A

State where lead attorney licensed: Texas and Arkansas

States where attorneys are licensed: Texas and Arkansas

Range of hourly rates proposed: $350.00

CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM

Failure to complete all of the following information may result in a delay in obtaining a contract, lease, purchase agreement, or grant award with any Arkansas State Agency.

SUBCONTRACTOR: ☒ Yes ☐ No

SUBCONTRACTOR NAME: Labaton Sucharow LLP

TAXPAYER ID NAME:

IS THIS FOR: ☐ Goods? ☒ Services? ☐ Both?

YOUR LAST NAME: Belfi FIRST NAME: Eric M.I.: J.

ADDRESS: 140 Broadway

CITY: New York STATE: NY ZIP CODE: 10005 COUNTRY: USA

AS A CONDITION OF OBTAINING, EXTENDING, AMENDING, OR RENEWING A CONTRACT, LEASE, PURCHASE AGREEMENT, OR GRANT AWARD WITH ANY ARKANSAS STATE AGENCY, THE FOLLOWING INFORMATION MUST BE DISCLOSED:

FOR INDIVIDUALS*

Indicate below if: you, your spouse or the brother, sister, parent, or child of you or your spouse *is* a current or former: member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee:

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/ commission, data entry, etc.]	For How Long?		What is the person(s) name and how are they related to you? [i.e., Jane Q. Public, spouse, John Q. Public, Jr., child, etc.]	
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Relation
General Assembly							
Constitutional Officer							
State Board or Commission Member							
State Employee							

☐ None of the above applies

FOR AN ENTITY (BUSINESS)*

Indicate below if any of the following persons, current or former, hold any position of control or hold any ownership interest of 10% or greater in the entity: member of the General Assembly, Constitutional Officer, State Board or Commission Member, State Employee, or the spouse, brother, sister, parent, or child of a member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee. Position of control means the power to direct the purchasing policies or influence the management of the entity.

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/commission, data entry, etc.]	For How Long?		What is the person(s) name and what is his/her % of ownership interest and/or what is his/her position of control?		
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Ownership Interest (%)	Position of Control
General Assembly								
Constitutional Officer								
State Board or Commission Member								
State Employee								

☒ None of the above applies

Contract and Grant Disclosure and Certification Form

Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this contract. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the agency.

As an additional condition of obtaining, extending, amending, or renewing a contract with a *state agency* I agree as follows:

1. Prior to entering into any agreement with any subcontractor, prior or subsequent to the contract date, I will require the subcontractor to complete a **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM**. Subcontractor shall mean any person or entity with whom I enter an agreement whereby I assign or otherwise delegate to the person or entity, for consideration, all, or any part, of the performance required of me under the terms of my contract with the state agency.

2. I will include the following language as a part of any agreement with a subcontractor:

   Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this subcontract. The party who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the contractor.

3. No later than ten (10) days after entering into any agreement with a subcontractor, whether prior or subsequent to the contract date, I will mail a copy of the **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM** completed by the subcontractor and a statement containing the dollar amount of the subcontract to the state agency.

I certify under penalty of perjury, to the best of my knowledge and belief, all of the above information is true and correct and that I agree to the subcontractor disclosure conditions stated herein.

Signature Eric J. Belfi Title Partner Date 7/30/08

Vendor Contact Person Eric Belfi Title Partner Phone No. 212-907-0878

Agency use only

Agency Number_____ Agency Name_____ Agency Contact Person_____ Contact Phone No._____ Contract or Grant No._____

CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM

Failure to complete all of the following information may result in a delay in obtaining a contract, lease, purchase agreement, or grant award with any Arkansas State Agency.

SUBCONTRACTOR: [X] Yes [ ] No

SUBCONTRACTOR NAME: Chargois & Herron, LLP

TAXPAYER ID NAME: 20-0927686

IS THIS FOR: [ ] Goods? [X] Services? [ ] Both?

YOUR LAST NAME: Chargois FIRST NAME: Damon M.I.: J.

ADDRESS: 2201 Timberloch Place, Suite 110

CITY: The Woodlands STATE: TX ZIP CODE: 77380 COUNTRY: USA

AS A CONDITION OF OBTAINING, EXTENDING, AMENDING, OR RENEWING A CONTRACT, LEASE, PURCHASE AGREEMENT, OR GRANT AWARD WITH ANY ARKANSAS STATE AGENCY, THE FOLLOWING INFORMATION MUST BE DISCLOSED:

FOR INDIVIDUALS*

Indicate below if: you, your spouse or the brother, sister, parent, or child of you or your spouse *is* a current or former: member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee:

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/ commission, data entry, etc.]	For How Long?		What is the person(s) name and how are they related to you? [i.e., Jane Q. Public, spouse, John Q. Public, Jr., child, etc.]	
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Relation
General Assembly							
Constitutional Officer							
State Board or Commission Member							
State Employee							

[ ] None of the above applies

FOR AN ENTITY (BUSINESS)*

Indicate below if any of the following persons, current or former, hold any position of control or hold any ownership interest of 10% or greater in the entity: member of the General Assembly, Constitutional Officer, State Board or Commission Member, State Employee, or the spouse, brother, sister, parent, or child of a member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee. Position of control means the power to direct the purchasing policies or influence the management of the entity.

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/commission, data entry, etc.]	For How Long?		What is the person(s) name and what is his/her % of ownership interest and/or what is his/her position of control?		
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Ownership Interest (%)	Position of Control
General Assembly								
Constitutional Officer								
State Board or Commission Member								
State Employee								

[X] None of the above applies

Contract and Grant Disclosure and Certification Form

Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this contract. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the agency.

As an additional condition of obtaining, extending, amending, or renewing a contract with a *state agency* I agree as follows:

1. Prior to entering into any agreement with any subcontractor, prior or subsequent to the contract date, I will require the subcontractor to complete a **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM.** Subcontractor shall mean any person or entity with whom I enter an agreement whereby I assign or otherwise delegate to the person or entity, for consideration, all, or any part, of the performance required of me under the terms of my contract with the state agency.

2. I will include the following language as a part of any agreement with a subcontractor:

   Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this subcontract. The party who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the contractor.

3. No later than ten (10) days after entering into any agreement with a subcontractor, whether prior or subsequent to the contract date, I will mail a copy of the **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM** completed by the subcontractor and a statement containing the dollar amount of the subcontract to the state agency.

I certify under penalty of perjury, to the best of my knowledge and belief, all of the above information is true and correct and that I agree to the subcontractor disclosure conditions stated herein.

Signature _____ Title Partner Date 07-21-08

Vendor Contact Person Damon Chargois Title Partner Phone No. (281) 444-0604

Agency use only

Agency Number _____ Agency Name _____ Agency Contact Person _____ Contact Phone No. _____ Contract or Grant No. _____

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

CONTRACT #		FEDERAL I.D. #	
VENDOR #		MINORITY VENDOR	YES NO

1. **PROCUREMENT:**
Check appropriate box below for the method of procurement for this contract:
ABA Criteria ☐ Request for Proposal ☐ Competitive Bid ☐ Request for Qualifications ☑
Intergovernmental ☐ Emergency ☐
Sole Source by Justification ☐ (Must be attached). Sole Source by Intent to Award ☐
Sole Source by Law ☐ Act # _____ or Statute # _____

2. **DATES, PARTIES:**
The term of this agreement shall begin on _____ and shall end on _____.

State of Arkansas is hereinafter referred to as the agency and vendor is here after referred to as the Contractor.

AGENCY NUMBER/NAME	
AGENCY NUMBER/NAME	

CONTRACTOR NAME	Labaton Sucharow LLP
ADDRESS	140 Broadway, New York, NY 10005

3. **CALCULATIONS OF COMPENSATION:**
For work to be accomplished under this agreement, the Contractor agrees to provide the personnel at the rates scheduled for each level of consulting personnel as listed herein. Calculations of compensation and reimbursable expenses shall only be listed in this section. If additional space is required, a continuation sheet may be used as an attachment.

Labaton Sucharow and Chargois and Herron will only be compensated on a contingency fee basis after court approval at the end of a case. Please refer to response in Section 5.10 for billing rates for all legal professionals.

LEVEL OF PERSONNEL	NUMBER	COMPENSATION RATE	TOTAL FOR LEVEL
Senior Partners		need info	
Junior Partners		need info	
Senior Associates		need info	
Junior Associates		need info	
Paralegals		need info	

Total compensation exclusive of expense reimbursement $ _____

REIMBURSABLE EXPENSES ITEM (Specify)	ESTIMATED RATE OF REIMB.	TOTAL

Total reimbursable expense $ _____

Total compensation inclusive of expense reimbursement $ _____

Projected total cost of contract if all available periods of extensions are completed	$

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

4. **SOURCE OF FUNDS:**
Complete appropriate box(es) below to total 100% of the funding in this contract.

% Federal Funds	% State Funds	% Cash Funds	% Trust Funds	% Other Funds

Identify the source of funds for the following:

Federal Funds	
Cash Funds	
Trust Funds	
Other Funds	

MUST BE SPECIFIC (i.e. fees, tuition, agricultural sales, bond proceeds, donations, etc.)

Labaton Sucharow and Chargois & Herron will advance all litigation costs and expect to be reimbursed for those costs only at the end of a case with the approval of the Court, and only out of the total class recovery. In a class action case, reimbursement could range from several hundred thousand dollars to several million dollars, depending on the length and complexity of the case involved.

5. **RENDERING OF COMPENSATION:**
The method(s) of rendering compensation and/or evaluation of satisfactory achievement toward attainment of the agreement listed herein is as follows, or in attachment no. ___ to this agreement.

As the engagement of Labaton Sucharow and Chargois & Herron is on a fully contingent basis, any fee awarded would be subject to Court approval, and only then after review and approval by the client.

6. **OBJECTIVES AND SCOPE:**
State description of services, objectives, and scope to the provided. (DO NOT USE "SEE ATTACHED")

Class action securities litigation and related portfolio monitoring services represent Labaton Sucharow's principal practice area and source of revenue. The firm has substantial experience in advising public pension plans and other institutional investors with regard to securities fraud matters, and has served as lead counsel in numerous securities class actions. Labaton Sucharow also monitors portfolios of state and institutional public pension plans in excess of $1 trillion dollars. Labaton Sucharow's portfolio monitoring services would be provided to ATRS at no cost. Labaton Sucharow seeks to provide securities litigation, class action monitoring and advice services on behalf of the ATRS.

7. **PERFORMANCE STANDARDS:**
List Performance standards for the term of the contract (if necessary, used attachments)

As class action attorneys working on a contingency fee basis, the amount of our compensation is directly related to the degree of success in the litigation.

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

8. **ATTACHMENTS:**
List ALL attachments to this contract by attachment number:

_____
_____
_____
_____
_____

9. **CERTIFICATION OF CONTRACTOR**

A. "I, Eric J. Belfi (Contractor) Partner (Title)
certify under penalty of perjury that, to the best of my knowledge and belief, no regular full-time or part-time employee of any State agency of the State of Arkansas will receive any personal, direct or indirect monetary benefits which would be in violation of the law as a result of the execution of this contract." Where the contractor is a widely-held public corporation, the term 'direct or indirect monetary benefits' "shall not apply to any regular corporate dividends paid to a stockholder of said corporation who is also a State employee and who owns less than ten percent (10%) of the total outstanding stock of the contracting corporation."

B. **List any other contracts or subcontracts you have with any other state government entities. (Not applicable to contracts between Arkansas state agencies.)**

_____
_____

C. **Are you currently engaged in any legal controversies with any state agencies or represent any clients engaged in any controversy with any Arkansas state agency?**

Neither me, Eric J. Belfi, nor Labaton Sucharow is currently engaged in any legal controversies with any state agencies and do not represent any clients engaged in any controversy with any Arkansas state agency.

D. **The contractor agrees to list below, or on an attachment hereto, names, addresses, and relationship of those persons who will be supplying services to the state agency at the time of the execution of the contract. If the names are not known at the time of the execution of the contract, the contractor shall submit the names along with the other information as they become known. Such persons shall, for all purposes, be employees or independent contractors operating under the control of the contractor (sub-contractors), and nothing herein shall be construed to create an employment relationship between the agencies and the persons listed below.**

NAME	RELATIONSHIP
Please see section 5.7 of the attached response for the attorneys who would be assigned to a securities litigation matter on behalf of the ATRS. Other professionals who would be assigned are:	
Jean Bliss	Paralegal Manager
Danette McKenzie	Assistant Paralegal Manager

E. **The agency shall exercise no managerial responsibilities over the contractor or his employees. In carrying out this contract, it is expressly agreed that there is no employment relationship between the contracting parties.**

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

10. DISCLOSURE REQUIRED BY EXECUTIVE ORDER 98-04:
Any contract or amendment to a contract executed by an agency which exceeds $25,000 shall require the contractor to disclose information as required under the terms of Executive Order 98-04 and the Regulations pursuant thereto. The contractor shall also require the subcontractor to disclose the same information. The Contract and Grant Disclosure and Certification Form (Form PCS-D attachment 11-10.3) shall be used for this purpose.

Contracts with another government entity such as a state agency, public education institution, federal government entity, or body of a local government are exempt from disclosure requirements.

The failure of any person or entity to disclose as required under any term of Executive Order 98-04, or the violation of any rule, regulation or policy promulgated by the Department of Finance and Administration pursuant to this Order, shall be considered a material breach of the terms of the contract, lease, purchase agreement, or grant and shall subject the party failing to disclose, or in violation, to all legal remedies available to the Agency under the provisions of existing law.

11. NON-APPROPRIATION CLAUSE:

"In the event the State of Arkansas fails to appropriate funds or make monies available for any biennial period covered by the term of this contract for the services to be provided by the contractor, this contract shall be terminated on the last day of the last biennial period for which funds were appropriated or monies made available for such purposes.

This provision shall not be construed to abridge any other right of termination the agency may have."

12. TERMS:
The term of this agreement begins on the date in SECTION 2 and will end on the date in SECTION 2, and/or as agreed to separately in writing by both parties.

This contract may be extended until _____, in accordance with the terms stated in the Procurement, by written mutual agreement of both parties and subject to: approval of the Arkansas Department of Finance and Administration/Director of Office of State Procurement, appropriation of necessary funding, and review by any necessary state or federal authority.

Amendments to contracts will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration/Director of Office of State Procurement if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount or involves major changes in the objectives and scope of the contract.

Amendments (to contracts that originally did not require review by Legislative Council or Joint Budget Committee) which cause the total compensation to exceed the sum of $25,000, shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration/Director of Office of State Procurement and before the execution date of the amendment.

This contract may be terminated by either party upon 30 day written notice, unless otherwise agreed by both parties.

13. AUTHORITY:
A. This contract shall be governed by the Laws of the State of Arkansas as interpreted by the Attorney General of the State of Arkansas and shall be in accordance with the intent of Arkansas Code Annotated §19-11-1001 et seq.

B. Any legislation that may be enacted subsequent to the date of this agreement, which may cause all or any part of the agreement to be in conflict with the laws of the State of Arkansas, will be given proper consideration if and when this contract is renewed or extended; the contract will be altered to comply with the then applicable laws.

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

14. AGENCY COORDINATION:
The Agency Representative coordinating the work of this contractor will be:

(NAME) (TITLE) (TELEPHONE #)

Mail approved contract to:

Agency agrees to make available advice, counsel, data, and personnel, etc. as described immediately below or in Attachment number _____ to this agreement.

15. AGENCY SIGNATURE CERTIFIES NO OBLIGATIONS WILL BE INCURRED BY A STATE AGENCY UNLESS SUFFICIENT FUNDS ARE AVAILABLE TO PAY THE OBLIGATIONS WHEN THEY BECOME DUE.

16. TYPE OF CONTRACT: PROFESSIONAL ☑ CONSULTANT ☐

17. SIGNATURES

Eric J. Belfi 7/30/08
CONTRACTOR DATE

AGENCY DIRECTOR DATE

Partner
TITLE

TITLE

140 Broadway
New York, NY 10005
ADDRESS

ADDRESS

7/30/09
CONTRACTOR DATE

Partner
TITLE

2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380

1021 W. Second Street
Little Rock, Arkansas 72201
ADDRESS

APPROVED:
DEPARTMENT OF FINANCE AND ADMINISTRATION DATE

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 3/9/2013 1:58:37 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Groupon

She had to reschedule for next week. Gracie said that she is one of her closest friends and we'll get it.

Sent from my iPhone

On Mar 8, 2013, at 7:09 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

How did you meeting go?

I owe you a call on your questions – been running around crazy as usual.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, March 05, 2013 2:12 PM
To: Belfi, Eric J.
Subject: Re: Groupon

Rhonda Smith (executive director of The muni employee fund), Gracie and I are having lunch on Thursday to discuss one topic-- Labaton monitoring the portfolio

Sent from my iPhone

On Mar 5, 2013, at 11:49 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

Anything new to report?

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Wednesday, February 20, 2013 10:13 AM
To: Belfi, Eric J.
Subject: RE: Groupon

Thank you, Eric. Btw, Gracie has identified members of most of the funds that you listed and she, Kamran and I wil be having lunch with them over the next few weeks in advance of the [redacted] meeting. It was Max's suggestion.

From: Belfi, Eric J. [EBelfi@labaton.com]
Sent: Wednesday, February 20, 2013 8:15 AM
To: Damon Chargois
Subject: FW: Groupon

FYI.

From: /o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie
Sent: Wednesday, February 20, 2013 9:15 AM
To: George Hopkins (georgeh@artrs.gov)

Subject: Groupon

Dear George:

Please see the results of the lead plaintiff motion that we made for ATRS in Groupon.

1. Arkansas Teacher Retirement System (Labaton) - $1.4 million

2. Jun Xue (Robbins /Geller) - $70,000

3. Gerald Smith (Levi & Korsinsky) - $63,077

We will update you as we get this case going.

Best regards,

Eric

P Please consider the environment before printing this email.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 2/20/2013 3:13:15 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Groupon

Thank you, Eric. Btw, Gracie has identified members of most of the funds that you listed and she, Kamran and I wil be having lunch with them over the next few weeks in advance of the Texpers meeting. It was Max's suggestion.

From: Belfi, Eric J. [EBelfi@labaton.com]
Sent: Wednesday, February 20, 2013 8:15 AM
To: Damon Chargois
Subject: FW: Groupon

FYI.

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Sent: Wednesday, February 20, 2013 9:15 AM
To: George Hopkins (georgeh@artrs.gov)
Subject: Groupon

Dear George:

Please see the results of the lead plaintiff motion that we made for ATRS in Groupon.

1. Arkansas Teacher Retirement System (Labaton) - $1.4 million

2. Jun Xue (Robbins /Geller) - $70,000

3. Gerald Smith (Levi & Korsinsky) - $63,077

We will update you as we get this case going.

Best regards,

Eric

P Please consider the environment before printing this email.

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 2/10/2012 9:43:05 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]; Garrett J. Bradley [gbradley@tenlaw.com]; Goldman, Mark [mgoldman@labaton.com]; Brian D. Penny [Penny@gsk-law.com]; Damon Chargois (damon@cmhllp.com) [damon@cmhllp.com]; Michael E. Lamb (mel@camlev.com) [mel@camlev.com]; 'Art Coia' [aec@hgk.com]; Joe Shekarchi (joe@shekarchilaw.com) [joe@shekarchilaw.com]; Thomas, Jordan A. [JThomas@labaton.com]; 'Allen Vaught' [avaught@baronbudd.com]; 'Jason Risch' [jrisch@rischpisca.com]; 'Martin Whitmer' [martin@whitmerworrall.com]; Jeffrey P. Yarbro (jyarbro@bassberry.com) [jyarbro@bassberry.com]; Michael Mazzuca [mmazzuca@kmlaw.ca]; tantoniou@aol.com
Subject: 5th Annual Business Development Conference - Miami Beach - March 19-20

Dear all:

Dates: Monday, March 19 - Tuesday, March 20. We will schedule dinner Monday night.

Place: Shore Club - 1901 Collins Avenue, Miami Beach - 305-695-3100 - http://www.shoreclub.com/en-us/#/home/

Eric J. Belfi
Partner || Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
<http://www.labaton.com/> www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 5/11/2010 6:18:38 PM
To: Damon Chargois [damon@cmhllp.com]
Subject: RE: Antitrust Alert: [redacted]

Damon:

From what we have learned, it does not appear that [redacted] are direct purchasers. We are focusing on any one that makes [redacted]

Eric

From: Belfi, Eric J.
Sent: Friday, May 07, 2010 9:58 AM
To: Belfi, Eric J.
Subject: Antitrust Alert: [redacted]

Dear Counsel:

We are investigating a potential price-fixing conspiracy in the market for [redacted]

If you know or represent [redacted] we would be interested in speaking with your contacts.

Potential Defendants

[redacted]

Background

[redacted]

Eric J. Belfi
Partner || Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
<http://www.labaton.com/> www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 6/18/2010 6:42:42 PM
To: Damon Chargois [damon@cmhllp.com]; 'Tim Herron' [tim@cmhllp.com]
Subject: Labaton Sucharow Symposium (Sept. 30 - Oct. 1st)
Attachments: 10-1 Invitation.pdf

Dear Damon/Tim:

We are pleased to invite you to join our distinguished panelists and participate in a small group discussion on Thursday, September 30th - Friday, October 1st at Le Parker Meridien in New York City, where Labaton Sucharow will host an exclusive, invitation-only symposium.

Previous symposia included a distinguished cross section of industry experts on issues relating to corporate governance and securities regulation. Speakers included Kenneth Feinberg, Special Master for Compensation, Treasury Department; Professor and former SEC General Counsel and Commissioner Harvey Goldschmid; and Joseph Stiglitz, University Professor and Nobel Prize Winner, Columbia University, to name a few. This year we have already lined up Professor James Cox, Chairman Gary Gensler of the Commodities Futures Trading Commission, Commissioner Harvey Goldschmid, and Professor Joel Seligman.

Attached is an invitation for the symposium. Labaton Sucharow has reserved a block of rooms at Le Parker Meridien, 119 West 56th Street (between 6th and 7th Avenues) for a special room rate of $329 a night. We are pleased to provide transportation to New York City-area airports and train stations at the conclusion of the symposium. If you would like to reserve a hotel room and/or transportation to an airport /train station, please contact Gennaro Della Gatta at +1.212.907.0643 or gdellagatta@labaton.com.

Best regards,

Eric

Eric J. Belfi
Partner || Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
<http://www.labaton.com/> www.labaton.com

Labaton Sucharow

LE PARKER MERIDIEN NEW YORK

Labaton Sucharow LLP's Annual Symposium

Thursday, September 30, 2010

Please join us for cocktails and dinner
Valbella Ristorante
421 West 13th Street
New York, NY 10014
6:30 - 10:00 p.m.

Friday, October 1, 2010

Symposium
Le Parker Meridien
119 West 56th Street
New York, NY 10019
8:30 a.m. - 3:45 p.m.

Featured speakers to include:

James Cox
Brainerd Currie Professor of Law
Duke Law School

Professor Cox joined the faculty of the School of Law at Duke in 1979 where he specializes in the areas of corporate and securities law. In addition to his texts *Financial Information, Accounting and the Law*; *Cox and Hazen on Corporations*; and *Securities Regulations Cases and Materials* (with Hillman & Langevoort), Professor Cox has published extensively in the areas of market regulation and corporate governance as well as having testified before the U.S. House and Senate on inside trading, class actions, and market reform issues.

Gary Gensler
Chairman
Commodities Futures Trading Commission

Gary Gensler was sworn in as the Chairman of the Commodity Futures Trading Commission on May 26, 2009. Chairman Gensler previously served at the U.S. Department of the Treasury as Under Secretary of Domestic Finance (1999-2001) and as Assistant Secretary of Financial Markets (1997-1999). He subsequently served as a Senior Advisor to the Chairman of the U.S. Senate Banking Committee, Senator Paul Sarbanes, on the Sarbanes-Oxley Act, reforming corporate responsibility, accounting and securities laws.

Harvey Goldschmid
Dwight Professor of Law
Columbia University School of Law

Professor Goldschmid has served as Dwight Professor since 1984, and was an Assistant Professor (1970-71), an Associate Professor (1971-73), and a Professor of Law (1973-84) at Columbia. From 2002-05, Professor Goldschmid served as a Commissioner of the United States Securities and Exchange Commission, and in 1998-99, he was the SEC's General Counsel (chief legal officer); from January 1 to July 15, 2000, he was Special Senior Advisor to SEC Chairman Arthur Levitt.

Joel Seligman
President
University of Rochester

Joel Seligman became the tenth president of the University of Rochester on July 1, 2005. One of the nation's leading experts on securities law, Mr. Seligman is the co-author, with the late Louis Loss and with Troy Paredes, of the 11-volume *Securities Regulation* (annually updated, Aspen Publishers), the leading treatise in the field, and author of *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (third edition, Aspen Publishers, 2003). He is the author or co-author of twenty books and more than forty articles on legal issues related to securities and corporations.

Remarks and a Book Signing By:

Roger Lowenstein
Author
The End of Wall Street

An American financial journalist, Mr. Lowenstein reported for the *Wall Street Journal* for more than a decade, including two years writing its "Heard on the Street" column, 1989 to 1991. Mr. Lowenstein has published three books and co-authored one. In addition, he has written for many publications, including *Smart Money* and *The New York Times*. Mr. Lowenstein is a regular book reviewer for *The New York Times* and has written a number of major articles and cover stories for the *The New York Times Magazine*.

This invitation-only event will have limited seating.

To RSVP and/or to reserve a room at Le Parker Meridien, please contact Gennaro Della Gatta at 212 907 0643 or gdellagatta@labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 7/2/2010 12:24:56 AM
To: Tim Herron [tim@cmhllp.com]; Damon Chargois [damon@cmhllp.com]
Subject: Goldman

Tim/Damon:

It was great seeing both of you last night.

As we discussed, here is a story about how quick Goldman may settle the SEC action.

Goldman Sachs Could Settle 'As Early as July 20,' Mayo Says

June 28 (Bloomberg) -- Goldman Sachs Group Inc. could settle its Securities and Exchange Commission lawsuit by the end of the year and "as early as July 20," Credit Agricole Securities USA Inc. analyst Mike Mayo said in a note to clients today. The New York-based firm, sued by the SEC in April for defrauding investors, could incur a legal charge of $1 billion for the settlement, Mayo said. Goldman Sachs denies the SEC's claims.

Eric

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 7/7/2010 6:35:21 PM
To: Johnson, James [JJohnson@labaton.com]
Subject: FW: RESUME
Attachments: meador10.doc

Jim:

An important attorney to the firm, Tim Herron (our Arkansas Teacher contact) has asked if we could hire his daughter from a summer position. She is only available from July 19 to August 20. I know it is really late but he has been very good to the firm and if there is a way that she could have something for the month that would be great. It is not an economic thing but rather an experience issue for her.

Thanks.

Eric

HILLARY CLAIRE HERRON MEADOR

[redacted]

[redacted]

Message

From: /o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 10/31/2011 9:50:53 PM
To: Damon Chargois (damon@cmhllp.com) [damon@cmhllp.com]
Subject: [redacted]

Damon:

[redacted] could be someone who could be some who is helpful.

[redacted]

So [redacted] itself does not administrate any funds.

[redacted]

The fund has $52M under management.

[redacted]

[redacted]

Let me know what you think.

Eric

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 12/7/2011 11:46:27 PM
To: Damon Chargois [damon@cmhllp.com]
Subject: Fwd: TEXPERS 2012 Membership - Update
Attachments: image001.jpg; ATT00001.htm; image003.jpg; ATT00002.htm; DB Support Letter & Acknowledgement.pdf; ATT00003.htm; Labaton Sucharow - 2012 Membership Annual Dues.pdf; ATT00004.htm

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1:516.509.5236

Begin forwarded message:

From: "Julie Vu" <julie@TEXPERS.org>
To: "Belfi, Eric J." <EBelfi@labaton.com>
Subject: TEXPERS 2012 Membership - Update

Dear Eric,
I am delighted to inform you the TEXPERS Board of Directors have recently approved of your firm's application for membership.

Please accept this correspondence as our invitation to join TEXPERS as an Associate Member for 2012.

Due to a limited availability of openings for new Associate Members, we kindly request for a response of your decision to join by December 16th, 2011.

If your firm accepts, please return a signed copy of the attached DB Acknowledgement form along with your membership dues of $5000 no later than January 6th, 2012.

In the event we do not receive a response of your decision by December 16th, TEXPERS will take it that your firm has declined the invite to join and your current spot for membership will expire.

Please feel free to contact me should you have any questions or concerns.

Happy Holidays and we look forward to hearing from you soon!

Sincerely,

[cid:image003.jpg@01CCB421.95C296E0]Julie Vu
Conferences & Membership Coordinator
Texas Association of Public Employee
Retirement Systems (TEXPERS)
1225 North Loop West, Suite 909, Houston, TX 77008
Phone: 713-622-8018 |Fax: 713-622-7022
Email: julie@texpers.org<mailto:julie@texpers.org>

*PLEASE TAKE NOTE OF TEXPERS NEW ADDRESS & KINDLY UPDATE YOUR RECORDS

TEXpers

September 26, 2011

Dear Investment Professional Member:

As both national and local media continue their negative portrayal of defined benefit pension plans, Texas public pension systems are doing well, but they too are feeling the pressure of this assault. Most notable occurred when an employee of a former TEXPERS Associate Member openly advocated for the replacement of the defined benefit pension plan for public employees.

As a result, TEXPERS took serious action; first by rescinding the offending firm's membership, and then by passing a resolution to prevent such an event from happening again. The membership voted to require Investment Professional Members to acknowledge a statement of support for defined benefit plans.

Your company, as a member of TEXPERS, is at a minimum expected to not advocate for the replacement of defined benefit plans. We recognize that some of our investment professional members sell multiple products, which is understandable. TEXPERS Board of Directors and its retirement system members are asking you to provide this letter and the accompanying Acknowledgement statement to your Chief Executive Officer or high-level corporate officer to sign. Once executed, please return the Acknowledgment to TEXPERS.

Thank you for your support in ensuring a reliable source of financial security for the many women and men who are dedicated to serving the public in the State of Texas.

Sincerely,

Max Patterson
Executive Director

Texas Association of Public Employee Retirement Systems
1225 North Loop West, Suite 909 • Houston, Texas 77008 • 713-622-8018 • 713-622-7022 (fax) • texpers@texpers.org
www.texpers.org

TEXpers

ACKNOWLEDGEMENT

Whereas, the Bylaws of the Texas Association of Public Employee Retirement Systems (TEXPERS) states therein a Member's objectives are consistent with the purposes of TEXPERS.

Furthermore, TEXPERS Bylaws lists as one of our purposes to work toward safeguarding the benefits and ensuring the financial soundness of Texas public retirement systems. In keeping with that purpose, your company, as a member of TEXPERS, should also support defined benefit plans for public employees.

Now therefore, as a condition of your continued membership with TEXPERS, please acknowledge, as signed by a senior partner or corporate officer where indicated, your company's confirmation of their support of defined benefit plans for public employees.

Company Name: _____

By: _____

Name: _____

Title: _____

Date: _____

Texas Association of Public Employee Retirement Systems
1225 North Loop West, Suite 909 • Houston, Texas 77008 • 713-622-8018 • 713-622-7022 (fax) • texpers@texpers.org
www.texpers.org

Invoice

TEXPERS
1225 North Loop West, Suite 909
Houston, TX 77008

DATE	INVOICE NO.
12/5/2011	2363

BILL TO

Labaton Sucharow LLP
140 Broadway
New York, NY 10005

TERMS
Due on Receipt

DESCRIPTION	AMOUNT
2012 Membership Dues - (NEW) Associate Member Entitles your Company to have two representatives to the Annual Conference. Eligible for attendance to all events open to the general membership. Eligible to be on all programs conducted by TEXPERS and eligible to write artieles for The Pension Observer.	5,000.00
	Total $5,000.00

Method of Payment
____Check enclosed payable to: TEXPERS
Charge my:____American Express ____VISA ____Mastercard ____Discover
Card No.: _____
Exp. Date:_____ CVV No.:_____
Cardholder's Name: _____
Signature: _____

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 4/13/2012 3:42:04 PM
To: Graciela Saenz [graciela@saenzburkhardt.com]; Belfi, Eric J. [EBelfi@labaton.com]
CC: Damon Chargois [damon@cmhllp.com]; burkhardtlaw@comcast.net
Subject: RE: Breaking bread and talking business

Dear Gracie:

Major congrats on the first step of getting [redacted] what they are aiming for. I wanted to see when would be a good time to have dinner with all of us including that [redacted] calls it) and also to talk strategy as to [redacted]

We look forward to seeing yall and have a great weekend and throw out some possible dates and off we go...

Camarones

_____

From: Graciela Saenz [mailto:graciela@saenzburkhardt.com]
Sent: Tue 4/3/2012 1:34 PM
To: 'Belfi, Eric J.'
Cc: Kamran Mashayekh; Damon Chargois; burkhardtlaw@comcast.net
Subject: RE: Telephone Conference

May not be able to do it until 4:30 p.m. (central time). Gracie

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, April 03, 2012 1:28 PM
To: Graciela Saenz
Cc: Kamran Mashayekh; Damon Chargois; burkhardtlaw@comcast.net
Subject: Re: Telephone Conference

No problem. Do you want to do it later today or tomorrow?

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1:516.509.5236

On Apr 3, 2012, at 2:25 PM, "Graciela Saenz" <graciela@saenzburkhardt.com> wrote:

Dear Eric: Here I go again, I am being pulled into a 2:00 p.m. meeting with the Houston Chronicle Editorial board with [redacted]. Will need to reschedule my phone conference. My apologies.

My best,

Graciela G. Saenz

Saenz & Burkhardt, P.L.L.C.

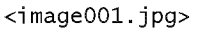
Midtown Plaza

5225 Katy Frwy., Ste. 540

Houston, Texas 77007

281-888-4409 (ofc)

graciela@saenzburkhardt.com



Message

From: Graciela Saenz [graciela@saenzburkhardt.com]
Sent: 3/28/2012 7:26:42 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: burkhardtlaw@comcast.net; kamran@cmhllp.com; 'Damon Chargois' [damon@cmhllp.com]; Stocker, Michael W. [MStocker@labaton.com]
Subject: RE: TEXpers

Thank you Eric: I would love to have the opportunity to go by your offices to learn more about your program. I am available to speak on Monday, April 2nd at around 2:00 p.m. Central Time, if that's okay with the rest of our group. I 'm also glad that the conference went nicely and I'm sure Max appreciated your participation.

In the meantime, looking forward to speaking with you.

My best,

Graciela Saenz

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, March 28, 2012 12:07 PM
To: graciela@saenzburkhardt.com
Cc: burkhardtlaw@comcast.net; kamran@cmhllp.com; Damon Chargois (damon@cmhllp.com); Stocker, Michael W.
Subject: TEXpers

Dear Gracie:

Thank you for making the introduction to Max. Things went very nicely at the conference.

I think that it would be beneficial if we can arrange for a call soon so we can discuss next steps. One idea that might be helpful to the process and has been helpful to other attorneys in your situation is for you to come to our office in New York and have us walk you through our program. We have found that when speaking with potential clients, it is very powerful to say that you have been to our offices and have seen the operation.

I am available for a call next week Monday (April 2) - Thursday (April 6) – please let me know when you have time in your schedule.

Thank you again for helping us with TEXpers.

Regards,

Eric

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

Telephone: +1.212.907.0878

Facsimile: +1.212.883.7078

ebelfi@labaton.com

www.labaton.com

P Please consider the environment before printing this email.

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 3/27/2012 2:18:11 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: email addresses for gracie saenz and elizabeth burkhardt

Eric;

great seeing you again and meeting michael. Gracie's email address is

graciela@saenzburkhardt.com and her partner's email elizabeth burkhardt's is burkhardtlaw@comcast.net

many thanks and talk soon

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 12/13/2011 4:55:00 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: FW: TEXPERS 2012 Membership - Update

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Tuesday, December 13, 2011 8:02 AM
To: Kamran Mashayekh; Damon Chargois
Cc: burkhardtlaw@comcast.net
Subject: RE: TEXPERS 2012 Membership - Update

Dear Kamran & Damon: I was advised by Max that at the last minute the Board decided not to expand the number of securities litigation firms against his recommendations. He did though think it still might be possible to get in since some of the existing firms might not renew their membership. It is with this in mind that the email below was sent to Eric. Not sure why an invite was mistakenly sent but then maybe that's why there was a mistake. Max was going to be gone so he asked his assistant to send the follow up to Eric. He believes that if Labaton stays in the picture and gets local presence then there is still good chance to get in.

My best,

Graciela Saenz

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, December 12, 2011 5:38 PM
To: saenzassociates@gmail.com
Subject: FW: TEXPERS 2012 Membership - Update

Dear Gracie:

Please see below and advise. Apparently, Labaton was mistakenly sent an invitation to join Texpers. The invitation was retracted if I am reading the email correctly.

Appreciate your input and thoughts.

Many thanks

Kamran

From: Damon Chargois
Sent: Mon 12/12/2011 12:27 PM
To: Kamran Mashayekh
Subject: FW: TEXPERS 2012 Membership - Update

Looks like TEXPERS spoke too soon. Need to talk to Gracie about Max. I thought Max had told them to expand the number of security litigation firms.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, December 12, 2011 12:18 PM
To: Damon Chargois
Subject: FW: TEXPERS 2012 Membership - Update

From: Julie Vu [mailto:julie@TEXPERS.org]
Sent: Monday, December 12, 2011 1:17 PM
To: Belfi, Eric J.
Subject: RE: TEXPERS 2012 Membership - Update

Hi Eric – I realized an error was made on our part and an invite was inadvertently sent out to your firm to join as a member for 2012. Unfortunately, pursuant to the TEXPERS Bylaws, we are only able to accept a limited number of security litigation firms as members each year. At the moment, these membership spots are either filled or pending.

We are currently waiting to hear back from two members in regards to their renewal status. In the event either of the two firms decline to renew for 2012, I will follow up with you to complete your membership process, as your firm is the first on the list for that membership spot.

I apologize for the miscommunication and hope you understand.

Best Regards,

Julie Vu

Conferences & Membership Coordinator

Texas Association of Public Employee

Retirement Systems (TEXPERS)

1225 North Loop West, Suite 909, Houston, TX 77008

Phone: 713-622-8018 |Fax: 713-622-7022

Email: julie@texpers.org

***PLEASE TAKE NOTE OF TEXPERS NEW ADDRESS & KINDLY UPDATE YOUR RECORDS**

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, December 12, 2011 9:29 AM
To: Julie Vu
Cc: Bankston, Jennifer S.; Weiss, Sara
Subject: RE: TEXPERS 2012 Membership - Update

Dear Julie:

Thank you for your email.

I have attached the required paperwork.

Please let us know if there is anything else that you need from us.

Thank you.

Eric

Eric J. Belfi
Partner | | Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Julie Vu [mailto:julie@TEXPERS.org]
Sent: Tuesday, December 06, 2011 3:17 PM
To: Belfi, Eric J.
Subject: TEXPERS 2012 Membership - Update

Dear Eric,

I am delighted to inform you the TEXPERS Board of Directors have recently approved of your firm's application for membership.

Please accept this correspondence as our invitation to join TEXPERS as an Associate Member for 2012.

Due to a limited availability of openings for new Associate Members, we kindly request for a response of your decision to join by December 16th, 2011.

If your firm accepts, please return a signed copy of the attached DB Acknowledgement form along with your membership dues of $5000 *no later* than **January 6th, 2012**.

In the event we do not receive a response of your decision by December 16th, TEXPERS will take it that your firm has declined the invite to join and your current spot for membership will expire.

Please feel free to contact me should you have any questions or concerns.

Happy Holidays and we look forward to hearing from you soon!

Sincerely,

Vu

Conferences & Membership Coordinator

Texas Association of Public Employee

Retirement Systems (TEXPERS)

1225 North Loop West, Suite 909, Houston, TX 77008

Phone: 713-622-8018 |Fax: 713-622-7022

Email: julie@texpers.org

*PLEASE TAKE NOTE OF TEXPERS NEW ADDRESS & KINDLY UPDATE YOUR RECORDS

Message

From: Graciela Saenz [saenzassociates@gmail.com]
Sent: 11/29/2011 5:07:37 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: 'Kamran Mashayekh' [kamran@cmhllp.com]; 'Damon Chargois' [damon@cmhllp.com]; burkhardtlaw@comcast.net; 'Elaine Doyal' [Elaine@cmhllp.com]
Subject: RE: Labaton call
Attachments: GRACIELA SAENZ - CV 2011.docx

Dear Eric: It was a pleasure to speak with you this morning. I have attached my CV and Elizabeth will be forwarding her's in the near future. In the meantime, please also make note of our contact information below.

My best,

Graciela G. Saenz

Saenz & Burkhardt, P.L.L.C.

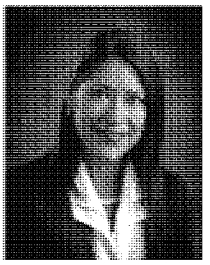
Midtown Plaza

5225 Katy Frwy., Ste. 540

Houston, Texas 77007

281-888-4409 (ofc)

832-250-7558 (cell)



GRACIELA SAENZ
SAENZ & BURKHARDT, PLLC
The Midtown Plaza Bldg.
5225 Katy Frwy., Ste. 540
Houston, Texas 77007
(282-888-4409)
[HYPERLINK "mailto:saenzassociates@gmail.com"]

Graciela "Gracie" Saenz is currently a law partner with Saenz & Burkhardt, PLLC. Her practice focuses on Government Relations, business, commercial and international business transactions.

Gracie's experience includes representing a broad range of government and corporate clients in corporate, international, energy and tourism including representation of numerous start up organizations and public clients.

Representative Experience:

-Presently represent clients in business development with local public entities including Metro, HISD, the City of Houston, Harris County and the Houston Community College

-Successfully assisted an environmental non profit to obtain funding from both State and Federal program sources;

-Assisted in lobbying for the sale of a sports venue from a public entity to client church organization;

-Assisted in keeping the relocation of a city recycling site from moving to clients neighboring property;

-Assisted in negotiations and representation of minority clients and organizations for inclusion in the venues of Minute Maid Field, the Toyota Center and other sports institutions;

-Assisted in the negotiations of the agreement for the City of Houston to host the 9th Annual Latin Grammy's

-Assisted real estate corporation in lobbying for the sale of sports venue;

-Assisted in the allocation of cell phone towers throughout the City of Houston;

-Successfully lobbied for a $400 million in assets administrative contract for a municipal deferred compensation program;

-Assisted minority concessionaire in obtaining presence in Houston Airport System;

Education:

-University of Houston Law Center – JD, 1986
- Universidad Panamerican – Mexico City – Mexican Legal Studies Summer 1984
-University of Houston – BA Spanish – 1978

Admitted to Practice:

-Texas, 1986
-U.S. District Court, Southern Division of Texas

Professional and Community Involvement:

-State Bar of Texas (1986 to Present)
- Fellow with the
-Memorial/Hermann Hospital System, TIRR Board Member (1998 to Present)
-The Houston Hispanic Chamber of Commerce, Board Member (2004 to Present)
-The American Leadership Forum, Chair & Board Member (2010 to Present)
-Project G.R.A.D., Board Member, 2007 to Present
-Coalition for Immigration Reform (2009 to Present)
-The Plaza Group, Board of Advisors (2001 to 2010)
-College of Biblical Studies, Board Member (2008 to present)
-Harris County Housing Authority, Appointed Commissioner (2007 to 2009)
-Houston City Council (at Large) Council Member 1992-1997
- Mayor Pro Tem – City of Houston (1993 to 1997)
-Oaklawn Presbyterian Church – Member (1983 to Present)
-Member of numerous local community organizations including – Latin Women's Initiative, the HWIL, LULAC Council 643; and PresWic

Awards & Recognitions:

-La Rosa Family Services Gala Honoree, 2008
-Sor Juana Women of Achievement, 2007
-Greater Houston Women's Chamber of Commerce – Women on the Move 2007
-Professional Women in Fellowship Award, 2002
-Hispanic Women in Leadership – Hall of Fame, 1996
-Hispanic Woman of the Year Award, The Mexican American Opportunity Foundation, 1996
-Outstanding Citizen Award from the Boy Scouts, 1996
-International Service Award, Houston Junior Chamber of Commerce, 1995
-Alumnus of the Year Award, University of Houston Law Alumni Assn. 1993
-Distinguished Service Award, University of Houston, College of Law Faculty 1986

Message

From: Graciela Saenz [saenzassociates@gmail.com]
Sent: 10/3/2011 3:49:22 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: 'Damon Chargois' [damon@cmhllp.com]; 'Kamran Mashayekh' [kamran@cmhllp.com]; Burkhardtlaw@comcast.net
Subject: RE: Labaton call

Dear Eric: I have confirmed the call with [redacted] and [redacted] with the [redacted] to take place today at 2:15 p.m. I will make the call to you at 2:00 p.m. to discuss any particulars before the call to the [redacted] I will call you at your office number. My cell number is [redacted] in case of any last minute changes. Thanks, Gracie Saenz

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Friday, September 30, 2011 4:37 PM
To: Graciela Saenz
Subject: Re: Labaton call

Sounds good. I do have a call at 3:30 Central time so I have to finish before then so if we can do it at 2:30 that would give us plenty of time.

Thanks for arranging and have a good weekend.

Eric

Eric Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1.516.509.5236

On Sep 30, 2011, at 5:33 PM, "Graciela Saenz" <saenzassociates@gmail.com> wrote:

Great! I will confirm and let's talk right before the call to [redacted] Gracie

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Friday, September 30, 2011 4:28 PM
To: 'damon@cmhllp.com'; 'saenzassociates@gmail.com'
Cc: 'kamran@cmhllp.com'; 'Burkhardtlaw@comcast.net'
Subject: Re: Labaton call

Gracie:

I can be at my desk at any time during that period.

My number is 212-907-0878.

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Damon Chargois
To: Graciela Saenz
Cc: Kamran Mashayekh ; ; Belfi, Eric J.
Sent: Fri Sep 30 17:24:15 2011
Subject: Re: Labaton call

I will be out of town, but Eric can be available between 2-3:30.

Sent from my iPhone

On Sep 30, 2011, at 4:05 PM, "Graciela Saenz" <saenzassociates@gmail.com> wrote:

Damon – Need to respond as soon as possible. Let me know. Gracie

From: [redacted]
Sent: Friday, September 30, 2011 3:14 PM
To: 'Graciela Saenz'
Cc: Christopher Gonzales
Subject: Labaton call

Hi Graciela. Would you and one or more of the Labaton firm attorneys you wanted to partake in a conference call be available for a conversation during any of the following time periods on Monday (Central Time)?

10 am - 12:30 pm

2 pm - 3:30 pm

Best regards, [redacted]

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 11/8/2012 11:21:05 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Electronic version - Marketing packet

correct....i say there is a high chance you will be coming since they told gracie that they first want to meet with her and elizabeth in private then with you but I want to one hundred percent make sure and confirm after they meet tomorrow that the meeting on the 16th with you in houston is still on.....I will call or text you IMMEDIATELY after gracie and elizabeth call me after their lunch with the head of the entity we are pursuing....gracie's partner, elizabeth is like you....a great closer so I am optimistic and I have already coached her on what to say....

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thu 11/8/2012 5:17 PM
To: Kamran Mashayekh
Subject: RE: Electronic version - Marketing packet

I have booked my flight yet but we will find out tomorrow if I need to come down in a week?

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Thursday, November 08, 2012 6:06 PM
To: Belfi, Eric J.
Cc: burkhardtlaw@comcast.net
Subject: RE: Electronic version - Marketing packet

thanks eric....look forward to seeing you in houston..Elizabeth, I gave Eric the address you gave me yesterday to send the materials to...let us know if you dont get it by tomorrow for some reason...

thanks

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thu 11/8/2012 4:58 PM
To: Kamran Mashayekh
Subject: RE: Electronic version - Marketing packet

The materials were fedexed to her today for morning delivery.

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Thursday, November 08, 2012 5:43 PM
To: Elizabeth Burkhardt; Damon Chargois
Cc: graciela@saenzburkhardt.com; Belfi, Eric J.
Subject: RE: Electronic version - Marketing packet

Thank you Elizabeth and will for sure communicate that to Eric (by copying him on this email thread) and I am holding out great hope and extreme optimism that tomorrow's meeting will lead to a November 16th invitation to meet with Eric in Houston with GV. Great work...:):):)

From: Elizabeth Burkhardt [mailto:burkhardtlaw@comcast.net]
Sent: Thu 11/8/2012 4:36 PM
To: Kamran Mashayekh; Damon Chargois
Cc: graciela@saenzburkhardt.com
Subject: RE: Electronic version - Marketing packet

Kamran: I have printed out a copy for tomorrow's meeting; but, please have Eric bring some nice sleek ones when he comes. Plenty of extras because we are looking at additional potentials as well. Thanks. Elizabeth

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Thursday, November 08, 2012 6:52 AM
To: burkhardtlaw@comcast.net
Cc: graciela@saenzburkhardt.com
Subject: FW: Electronic version - Marketing packet

confirm receipt please...my apologies for the late send and good morning...

_____

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wed 11/7/2012 8:21 PM
To: Kamran Mashayekh
Subject: Electronic version - Marketing packet

Kamran:

Here is the electronic version of the marketing package.

Fingers crossed.

Eric

P Please consider the environment before printing this email.

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 11/8/2012 2:44:08 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Damon Chargois [damon@cmhllp.com]; graciela@saenzburkhardt.com; burkhardtlaw@comcast.net
Subject: RE: Electronic version - Marketing packet

Thank you Eric. Gracie and Elizabeth will report back on friday post meeting and will inform you if you need to come down on the 16th of November for a meeting with [redacted]- the major player on the entity we are pursuing. If he likes what he hears this friday, he will want to meet you in person. Again, I am optimistic and highly confident of your abilities and as I have told Damon, Gracie and Elizabeth, all we need to do is to get you in front of [redacted] and the rest of the board and you will close it.

Talk soon
Kamran

ps- Elizabeth, please print and take to your meeting...with the storm sandy, mail is an issue hence email is the best option for now...

_____

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wed 11/7/2012 8:21 PM
To: Kamran Mashayekh
Subject: Electronic version - Marketing packet

Kamran:

Here is the electronic version of the marketing package.

Fingers crossed.

Eric

P Please consider the environment before printing this email.

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 7/26/2012 5:17:35 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Damon Chargois [damon@cmhllp.com]
Subject: RE: [redacted]

Eric:

lots of activity last two days re the biz we been chasing in [redacted] Damon will issue a full report cause I have relayed the info to him. Related to that, there is a gala for the entity we are pursuing slated for October 18th and Damon and I are attending for obvious reasons. Let me know if your firm wishes to participate and if so, I can have my contact send you the information.

thanks
Kamran

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thu 7/26/2012 12:14 PM
To: Damon Chargois; Kamran Mashayekh
Subject: RE: [redacted]

I received the St. Jude's info – when do you need the money by?

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Thursday, July 26, 2012 1:05 PM
To: Belfi, Eric J.; Kamran Mashayekh
Subject: RE: [redacted]

Thank you, Eric. I hope you are getting your batteries recharged. Let's discuss below at your convenience. On another note, did you get Elaine's email about Labaton contributing to the St. Jude's Children's Cancer Research Gala? The form was attached and we had discussed Labaton doing a $2,500 table.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thursday, July 26, 2012 11:48 AM
To: Damon Chargois; Kamran Mashayekh
Subject: [redacted]

Please see below – this was last night:

[redacted]

1. [redacted] $911,952

2. [redacted] $858,384.78

3. [redacted] - $788,799 [redacted]

4. [redacted] - $209,428.10

5. [redacted] - $184,829.09

6. [redacted] - $124,904

7. [redacted] $100,000 (approximately-did not provide loss chart)

8. [redacted] - $73,922.96

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

Telephone: +1.212.907.0878

Facsimile: +1.212.883.7078

ebelfi@labaton.com

www.labaton.com <http://www.labaton.com/>

P Please consider the environment before printing this email.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 7/29/2013 6:07:01 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Fwd: Telephone Call from [redacted]
Attachments: Notes of Conversation with [redacted] July 29 2013.docx; ATT00001.htm

[redacted] cancelled at the last minute on us, so we put together an informal text to him telling him its time to put the cards on the table regarding getting Labaton on board. He called Gracie and Elizabeth back at their offices today and attached is their summary of the conversation. I could use your guidance on the best way to handle bc my first impulse may not be what's best for us, broth.

On another note, call me when you get free for some interesting [redacted] information. It's good stuff.

Sent from my iPhone

Begin forwarded message:

From: Graciela Saenz <saenzassociates@gmail.com>
Date: July 29, 2013, 12:52:45 PM CDT
To: 'Damon Chargois' <damon@cmhllp.com>, 'Kamran Mashayekh' <kamran@cmhllp.com>
Cc: 'Elizabeth Burkhardt' <burkhardtlaw@comcast.net>
Subject: Telephone Call from [redacted]

[redacted] finally returned my call and Elizabeth & I got to speak with him. Please see attached notes.

Graciela Saenz

Saenz & Burkhardt PLLC

The Midtown Plaza Bldg.

5225 Katy Frwy., Ste. 540

Houston, Texas 77007

281-888-4409 (ofc)

832-250-7558 (cell)

Notes of Conversation with [redacted] (7/29/13)

[redacted]

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 7/24/2013 6:16:29 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Kamran Mashayekh [kamran@cmhllp.com]
Subject: Re: [redacted]
Attachments: [redacted]

Thank you, Eric

Sent from my iPhone

On Jul 24, 2013, at 9:47 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

>
>
> _____
> From: Rogers, Denise R.
> Sent: Wednesday, July 24, 2013 10:47 AM
> To: Belfi, Eric J.
> Subject: RE: Houston Funds (Police, Fire & Municipal)
>
> Eric, see info below, pardon the format. Thanks.
>

[redacted]

> _____
> From: Belfi, Eric J.
> Sent: Tuesday, July 23, 2013 11:57 AM
> To: Rogers, Denise R.

> Subject: [redacted]
>
> Please send me the trustees for each of the funds. I know you are out today so it can wait until tomorrow.
>
> Eric J. Belfi
> Partner
> Labaton Sucharow LLP
> 140 Broadway
> New York, N.Y. 10005
> Telephone: +1.212.907.0878
> Facsimile: +1.212.883.7078
> ebelfi@labaton.com
> www.labaton.com
>
>

>
>

[redacted]

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 8/1/2014 2:31:39 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Attachments: photo.PNG; ATT00001.txt

Please call me as soon as possible.

Sent from my iPhone

Hi Graciela,

Thank you for your reply. I will be sure to update your information. We will be meeting with the board next week and hope to get some more approvals for security litigation firms.
I will follow up with you as soon as we are able to approve your application. Could you answer the questions below for me with a yes or no?

Texas Clients?
Texas Office?
Public Pension Fund Clients?

Lena Parker
Member Services Specialist
Texas Association of Public Employee Retirement Systems (TEXPERS)
1225 North Loop West, Suite 909, Houston TX 77008

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 10/18/2014 5:15:00 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Eric, in reviewing your text regarding HP, it appe

That helps, Eric. Thank you

Sent from my iPhone

> On Oct 18, 2014, at 12:14 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
>
> With Garrett and all referrers we deal with, it is done exactly in the same manner. As long as I have been with Labaton, we have never done it any other way. It is the only equitable way that we see dividing up the referral fees.
>
> -----Original Message-----
> From: Damon Chargois [mailto:damon@cmhllp.com]
> Sent: Saturday, October 18, 2014 12:59 PM
> To: Belfi, Eric J.
> Subject: Re: Eric, in reviewing your text regarding HP, it appe
>
> This isn't my understanding, but I will go over all of our correspondence before going further. Do you calculate Garrett's firm's fee split in the exact same manner (his referred client's percentage of loss relative to total loss alleged by all Labaton clients times Labaton's fee times 20%)?
>
> Sent from my iPhone
>
>> On Oct 18, 2014, at 11:08 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
>>
>> Damon:
>>
>> Unlike Colonial where there was a modification, here this 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%. 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 4 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 3 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 sole lead so this is going to happen in almost every case. It is not a modification, it is just how the agreement works.
>>
>> I am around all day if you want to discuss further.
>>
>> Eric
>>
>> -----Original Message-----
>> From: Damon Chargois [mailto:damon@cmhllp.com]
>> Sent: Saturday, October 18, 2014 9:15 AM
>> To: Belfi, Eric J.
>> Subject: Eric, in reviewing your text regarding HP, it appe
>>
>> Eric, the call kept dropping, so I'm sending this email. In reviewing your text regarding HP, it appears that Labaton is trying to use the fee calculation done as a special consideration for Garrett's 20% 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 agreed 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 have discussed, in the past, treating certain cases where 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 ok with the fee split in this instance. We are not changing our fee split agreement for all of the other pension fund cases. You promised me that you would give me advanced notice of when you guys would seek a modification or accommodation on a given settlement and I want you to keep to that going forward.
>>
>>
>>
>>
>>
>>
>>
>>
>> Sent from my iPhone
>>
>>
>> ***Privilege and Confidentiality Notice***
>>
>> This electronic message contains information that is (a) LEGALLY PRIVILEGED, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not the Addressee(s), or the person responsible for delivering this to the Addressee(s), you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please contact us immediately at 212-907-0700 and take the steps necessary to delete the message completely from your computer system. Thank you.
>>
>>

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 1/25/2012 1:56:21 AM
To: 'Damon Chargois' [damon@cmhllp.com]
CC: Stocker, Michael W. [MStocker@labaton.com]
Subject: Investing in Foreign Securities in the Post Morrison World
Attachments: International Monitoring-ALT.pdf

Dear Damon:

As we discussed today, in June 2010, the Supreme Court ruled in the Morrison case that the US securities laws only cover purchases of securities on US exchanges regardless of where the plaintiff resides and where the fraud occurred. For example, a Texas pension fund who purchased BP common stock on the London Stock Exchange would not have a claim in the US for the stock drop as a result of the spill in the Gulf of Mexico. Therefore, the only place that a claim could be brought is in the UK.

As you can imagine, there is has been a large up tick in the number of claims that have been filed outside of the United States. We would propose to talk about how this is proceeding and whether or not any of these claims makes sense for US pension funds. We are involved in cases that have been filed in Canada, France, Belgium and Australia as well as monitoring numerous other claims in other parts of Europe and Asia.

I have attached our marketing sheet on International monitoring as a reference.

Please let me know if you need any other information at this point.

Eric J. Belfi
Partner || Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
<http://www.labaton.com/> www.labaton.com

Labaton Sucharow

Global reach.
Extraordinary results.

International Class Action Monitoring and Analysis

Labaton Sucharow enjoys a world-wide reputation for its expertise in U.S. class action litigation. We combine deep knowledge of the financial markets, familiarity with the legal issues at the core of shareholder actions, and the resources to efficiently prosecute sprawling and complex cases. Our track record of investor advocacy is unparalleled, including many of the largest and most influential shareholder victories in history. The Firm's success is reflected in our client base: Labaton Sucharow represents many of the world's largest and most sophisticated institutional investors.

In recent years the Firm has taken on a groundbreaking role in offering advice to both domestic and international clients regarding class and group actions brought overseas. Labaton Sucharow combines its own team of seasoned securities litigators with similarly high-level expertise offered by allied firms in key overseas jurisdictions to create a truly international law practice.

Counsel Regarding Non-U.S. Actions

We track securities fraud filings globally—in all jurisdictions where a formal legal framework exists to recover investors' damages suffered due to fraud. When potential opportunities for loss recovery are identified, we undertake a careful examination and analysis of risks and opportunities for our clients. Labaton Sucharow analyzes not only the scale of potential recoveries, but the potential downside risks of joining an action, including analysis of cost shifting provisions, discovery obligations, and reputational concerns. In appropriate cases, we act as liaison for our clients in managing participation in overseas actions and overseeing the prosecution of litigation by non-U.S. attorneys.

For more information regarding Labaton Sucharow's international monitoring services, please contact us directly:

Michael Stocker
mstocker@labaton.com
212.907.0882

Dominic Auld
dauld@labaton.com
212.907.0619

On behalf of our clients, we evaluate:

- Client losses and the scale of potential recoveries
- The reputation and experience of overseas firms and litigation funders involved in the litigation
- History of the non-U.S. jurisdiction and the state of its class action jurisprudence
- Potential downside risk, including cost shifting provisions, up-front costs, and resource demands on clients
- The merits of the case
- Reputational concerns

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 2/19/2014 3:49:20 AM
To: Auld, Dominic J. [DAuld@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]
Subject: Re: [redacted]

I already reached out to them to get a status report. I am sure it will come back as nothing going on.

Eric Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1.516.509.5236

On Feb 18, 2014, at 10:47 PM, "Auld, Dominic J." <DAuld@labaton.com> wrote:

Please don't reach out to BB until I have reported back. No point in rekindling their interest until we need it.

On Feb 18, 2014, at 6:24 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

Let us know what you find out.

<http://www.labaton.com/> http://www.labaton.com/images/email-logo.jpg

Eric J. Belfi | Partner

Labaton Sucharow LLP

140 Broadway, New York, New York 10005 <x-apple-data-detectors://0/0>

T: (212) 907-0878 <tel:(212)%20907-0878> | F: (212) 883-7078 <tel:(212)%20883-7078>

E: ebelfi@labaton.com | W:www.labaton.com <http://www.labaton.com/>

<http://www.linkedin.com/company/labaton-sucharow-llp> http://www.labaton.com/images/email-linkedin.gif
<https://twitter.com/LabatonSucharow> http://www.labaton.com/images/email-twitter.gif
<https://www.facebook.com/pages/Labaton-Sucharow-LLP/443111702425065>
http://www.labaton.com/images/email-facebook.gif

On Feb 18, 2014, at 6:23 PM, "Auld, Dominic J." <DAuld@labaton.com> wrote:

Spoke with Chris – strategy in place for the near-term, let's manage the landscape as it presents itself. thanks

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 6:12 PM
To: Keller, Christopher J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: [redacted]

Our application was with Baron & Budd. One of their lawyers was a former State Legislator and he had been working the political angle but we have not been able to get them to rule on now two RFPs. I had heard that there had been a second cleaning at [redacted] so I am not sure that we have any real strategy anymore. Damon does not have any contacts left there. Let me reach out to the lawyer at Baron & Budd to see if he has anything new to report.

From: Keller, Christopher J.
Sent: Tuesday, February 18, 2014 6:08 PM
To: Belfi, Eric J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: [redacted]

We should discuss and strategize. Did we go in through Damon? Do we have an existing strategic relationship?

Christopher J. Keller

Partner | Labaton Sucharow LLP

140 Broadway, 34th Fl

New York, NY 10005

Ph. 212-907-0853

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 5:42 PM
To: Auld, Dominic J.; Business Development--Group
Cc: Avan, Rachel
Subject: RE: [redacted]

Dom:

We still have an outstanding RFP with [redacted]. Rachel can provide when it was submitted.

Eric

From: Auld, Dominic J.
Sent: Tuesday, February 18, 2014 5:40 PM
To: Business Development--Group
Subject: [redacted]

Hi all,

I'm meeting up with the [redacted] on Thursday. I was introduced (and graciously recommended) last year by a mutual friend who is a partner at [redacted] former firm (Davis Polk) and have seen her socially a couple of times before. Does anyone at the firm have historical contact with this entity that I should know about? Any context that might be helpful? Anyone else I should look up while in Austin?

Thanks

Dom

Dominic J. Auld

Partner

Labaton Sucharow LP

140 Broadway

New York, NY, 10005

212 907 0619 - direct

917 515 2456 - mobile

dauld@labaton.com

www.labaton.com <http://www.labaton.com/>

Message

From: /o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 4/27/2014 8:21:22 PM
To: Damon Chargois (damon@cmhllp.com) [damon@cmhllp.com]
CC: Giulio de Tommaso (gdetommaso@consiliumgroupadvisors.com) [gdetommaso@consiliumgroupadvisors.com]
Subject: FW: Networking Potential

Damon:

I know you are always interested in opportunities so I am sending this email on behalf of a college classmate and good friend of mine Giulio de Tommaso. I think there may be some opportunities with your International connections to create an opportunity for both you and Giulio.

If you are able to successfully assist Giulio in generating business, he is prepared to share between 10 to 15 percent of the transaction.

Here is an introduction email. Please let Giulio know if you have any questions:

1. Background

At the World Bank, Giulio dealt with Public Sector Management and Governance Reforms. This means that he assisted country governments in their efforts to improve transparency, accountability and service delivery. He was working specifically to strengthen public sector management systems within the executive branch, including the management of public finances and public employment.

But the work entails working to improve the broader governance environment within which the public sector operates, supporting institutions for public accountability, such as parliaments and offices of the ombudsman, and tracking improvements by measures of the rule of law, state legitimacy and trust in government institutions. Efforts to reduce the risk of corruption are prominent in both of these. To address the totality of this agenda, he put together a a multi sectoral, multifaceted team, with expertise in several areas (political science, economics, statistics, law, accounting, IT, procurement, etc) to respond to these reform challenges.

While his experience and that of his partners is mostly in developing countries, many if not all countries in the world are confronted with similar problems. He knows for a fact that European countries are looking to the developing world and are coming up with very similar solutions to those that he is providing to his developing country partners.

He has assembled a team that has a ton of experience in their respective fields. Some of his colleagues are world renowned experts. He has not come across any private consulting outfit that has the in-house experience in this area that he has been able to assemble. He also has incredible flexibility in terms of regional experience and language ability.

Here is a link to his website - http://consiliumgroupadvisors.com/

2. The Challenge

He believes that he can break in four ways:

1. Partner up with a known entity that has complementary experience, and go in as subcontractors.

2. Develop partnerships with educational instittuions and NGOs that have credibility but do not have the capacity to bid for consultancy projects

3. Introduce themselves to multilateral and financial institutions such as the World Bank, USAID, the Millennium Challenge Corporation (US), the InterAmerican Development Bank, the Asian Development Bank, the African Development Bank, DfID (UK), GIZ and GTZ (Germany), the European Community.

4. Lobby government institutions (the ultimate users), so that when they do submit bids, they are familiar with their offer.

3. What I need:

He needs people to help him get introduced to as many people in the four groups that he has highlighted. He needs to develop cooperation and subcontracting agreements with potential partners. He needs to meet decision makers in ministries and agencies, whether financing agencies (such as USAID, MCC, DFID, GTZ) that finance or commission work or in recipient agencies (ministries, utilities, etc.) who could be recipients of the advice.

Eric

Message

From: Della Gatta, Gennaro [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=DELLAGAG]
Sent: 2/19/2015 3:37:39 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Avan, Rachel [RAvan@labaton.com]
CC: Rogers, Denise R. [DRogers@labaton.com]; Marketing Team [MarketingTeam@labaton.com]
Subject: RE: Portfolio Monitoring Agreements - 2009 and Older
Attachments: Arkansas RFQ (Cover letter and signed docs).pdf

Is this what you were looking for?

From: Belfi, Eric J.
Sent: Wednesday, February 18, 2015 7:25 PM
To: Avan, Rachel
Cc: Rogers, Denise R.; Marketing Team
Subject: Re: Portfolio Monitoring Agreements - 2009 and Older

There no agreements signed before the winter of 2009.

Eric Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1.516.509.5236

On Feb 18, 2015, at 6:23 PM, Avan, Rachel <RAvan@labaton.com> wrote:

I think we have determined that we would not have these agreements. Please hold off on searching.

From: Rogers, Denise R.
Sent: Wednesday, February 18, 2015 5:56 PM
To: Marketing Team

Cc: Belfi, Eric J.; Avan, Rachel
Subject: Portfolio Monitoring Agreements - 2009 and Older

Gennaro, we are trying to locate agreements signed by Arkansas Teacher Retirement System (ATRS) from 2005 to 2009. [redacted]

Denise

Labaton Sucharow

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

Eric J. Belfi
Partner
212 907 0878 direct
212 883 7078 fax
email ebelfi@labaton.com

Damon J. Chargois
Managing Partner
281 444 0604 telephone
281 440 0124 fax
email damon@cmhllp.com

July 30, 2008

VIA FEDERAL EXPRESS

Christa S. Clark
Chief Counsel
Arkansas Teacher Retirement System
1400 West Third Street
Little Rock, AR 72201

Re: Request For Qualifications For Outside Legal Counsel
Securities Litigation, Class Action Monitoring and Advice; Asset Recovery

Dear Ms. Clark:

In response to the above-referenced Request for Qualifications (the "RFQ"), Labaton Sucharow LLP ("Labaton Sucharow") and Chargois & Herron, LLP ("Chargois & Herron") respectfully submit three stapled copies of our response, along with the required forms including: the Contact Data Sheet, the Contract and Grant Disclosure Certification Form, and the State of Arkansas Professional/Consultant Services Contract.

We believe that the resources, knowledge, integrity and experience of Labaton Sucharow and Chargois & Herron, will provide the Arkansas Teacher Retirement System ("ATRS") with outstanding securities litigation representation. We hope that we can be of further assistance to you in this matter. Please do not hesitate to contact us if you have any questions regarding our response to the RFQ.

Very truly yours,

Eric J. Belfi
Partner
Labaton Sucharow LLP

Damon J. Chargois
Managing Partner
Chargois & Herron, LLP

ARKANSAS TEACHER RETIREMENT SYSTEM

CONTACT DATA SHEET FOR

REQUEST FOR PROPOSALS ("RFQ") FOR OUTSIDE COUNSEL

TO BE COMPLETED AND SUBMITTED WITH YOUR RESPONSE.

Full legal firm name: Labaton Sucharow LLP

Name of lead attorney contact: Eric J. Belfi

Lead attorney's telephone no.: 212 907 0878

Lead attorney's facsimile no.: 212 883 7078

Lead attorney's e-mail address: ebelfi@labaton.com

Firm Internet address: www.Labaton.com

Firm main switchboard no.: 212 907 0700

Firm main mailing address: 140 Broadway New York, NY 10005

Firm main street address: 140 Broadway New York, NY 10005

Lead attorney's mailing address if different from above: _____

State where lead attorney licensed: Mr. Belfi is admitted to practice in the State of New York

States where attorneys are licensed: Connecticut, Massachussets, New Jersey, New York

Range of hourly rates proposed: Eric Belfi's reduced hourly rate is $350.00

[redacted]

CONTACT DATA SHEET FOR

REQUEST FOR PROPOSALS ("RFQ") FOR OUTSIDE COUNSEL

TO BE COMPLETED AND SUBMITTED WITH YOUR RESPONSE.

Full legal firm name: Chargois & Herron, LLP

Name of lead attorney contact: Damon J. Chargois

Lead attorney's telephone no.: 281 444-0604

Lead attorney's facsimile no.: 281 440-0124

Lead attorney's e-mail address: damon@cmhllp.com

Firm Internet address:

Firm main switchboard no.: 281 444-0604

Firm main mailing address: 2201 Timberloch Place, Suite 110, The Woodlands, Tx 77380

Firm main street address: 2201 Timberloch Place, Suite 110, The Woodlands, Texas 77380

Lead attorney's mailing address if different from above: N/A

State where lead attorney licensed: Texas and Arkansas

States where attorneys are licensed: Texas and Arkansas

Range of hourly rates proposed: $350.00

CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM

Failure to complete all of the following information may result in a delay in obtaining a contract, lease, purchase agreement, or grant award with any Arkansas State Agency.

SUBCONTRACTOR: ☒ Yes ☐ No

SUBCONTRACTOR NAME: Labaton Sucharow LLP

TAXPAYER ID NAME:

IS THIS FOR: ☐ Goods? ☒ Services? ☐ Both?

YOUR LAST NAME: Belfi FIRST NAME: Eric M.I.: J.

ADDRESS: 140 Broadway

CITY: New York STATE: NY ZIP CODE: 10005 COUNTRY: USA

AS A CONDITION OF OBTAINING, EXTENDING, AMENDING, OR RENEWING A CONTRACT, LEASE, PURCHASE AGREEMENT, OR GRANT AWARD WITH ANY ARKANSAS STATE AGENCY, THE FOLLOWING INFORMATION MUST BE DISCLOSED:

FOR INDIVIDUALS*

Indicate below if: you, your spouse or the brother, sister, parent, or child of you or your spouse *is* a current or former: member of the General Assembly, Constitutional Officer, State Board or Commission *Member, or State Employee:*

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/ commission, data entry, etc.]	For How Long?		What is the person(s) name and how are they related to you? [i.e., Jane Q. Public, spouse, John Q. Public, Jr., child, etc.]	
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Relation
General Assembly							
Constitutional Officer							
State Board or Commission Member							
State Employee							

☐ None of the above applies

FOR AN ENTITY (BUSINESS)*

Indicate below if any of the following persons, current or former, hold any position of control or hold any ownership interest of 10% or greater in the entity: member of the General Assembly, Constitutional Officer, State Board or Commission Member, State Employee, or the spouse, brother, sister, parent, or child of a member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee. Position of control means the power to direct the purchasing policies or influence the management of the entity.

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/commission, data entry, etc.]	For How Long?		What is the person(s) name and what is his/her % of ownership interest and/or what is his/her position of control?		
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Ownership Interest (%)	Position of Control
General Assembly								
Constitutional Officer								
State Board or Commission Member								
State Employee								

☒ None of the above applies

Contract and Grant Disclosure and Certification Form

Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this contract. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the agency.

As an additional condition of obtaining, extending, amending, or renewing a contract with a *state agency* I agree as follows:

1. Prior to entering into any agreement with any subcontractor, prior or subsequent to the contract date, I will require the subcontractor to complete a **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM.** Subcontractor shall mean any person or entity with whom I enter an agreement whereby I assign or otherwise delegate to the person or entity, for consideration, all, or any part, of the performance required of me under the terms of my contract with the state agency.

2. I will include the following language as a part of any agreement with a subcontractor:

   Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this subcontract. The party who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the contractor.

3. No later than ten (10) days after entering into any agreement with a subcontractor, whether prior or subsequent to the contract date, I will mail a copy of the **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM** completed by the subcontractor and a statement containing the dollar amount of the subcontract to the state agency.

I certify under penalty of perjury, to the best of my knowledge and belief, all of the above information is true and correct and that I agree to the subcontractor disclosure conditions stated herein.

Signature Eric J. Belfi Title Partner Date 7/30/08

Vendor Contact Person Eric Belfi Title Partner Phone No. 22-907-0878

Agency use only

Agency Number_____ Agency Name_____ Agency Contact Person_____ Contact Phone No._____ Contract or Grant No._____

CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM

Failure to complete all of the following information may result in a delay in obtaining a contract, lease, purchase agreement, or grant award with any Arkansas State Agency.

SUBCONTRACTOR: ☒ Yes ☐ No

SUBCONTRACTOR NAME: Chargois & Herron, LLP

TAXPAYER ID NAME: 20-0927686

IS THIS FOR: ☐ Goods? ☒ Services? ☐ Both?

YOUR LAST NAME: Chargois FIRST NAME: Damon M.I.: J.

ADDRESS: 2201 Timberloch Place, Suite 110

CITY: The Woodlands STATE: TX ZIP CODE: 77380 COUNTRY: USA

AS A CONDITION OF OBTAINING, EXTENDING, AMENDING, OR RENEWING A CONTRACT, LEASE, PURCHASE AGREEMENT, OR GRANT AWARD WITH ANY ARKANSAS STATE AGENCY, THE FOLLOWING INFORMATION MUST BE DISCLOSED:

FOR INDIVIDUALS*

Indicate below if: you, your spouse or the brother, sister, parent, or child of you or your spouse *is* a current or former: member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee:

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/ commission, data entry, etc.]	For How Long?		What is the person(s) name and how are they related to you? [i.e., Jane Q. Public, spouse, John Q. Public, Jr., child, etc.]	
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Relation
General Assembly							
Constitutional Officer							
State Board or Commission Member							
State Employee							

☐ None of the above applies

FOR AN ENTITY (BUSINESS)*

Indicate below if any of the following persons, current or former, hold any position of control or hold any ownership interest of 10% or greater in the entity: member of the General Assembly, Constitutional Officer, State Board or Commission Member, State Employee, or the spouse, brother, sister, parent, or child of a member of the General Assembly, Constitutional Officer, State Board or Commission Member, or State Employee. Position of control means the power to direct the purchasing policies or influence the management of the entity.

Position Held	Mark (√)		Name of Position of Job Held [senator, representative, name of board/commission, data entry, etc.]	For How Long?		What is the person(s) name and what is his/her % of ownership interest and/or what is his/her position of control?		
	Current	Former		From MM/YY	To MM/YY	Person's Name(s)	Ownership Interest (%)	Position of Control
General Assembly								
Constitutional Officer								
State Board or Commission Member								
State Employee								

☒ None of the above applies

Contract and Grant Disclosure and Certification Form

Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this contract. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the agency.

As an additional condition of obtaining, extending, amending, or renewing a contract with a *state agency* I agree as follows:

1. Prior to entering into any agreement with any subcontractor, prior or subsequent to the contract date, I will require the subcontractor to complete a **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM**. Subcontractor shall mean any person or entity with whom I enter an agreement whereby I assign or otherwise delegate to the person or entity, for consideration, all, or any part, of the performance required of me under the terms of my contract with the state agency.

2. I will include the following language as a part of any agreement with a subcontractor:

   Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that Order, shall be a material breach of the terms of this subcontract. The party who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the contractor.

3. No later than ten (10) days after entering into any agreement with a subcontractor, whether prior or subsequent to the contract date, I will mail a copy of the **CONTRACT AND GRANT DISCLOSURE AND CERTIFICATION FORM** completed by the subcontractor and a statement containing the dollar amount of the subcontract to the state agency.

I certify under penalty of perjury, to the best of my knowledge and belief, all of the above information is true and correct and that I agree to the subcontractor disclosure conditions stated herein.

Signature _____ Title Partner Date 07-21-08

Vendor Contact Person Damon Chargois Title Partner Phone No. (281) 444-0604

Agency use only

Agency Number _____ Agency Name _____ Agency Contact Person _____ Contact Phone No. _____ Contract or Grant No. _____

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

CONTRACT #		FEDERAL I.D. #	
VENDOR #		MINORITY VENDOR	YES NO

1. **PROCUREMENT:**
   Check appropriate box below for the method of procurement for this contract:
   ABA Criteria ☐ Request for Proposal ☐ Competitive Bid ☐ Request for Qualifications ☑
   Intergovernmental ☐ Emergency ☐
   Sole Source by Justification ☐ (Must be attached). Sole Source by Intent to Award ☐
   Sole Source by Law ☐ Act # _____ or Statute # _____

2. **DATES, PARTIES:**
   The term of this agreement shall begin on _____ and shall end on _____.

   State of Arkansas is hereinafter referred to as the agency and vendor is here after referred to as the Contractor.

AGENCY NUMBER/NAME	
AGENCY NUMBER/NAME	

CONTRACTOR NAME	Labaton Sucharow LLP
ADDRESS	140 Broadway, New York, NY 10005

3. **CALCULATIONS OF COMPENSATION:**
   For work to be accomplished under this agreement, the Contractor agrees to provide the personnel at the rates scheduled for each level of consulting personnel as listed herein. Calculations of compensation and reimbursable expenses shall only be listed in this section. If additional space is required, a continuation sheet may be used as an attachment.

Labaton Sucharow and Chargois and Herron will only be compensated on a contingency fee basis after court approval at the end of a case. Please refer to response in Section 5.10 for billing rates for all legal professionals.

LEVEL OF PERSONNEL	NUMBER	COMPENSATION RATE	TOTAL FOR LEVEL
Senior Partners		need info	
Junior Partners		need info	
Senior Associates		need info	
Junior Associates		need info	
Paralegals		need info	

Total compensation exclusive of expense reimbursement $ _____

REIMBURSABLE EXPENSES ITEM (Specify)	ESTIMATED RATE OF REIMB.	TOTAL

Total reimbursable expense $ _____

Total compensation inclusive of expense reimbursement $ _____

Projected total cost of contract if all available periods of extensions are completed	$

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

4. **SOURCE OF FUNDS:**
Complete appropriate box(es) below to total 100% of the funding in this contract.

% Federal Funds	% State Funds	% Cash Funds	% Trust Funds	% Other Funds

Identify the source of funds for the following:

Federal Funds	
Cash Funds	
Trust Funds	
Other Funds	

MUST BE SPECIFIC (i.e. fees, tuition, agricultural sales, bond proceeds, donations, etc.)

Labaton Sucharow and Chargois & Herron will advance all litigation costs and expect to be reimbursed for those costs only at the end of a case with the approval of the Court, and only out of the total class recovery. In a class action case, reimbursement could range from several hundred thousand dollars to several million dollars, depending on the length and complexity of the case involved.

5. **RENDERING OF COMPENSATION:**
The method(s) of rendering compensation and/or evaluation of satisfactory achievement toward attainment of the agreement listed herein is as follows, or in attachment no. ___ to this agreement.

As the engagement of Labaton Sucharow and Chargois & Herron is on a fully contingent basis, any fee awarded would be subject to Court approval, and only then after review and approval by the client.

6. **OBJECTIVES AND SCOPE:**
State description of services, objectives, and scope to the provided. (DO NOT USE "SEE ATTACHED")

Class action securities litigation and related portfolio monitoring services represent Labaton Sucharow's principal practice area and source of revenue. The firm has substantial experience in advising public pension plans and other institutional investors with regard to securities fraud matters, and has served as lead counsel in numerous securities class actions. Labaton Sucharow also monitors portfolios of state and institutional public pension plans in excess of $1 trillion dollars. Labaton Sucharow's portfolio monitoring services would be provided to ATRS at no cost. Labaton Sucharow seeks to provide securities litigation, class action monitoring and advice services on behalf of the ATRS.

7. **PERFORMANCE STANDARDS:**
List Performance standards for the term of the contract (if necessary, used attachments)

As class action attorneys working on a contingency fee basis, the amount of our compensation is directly related to the degree of success in the litigation.

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

8. **ATTACHMENTS:**
List ALL attachments to this contract by attachment number:

9. **CERTIFICATION OF CONTRACTOR**

A. "I, Eric J. Belfi (Contractor) Partner (Title)
certify under penalty of perjury that, to the best of my knowledge and belief, no regular full-time or part-time employee of any State agency of the State of Arkansas will receive any personal, direct or indirect monetary benefits which would be in violation of the law as a result of the execution of this contract." Where the contractor is a widely-held public corporation, the term 'direct or indirect monetary benefits' "shall not apply to any regular corporate dividends paid to a stockholder of said corporation who is also a State employee and who owns less than ten percent (10%) of the total outstanding stock of the contracting corporation."

B. **List any other contracts or subcontracts you have with any other state government entities. (Not applicable to contracts between Arkansas state agencies.)**

C. **Are you currently engaged in any legal controversies with any state agencies or represent any clients engaged in any controversy with any Arkansas state agency?**

Neither me, Eric J. Belfi, nor Labaton Sucharow is currently engaged in any legal controversies with any state agencies and do not represent any clients engaged in any controversy with any Arkansas state agency.

D. **The contractor agrees to list below, or on an attachment hereto, names, addresses, and relationship of those persons who will be supplying services to the state agency at the time of the execution of the contract. If the names are not known at the time of the execution of the contract, the contractor shall submit the names along with the other information as they become known. Such persons shall, for all purposes, be employees or independent contractors operating under the control of the contractor (sub-contractors), and nothing herein shall be construed to create an employment relationship between the agencies and the persons listed below.**

NAME	RELATIONSHIP
Please see section 5.7 of the attached response for the	
attorneys who would be assigned to a securities litigation	
matter on behalf of the ATRS. Other professionals who	
would be assigned are:	
Jean Bliss	Paralegal Manager
Danette McKenzie	Assistant Paralegal
	Manager

E. **The agency shall exercise no managerial responsibilities over the contractor or his employees. In carrying out this contract, it is expressly agreed that there is no employment relationship between the contracting parties.**

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

10. DISCLOSURE REQUIRED BY EXECUTIVE ORDER 98-04:
Any contract or amendment to a contract executed by an agency which exceeds $25,000 shall require the contractor to disclose information as required under the terms of Executive Order 98-04 and the Regulations pursuant thereto. The contractor shall also require the subcontractor to disclose the same information. The Contract and Grant Disclosure and Certification Form (Form PCS-D attachment 11-10.3) shall be used for this purpose.

Contracts with another government entity such as a state agency, public education institution, federal government entity, or body of a local government are exempt from disclosure requirements.

The failure of any person or entity to disclose as required under any term of Executive Order 98-04, or the violation of any rule, regulation or policy promulgated by the Department of Finance and Administration pursuant to this Order, shall be considered a material breach of the terms of the contract, lease, purchase agreement, or grant and shall subject the party failing to disclose, or in violation, to all legal remedies available to the Agency under the provisions of existing law.

11. NON-APPROPRIATION CLAUSE:

"In the event the State of Arkansas fails to appropriate funds or make monies available for any biennial period covered by the term of this contract for the services to be provided by the contractor, this contract shall be terminated on the last day of the last biennial period for which funds were appropriated or monies made available for such purposes.

This provision shall not be construed to abridge any other right of termination the agency may have."

12. TERMS:
The term of this agreement begins on the date in SECTION 2 and will end on the date in SECTION 2, and/or as agreed to separately in writing by both parties.

This contract may be extended until _____, in accordance with the terms stated in the Procurement, by written mutual agreement of both parties and subject to: approval of the Arkansas Department of Finance and Administration/Director of Office of State Procurement, appropriation of necessary funding, and review by any necessary state or federal authority.

Amendments to contracts will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration/Director of Office of State Procurement if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount or involves major changes in the objectives and scope of the contract.

Amendments (to contracts that originally did not require review by Legislative Council or Joint Budget Committee) which cause the total compensation to exceed the sum of $25,000, shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration/Director of Office of State Procurement and before the execution date of the amendment.

This contract may be terminated by either party upon 30 day written notice, unless otherwise agreed by both parties.

13. AUTHORITY:
A. This contract shall be governed by the Laws of the State of Arkansas as interpreted by the Attorney General of the State of Arkansas and shall be in accordance with the intent of Arkansas Code Annotated §19-11-1001 et seq.

B. Any legislation that may be enacted subsequent to the date of this agreement, which may cause all or any part of the agreement to be in conflict with the laws of the State of Arkansas, will be given proper consideration if and when this contract is renewed or extended; the contract will be altered to comply with the then applicable laws.

STATE OF ARKANSAS
PROFESSIONAL/CONSULTANT SERVICES CONTRACT

14. **AGENCY COORDINATION:**
The Agency Representative coordinating the work of this contractor will be:

(NAME)	(TITLE)	(TELEPHONE #)

Mail approved contract to: _____

Agency agrees to make available advice, counsel, data, and personnel, etc. as described immediately below or in Attachment number _____ to this agreement.

15. AGENCY SIGNATURE CERTIFIES NO OBLIGATIONS WILL BE INCURRED BY A STATE AGENCY UNLESS SUFFICIENT FUNDS ARE AVAILABLE TO PAY THE OBLIGATIONS WHEN THEY BECOME DUE.

16. **TYPE OF CONTRACT:** PROFESSIONAL ☑ CONSULTANT ☐

17. **SIGNATURES**

Eric J. Belfi 7/30/08
CONTRACTOR DATE

AGENCY DIRECTOR DATE

Partner
TITLE

TITLE

140 Broadway
New York, NY 10005
ADDRESS

ADDRESS

7/30/09
CONTRACTOR DATE

Partner
TITLE

2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380

1021 W. Second Street
Little Rock, Arkansas 72201
ADDRESS

APPROVED: _____ _____
DEPARTMENT OF FINANCE AND ADMINISTRATION DATE

Appointment

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 6/6/2007 8:20:32 PM
To: Keller, Christopher J. [ckeller@labaton.com]

Subject: Conference Call - Kamran/Damon - Ken Bailey - Unions

Start: 6/7/2007 3:00:00 PM
End: 6/7/2007 3:30:00 PM
Show Time As: Busy

Date: June 7, 2007
Time: 9AM Central/10AM EST
Dial in number is 1-888-870-8293
Passcode: 212-907-0878

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/9/2015 2:39:01 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Fwd: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)
Attachments: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3).doc; ATT00001..htm

Here was my return draft. Importantly I changed the venue for any dispute to arbitration in Texas or New York. So at least we're out of court.

Christopher Keller
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
212-907-0853

Begin forwarded message:
From: "Keller, Christopher J." <ckeller@labaton.com>
Date: April 22, 2009 at 3:04:08 PM EDT
To: "'damon@cmhllp.com'" <damon@cmhllp.com>
Cc: "Belfi, Eric J." <EBelfi@labaton.com>
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)
Damon, sorry for the long wait. Here are our proposed changes. Hope you are well. Chris

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation ("Clients"), brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

In instances where Clients introduced by CMH serve as sole lead plaintiff or sole class representative, CMH will receive the full 20% fee (the "Fee"). However, there may be instances where one or more clients may be represented by Labaton Sucharow in a particular case and a fee may be owed to other associating counsel. In that event, the amount of the Fee may be reduced commensurate with the contributory losses of the several clients represented by Labaton Sucharow. For instance, if Labaton Sucharow files a motion for the appointment of lead plaintiff with two clients with associating counsel (including a CMH client) with losses totaling $1.5 million, and the CMH client has losses of $1,000,000, then CMH shall receive a Fee of 2/3 of 20%, or 13.35%. Any such arrangement, however, shall be disclosed and agreed to at the inception of the case or at such later date if the need for additional or substitute clients later arises. Labaton Sucharow and CMH are free to discuss other methodologies for an allocation of the Fee under the multiple lead-plaintiff scenario at their mutual discretion.

In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's Fee will fall to ten percent (10%).

Formatted: Indent: First line: 0"

It is agreed that CMH will not bare any costs, expenses or payments of any kind whatsoever in relation to the examination or investigation of a potential cause of action, the litigation of the action or any other related costs, expenses or payments.

The parties hereto expressly understand and agree that information exchanged between the firms may contain confidential information, such as client lists, firm strategies, litigation strategies and other sensitive information constitutes confidential and/or privileged information. Each of the parties mutually agree that they shall not use or disclose such confidential information for any purpose other than in the performance of the services under this Agreement.

Any dispute between the parties hereto shall be resolved by arbitration conducted pursuant to the applicable rules of the American Arbitration Association in Galveston County, Texas or New York City, New York. In any such arbitration, the arbitrator is authorized to award attorney's fees to the prevailing party or parties if the arbitrator finds that the position of the other party or parties was maintained in bad faith.

~~REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.~~

~~Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.~~

~~Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.~~

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

Message

From: Hollingsworth, Jarvis [Jarvis.Hollingsworth@bgllp.com]
Sent: 1/25/2008 1:24:08 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: damon@cmhllp.com
Subject: Re: Houston

Eric
Thanks for reaching out. That's a tough day-booked solid. Catch me next time.
Best
Jarvis

----- Original Message -----
From: Belfi, Eric J. <EBelfi@labaton.com>
To: Hollingsworth, Jarvis
Cc: damon@cmhllp.com <damon@cmhllp.com>
Sent: Fri Jan 25 06:44:04 2008
Subject: Houston

Dear Jarvis:

I will be in Houston next Thursday (31st) and I was wondering if you would be available to go to lunch or meet at your office with Damon and I.

Best regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Hollingsworth, Jarvis [Jarvis.Hollingsworth@bgllp.com]
Sent: 6/10/2008 12:36:14 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: damon@cmhllp.com
Subject: Re: Meeting

Eric
Hope things are well. Unfortunately that is a very busy day for me. Pls contact me the next time you are in town and we will get together.
Best
Jarvis

----- Original Message -----
From: Belfi, Eric J. <EBelfi@labaton.com>
To: Hollingsworth, Jarvis
Cc: damon@cmhllp.com <damon@cmhllp.com>
Sent: Mon Jun 09 10:40:11 2008
Subject: Meeting

Dear Jarvis:

I am planning on being in Houston next Monday (June 16th) and I was wondering if you have time for a visit with Damon and I?

Regards,

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway

New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com <http://www.labaton.com/>

Message

From: [redacted]
Sent: 10/9/2007 7:17:35 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: damon@cmhllp.com; [redacted]
Subject: Re: Labaton Sucharow/Portfolio Monitoring
Attachments: LPAS Summary (full).pdf; Reputation Matters.pdf; Sample Quarterly Report.pdf

Mr. Belfi:

I represent the Board of Directors of the [redacted] has a separate Board of Investors, some members of which would likely be interested in your presentation. [redacted] Director of Revenue and Policy for [redacted] (a member of the Board of Investors) should be able to help you. You may contact him at: ja[redacted]

[redacted]

"Belfi, Eric J." <EBelfi@labaton.com>

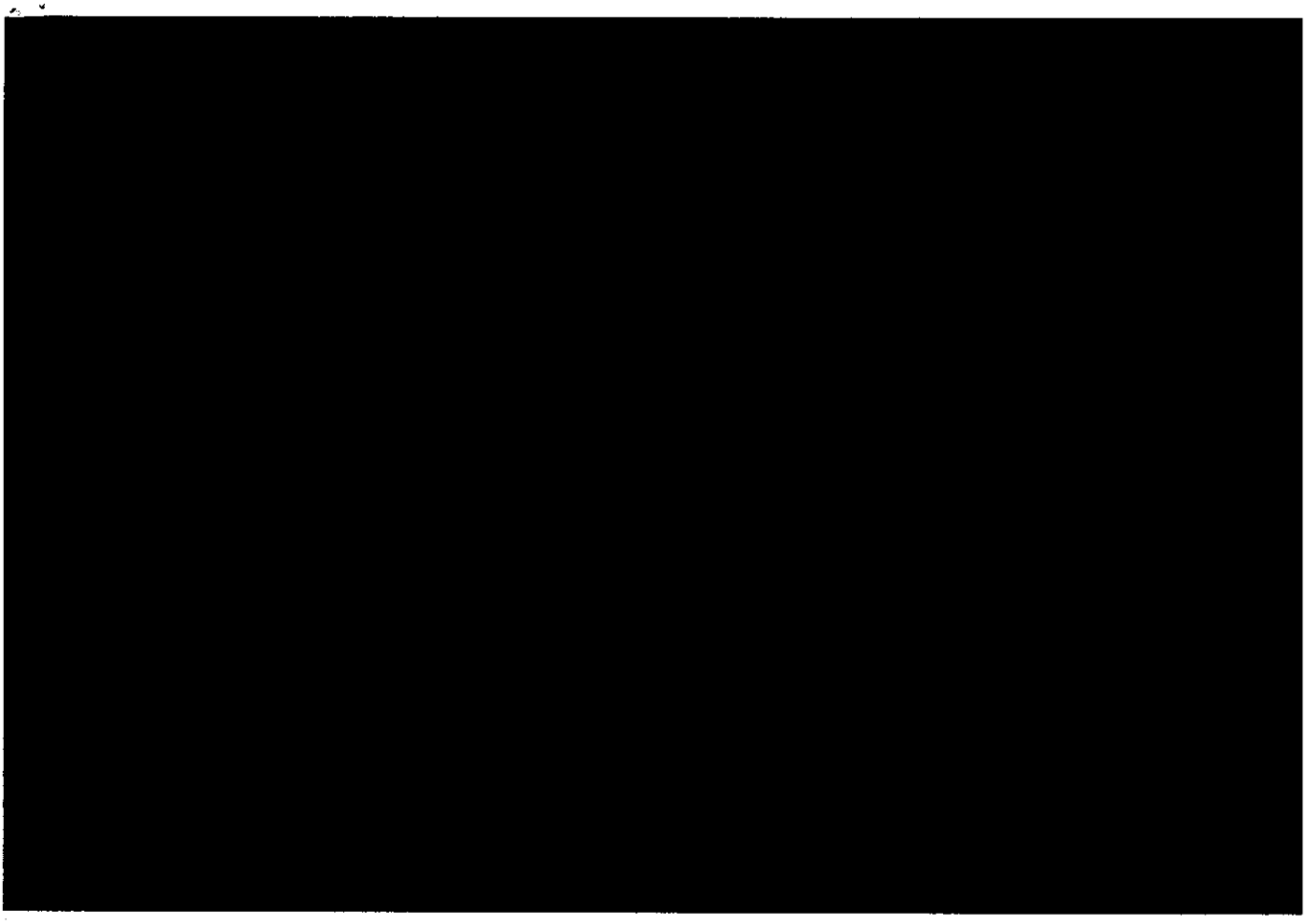
10/04/2007 11:01 PM

To <[redacted]
cc <[redacted]
Subject Labaton Sucharow/Portfolio Monitoring

Dear [redacted]

I had the pleasure of meeting with [redacted] yesterday concerning the portfolio monitoring of [redacted] He suggested that I should contact you concerning this issue.

[redacted]



I plan to be in [redacted] between Wednesday, October 17 and Friday, October 19. Please let me know if you would have time to meet and discuss these issues.

Thank you for your time and consideration in the matter.

Regards,

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 9/1/2009 4:31:19 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tim Herron [tim@cmhllp.com]
Subject: RE: [redacted] and [redacted] - Monitoring Agreements

Thank you, Eric. We are also confirming our agreement that any attorney fee award realized by your firm as a result of representing either of these funds, or any related funds where Labaton's representation came about as a result of Chargois, Mashayekh & Herron's efforts and/or contacts (or our agents, assigns, friends, etc.) will be treated the same as our agreement on the Arkansas Teacher Retirement Fund, namely that gross attorney fees will be divided 80/20 (80% to Labaton, Sucharow and 20% to Chargois, Mashayekh & Herron).

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, September 01, 2009 11:19 AM
To: Damon Chargois; Tim Herron
Subject: [redacted] and [redacted] - Monitoring Agreements

Damon/Tim:

Attached please find the Word and PDF versions of the monitoring agreements for [redacted] and [redacted].

Let me know if you need anything else.

Eric

Please consider the environment before printing this email.

Message

From: Elaine Doyal [Elaine@cmhllp.com]
Sent: 10/29/2009 8:02:06 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: FW: Correspondence
Attachments: Ltr to Eric Belfi - 10-29-09.pdf

From: Elaine Doyal
Sent: Thursday, October 29, 2009 12:34 PM
To: 'Belfi, Eric J.'
Cc: Damon Chargois
Subject: Correspondence
Dear Mr. Belfi:

Please see attached correspondence.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Facsimile

CHARGOIS & HERRON, L.L.P.

ATTORNEYS AT LAW

2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380

Damon Chargois
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D.*
Kamran Mashayekh
Kirk A. Chargois

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

*Board Certified – Texas Civil Trial Law

October 29, 2009

Via E-Mail to ebelfi@labaton.com
and U.S. Regular Mail
Eric Belfi
Labaton Sucharow
140 Broadway
New York, New York 10005

RE: In Re [redacted] Antitrust Litigation

Dear Eric:

As we have discussed both recently and in September, Frank Stout is not "with our office". He is also not an attorney, legal assistant or paralegal. He is Tim's son-in-law who I asked, at your firm's request, to talk to any of his current or former [redacted]

After receiving a call from you about your concern regarding Frank's status, I investigated and determined that Frank was not, and had never, held himself out as being with any law firm-- yours or anybody else's. I learned from our September telephone conversation that your office had contacted one of Frank's friends who indicated to you a desire to know what he stood to gain, or possibly lose, from pursuing a claim against [redacted]

You told me that he was confused about how he could benefit from pursuing a claim and that the source of his confusion may have come via a prior conversation with Frank. This would be understandable, because Frank knows nothing about law or the practice of law.

In an abundance of caution, after speaking with you, I spoke to Frank and told him to stop speaking with his friends about this subject and not to worry about it anymore.

I regret that you no longer wish to associate with my firm and believe that you are overreacting; nevertheless, I will honor your request.

One issue remains, however. I have already sent you a client [redacted] class action litigation and both of our firms represent him. I found him through an attorney friend of mine who has no connection to Frank whatsoever. He and Mike do not know Frank at all.

Based on your letter, I suppose you will be informing [redacted] and the Court (if you have filed his case) that you are withdrawing representation. Please forward his file to my office immediately, so that we can get up to speed on what you have done on his behalf.

Yours truly,

CHARGOIS & HERRON, LLP

Damon J. Chargois

DJC/med

Message

From: Elaine Doyal [Elaine@cmhllp.com]
Sent: 11/13/2012 5:12:11 PM
To: Kamran Mashayekh [kamran@cmhllp.com]; Graciela Saenz [saenzassociates@gmail.com]; Elizabeth Burkhardt [burkhardtlaw@comcast.net]; Damon Chargois [damon@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
Subject: Conference Call for today at 3:30 p.m. cst

Good morning, all:

For the purpose of the conference call today which has now been scheduled for 3:30 p.m. central time, the following is the Dial-In Information needed to participate:

Telephone: 1-800-430-0714
Passcode: 4440604.

Please let me know if you have any questions.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Facsimile

From: Kamran Mashayekh
Sent: Tuesday, November 13, 2012 10:58 AM
To: Graciela Saenz; 'Elizabeth Burkhardt'; Damon Chargois
Cc: Elaine Doyal; ebelfi@labaton.com
Subject: RE: Great job Gracie and Elizabeth and plans for next friday
Thank you Gracie and elaine, may you please circulate a call in number for today at 2:30 pm central time..

appreicate everyone's help and participation...

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Tue 11/13/2012 9:54 AM
To: Kamran Mashayekh; 'Elizabeth Burkhardt'; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Let's schedule for something after 2 p.m. today. I will be at Elizabeth's place to work on some files. Thanks, Gracie

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Friday, November 09, 2012 3:57 PM
To: saenzassociates@gmail.com; Elizabeth Burkhardt; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Gracie and Elizabeth:

Fabulous job today even though I was only there in spirit and not in body. Eric is flying in at 11:56 am next friday and Damon will pick him up and bring him to the lunch meeting wherever you decide that location shall be. In an abundance of caution, is it possible to schedule the lunch for one pm or better one thirty pm as to give eric sufficient time to get there and to make allowances for any unforseen contingencies and delays that might be associated with flying? As Al says: UAL- you aint leaving airlines can be so a propos in this instance.

Also, it behooves us to have a call with eric before friday as to brush up on any loose ends that might be out there, but the way it appears is that you two have done a fabulous job in selling labaton and all eric has to do is to convince GV that time is of the essence and their engagement will serve the highest and best interest of his organization.

With the above rant, I thank you both and wish you a happy weekend.

Senor K

Saenz

Message

From: Elizabeth Burkhardt [burkhardtlaw@comcast.net]
Sent: 11/20/2012 1:00:01 AM
To: 'Kamran Mashayekh' [kamran@cmhllp.com]; 'Graciela Saenz' [saenzassociates@gmail.com]; 'Damon Chargois' [damon@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
CC: 'Elizabeth Burkhardt' [burkhardtlaw@comcast.net]
Subject: RE: LABATON - Other Potential Clients

ERIC: It was nice meeting you. Thank you for finding the time to meet at this stressful time in your life (e.g. Sandy fall-out). While I am hopeful that we will deliver the [redacted] account in the not so distant future, I would like to pursue the other potential clients to which you alluded in our last phone conversation. You might recall telling me you had some ideas about where we should next focus our efforts. Look forward to your suggestions. Have a great Thanksgiving. Elizabeth Burkhardt

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, November 13, 2012 6:48 PM
To: Elaine Doyal; Graciela Saenz; Elizabeth Burkhardt; Damon Chargois; ebelfi@labaton.com
Subject: RE: Confirmation of meeting at cheesecake factory in the Woodlands at one pm on friday nov. 16

Good Evening All:

By way of this email, I am confirming our friday meeting at the Cheesecake factory in the WOODLANDS with GV. Eric, you should have plenty of time to get to the meeting since CCF Woodlands location is close to the airport.

Best

Kamran

From: Elaine Doyal
Sent: Tue 11/13/2012 11:12 AM
To: Kamran Mashayekh; Graciela Saenz; 'Elizabeth Burkhardt'; Damon Chargois; ebelfi@labaton.com
Subject: Conference Call for today at 3:30 p.m. cst

Good morning, all:

For the purpose of the conference call today which has now been scheduled for 3:30 p.m. central time, the following is the Dial-In Information needed to participate:

Telephone: 1-800-430-0714

Passcode: 4440604.

Please let me know if you have any questions.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
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From: Kamran Mashayekh
Sent: Tuesday, November 13, 2012 10:58 AM
To: Graciela Saenz; 'Elizabeth Burkhardt'; Damon Chargois
Cc: Elaine Doyal; ebelfi@labaton.com
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Thank you Gracie and elaine, may you please circulate a call in number for today at 2:30 pm central time..

appreicate everyone's help and participation...

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Tue 11/13/2012 9:54 AM
To: Kamran Mashayekh; 'Elizabeth Burkhardt'; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Lets schedule for something after 2 p.m. today. I will be at Elizabeths place to work on some files. Thanks, Gracie

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Friday, November 09, 2012 3:57 PM
To: saenzassociates@gmail.com; Elizabeth Burkhardt; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Gracie and Elizabeth:

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Also, it behooves us to have a call with eric before friday as to brush up on any loose ends that might be out there, but the way it appears is that you two have done a fabulous job in selling labaton and all eric has to do is to convince [redacted] that time is of the essence and their engagement will serve the highest and best interest of his organization.

With the above rant, I thank you both and wish you a happy weekend.

Senor K

Saenz

Message

From: /o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 11/20/2012 1:27:45 PM
To: Elizabeth Burkhardt [burkhardtlaw@comcast.net]; 'Kamran Mashayekh' [kamran@cmhllp.com]; 'Graciela Saenz' [saenzassociates@gmail.com]; 'Damon Chargois' [damon@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: LABATON - Other Potential Clients

Elizabeth:

It was a pleasure meeting you and Gracie and I look forward to working with you on [redacted] hopefully soon.

As for other targets, please find a list below of funds that we would be interested in Texas:

Name of Fund	City	State	Sponsor Type	Total Assets* ($Mil)
Texas				
[redacted]				

[redacted]

Eric

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

Telephone: +1.212.907.0878

Facsimile: +1.212.883.7078

ebelfi@labaton.com

www.labaton.com

From: Elizabeth Burkhardt [mailto:burkhardtlaw@comcast.net]
Sent: Monday, November 19, 2012 8:00 PM
To: 'Kamran Mashayekh'; 'Graciela Saenz'; 'Damon Chargois'; Belfi, Eric J.
Cc: 'Elizabeth Burkhardt'
Subject: RE: LABATON - Other Potential Clients

ERIC: It was nice meeting you. Thank you for finding the time to meet at this stressful time in your life (e.g. Sandy fall-out). While I am hopeful that we will deliver the [redacted] account in the not so distant future, I would like to pursue the other potential clients to which you alluded in our last phone conversation. You might recall telling me you had some ideas about where we should next focus our efforts. Look forward to your suggestions. Have a great Thanksgiving. Elizabeth Burkhardt

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, November 13, 2012 6:48 PM
To: Elaine Doyal; Graciela Saenz; Elizabeth Burkhardt; Damon Chargois; ebelfi@labaton.com
Subject: RE: Confirmation of meeting at cheesecake factory in the Woodlands at one pm on friday nov. 16

Good Evening All:

By way of this email, I am confirming our friday meeting at the Cheesecake factory in the WOODLANDS with GV. Eric, you should have plenty of time to get to the meeting since CCF Woodlands location is close to the airport.

Best

Kamran

From: Elaine Doyal
Sent: Tue 11/13/2012 11:12 AM
To: Kamran Mashayekh; Graciela Saenz; 'Elizabeth Burkhardt'; Damon Chargois; ebelfi@labaton.com
Subject: Conference Call for today at 3:30 p.m. cst

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Telephone: 1-800-430-0714

Passcode: 4440604.

Please let me know if you have any questions.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
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From: Kamran Mashayekh
Sent: Tuesday, November 13, 2012 10:58 AM
To: Graciela Saenz; 'Elizabeth Burkhardt'; Damon Chargois
Cc: Elaine Doyal; ebelfi@labaton.com
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Thank you Gracie and elaine, may you please circulate a call in number for today at 2:30 pm central time..

appreicate everyone's help and participation...

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Tue 11/13/2012 9:54 AM
To: Kamran Mashayekh; 'Elizabeth Burkhardt'; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

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Sent: Friday, November 09, 2012 3:57 PM
To: saenzassociates@gmail.com; Elizabeth Burkhardt; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Gracie and Elizabeth:

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Also, it behooves us to have a call with eric before friday as to brush up on any loose ends that might be out there, but the way it appears is that you two have done a fabulous job in selling labaton and all eric has to do is to convince [redacted] that time is of the essence and their engagement will serve the highest and best interest of his organization.

With the above rant, I thank you both and wish you a happy weekend.

Senor K

Saenz

Document Withheld

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation ("Clients"), brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

In instances where Clients introduced by CMH serve as sole lead plaintiff or sole class representative, CMH will receive the full 20% fee (the "Fee"). However, there may be instances where one or more clients may be represented by Labaton Sucharow in a particular case and a fee may be owed to other associating counsel. In that event, the amount of the Fee may be reduced commensurate with the contributory losses of the several clients represented by Labaton Sucharow. For instance, if Labaton Sucharow files a motion for the appointment of lead plaintiff with two clients with associating counsel (including a CMH client) with losses totaling $1.5 million, and the CMH client has losses of $1,000,000, then CMH shall receive a Fee of 2/3 of 20%, or 13.35%. Any such arrangement, however, shall be disclosed and agreed to at the inception of the case or at such later date if the need for additional or substitute clients later arises. Labaton Sucharow and CMH are free to discuss other methodologies for an allocation of the Fee under the multiple lead-plaintiff scenario at their mutual discretion.

In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's Fee will fall to ten percent (10%).

Formatted: Indent: First line: 0"

It is agreed that CMH will not bare any costs, expenses or payments of any kind whatsoever in relation to the examination or investigation of a potential cause of action, the litigation of the action or any other related costs, expenses or payments.

The parties hereto expressly understand and agree that information exchanged between the firms may contain confidential information, such as client lists, firm strategies, litigation strategies and other sensitive information constitutes confidential and/or privileged information. Each of the parties mutually agree that they shall not use or disclose such confidential information for any purpose other than in the performance of the services under this Agreement.

Any dispute between the parties hereto shall be resolved by arbitration conducted pursuant to the applicable rules of the American Arbitration Association in Galveston County, Texas or New York City, New York. In any such arbitration, the arbitrator is authorized to award attorney's fees to the prevailing party or parties if the arbitrator finds that the position of the other party or parties was maintained in bad faith.

~~REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.~~

~~Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.~~

~~Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.~~

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

Message

From: Keller, Christopher J. [ckeller@labaton.com]
Sent: 9/2/2016 4:10:49 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Fwd: Spectrum and Vocera settlement

Let's discuss

Christopher Keller
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
212-907-0853

Begin forwarded message:
From: Damon Chargois <damon@cmhllp.com>
Date: September 2, 2016 at 10:49:17 AM EDT
To: "ckeller@labaton.com" <ckeller@labaton.com>
Subject: Spectrum and Vocera settlement
Chris, we will adjust our arrangement with Labaton with respect to the Spectrum Pharmaceuticals and Vocera Communications by lowering our share of the fee from 20% down to 15%, meaning after the 36% loss allocation for ATRS in Vocera is applied to the full fee award (36% of 1,956,564.00), Labaton pays us 15% of that number (15% of 704,363.04). For Spectrum, since ATRS is the only client, Labaton pays us 15% of the fee.

Chris, I have to point out that for every ATRS case settlement since the very beginning of our arrangement, Labaton has called and asked us to take a haircut each time and we have worked with Labaton by agreeing to a reduced amount. The last time-- in the Colonial Bank case-- Eric promised me that if we took a rather sizable haircut in that case, then Labaton would not seek a haircut the next time and that he didn't expect to seek haircuts going forward. Feel free to discuss with Eric if you like. You've explained the changing situation at Labaton and I appreciate your candor, but I need you to understand the position that your request puts me in, especially in light of what I was previously told and what we relied on to our detriment. As you know, we dedicated a ton of money, energy, political favors, time and effort to secure ATRS for Labaton at the start of this thing based on the promise of 20% of Labaton's attorney fees received in any ATRS case where Labaton was appointed lead. With that said and taken into consideration, the 15% is as low as we can go in Spectrum Pharmaceuticals and Vocera.

Sent from my iPhone

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 4/11/2009 12:40:54 AM
To: Keller, Christopher J. [ckeller@labaton.com]; Belfi, Eric J. [EBelfi@labaton.com]
CC: Elaine Doyal [elaine@cmhllp.com]; Jeni Farrish [jeni@cmhllp.com]
Subject: Re: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Good deal, Chris.

Sent via BlackBerry by AT&T

From: "Keller, Christopher J."
Date: Thu, 9 Apr 2009 18:48:05 -0400
To: Damon Chargois<damon@cmhllp.com>; Belfi, Eric J.<EBelfi@labaton.com>
Subject: RE: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Very well done indeed. If I may, I will add some of the usual stuff we have in our agreements and see if you can live with it.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com <http://www.labaton.com/>

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Thursday, April 09, 2009 11:33 AM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Elaine Doyal; Jeni Farrish
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09

Okay boys. Take a gander and sign if it meets with your approval. Eric, pursuant to our discussion following our business development summit in February, I inserted an attorney fee reduction statement that says CMH only gets 10% of the gross attorney fee if a judge awards less than 15% gross attorney fee to Labaton in cases where the total class award is $25,000,000 or less. Even though the attached letter agreement is perfectly written, please make whatever changes you think appropriate and send back.

P Please consider the environment before printing this email.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 2/11/2009 4:27:27 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]
CC: Elaine Doyal [Elaine@cmhllp.com]
Subject: RE: We are at the pool bar

Flag: Follow up

Great seeing you again, Eric and Chris. Eric, you told me that Chris is working on an agreement in writing, so I am including him on this email. I don't know how formal you guys want to be with this, but you have probably noticed that I am pretty informal and rely more on our mutual trust and respect for each other to carry the day. That said, I think it's important for us to lay out our understanding of our agreement with respect to the gathering of pension fund business.

We have agreed that Chargois & Herron, LLP, shall receive 20% of the gross attorney fees recovered by Labaton Sucharow on any litigation or claims process brought on behalf of the Arkansas Teachers' Retirement Pension Fund. We have also agreed to the same payment terms shall apply to any other pension fund or retirement fund representation that Labaton Sucharow obtains via contacts through Chargois & Herron, LLP. This includes introductions to funds in Atlanta, Richmond and Georgia via Frank Stout, in addition to Chargois & Herron, LLP (CMH), and CMH's contacts.

Eric, much earlier you and I had agreed that CMH would receive 10% of gross attorney fees received by Labaton for any pension fund business that came by way of contacts through Bailey, Bailey & Perrin. While I initially put you guys together, in addition to getting us an audience with poppa Bailey, I haven't kept up with what you are doing with that firm. My experience with that firm is that they would like to make and keep as much of the fees generated through their contacts as possible. Please advise me on whether our deal with you is creating an issue.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, February 10, 2009 12:28 PM
To: aec@hgk.com; Damon Chargois
Subject: We are at the pool bar

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

P Please consider the environment before printing this email.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 2/19/2009 5:41:04 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]
Subject: FW: Eric Belfi

Guys, do I need to draft letter agreement? I don't mind bc I want to get this off of my todo list. Eric, to address Chris's concern about judges slashing fees, we can add a provision that says CMH's interest falls to 10% if the judge awards a gross attorney fee that falls below 15%. Let me know, boys.

From: Elaine Doyal
Sent: Thursday, February 19, 2009 11:32 AM
To: Damon Chargois
Subject: Eric Belfi

From: Damon Chargois
Sent: Wednesday, February 11, 2009 10:27 AM
To: Belfi, Eric J.; ckeller@labaton.com
Cc: Elaine Doyal
Subject: RE: We are at the pool bar

Great seeing you again, Eric and Chris. Eric, you told me that Chris is working on an agreement in writing, so I am including him on this email. I don't know how formal you guys want to be with this, but you have probably noticed that I am pretty informal and rely more on our mutual trust and respect for each other to carry the day. That said, I think it's important for us to lay out our understanding of our agreement with respect to the gathering of pension fund business.

We have agreed that Chargois & Herron, LLP, shall receive 20% of the gross attorney fees recovered by Labaton Sucharow on any litigation or claims process brought on behalf of the Arkansas Teachers' Retirement Pension Fund. We have also agreed to the same payment terms shall apply to any other pension fund or retirement fund representation that Labaton Sucharow obtains via contacts through Chargois & Herron, LLP. This includes introductions to funds in Atlanta, Richmond and Georgia via Frank Stout, in addition to Chargois & Herron, LLP (CMH), and CMH's contacts.

Eric, much earlier you and I had agreed that CMH would receive 10% of gross attorney fees received by Labaton for any pension fund business that came by way of contacts through Bailey, Bailey & Perrin. While I initially put you guys together, in addition to getting us an audience with poppa Bailey, I haven't kept up with what you are doing with that firm. My experience with that firm is that they would like to make and keep as much of the fees generated through their contacts as possible. Please advise me on whether our deal with you is creating an issue.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, February 10, 2009 12:28 PM
To: aec@hgk.com; Damon Chargois
Subject: We are at the pool bar

Eric J. Belfi

Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

P Please consider the environment before printing this email.

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 11/17/2007 4:52:46 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; '[redacted]
[redacted]
CC: 'damon@cmhllp.com' [damon@cmhllp.com]; Keller, Christopher J. [ckeller@labaton.com]
Subject: [redacted] Report
Attachments: Labaton Sucharow [redacted] Case Analysis.pdf

Dear [redacted]:

As a follow up to our initial report that we provided to you a couple of weeks ago, please find our updated report that is a much more detailed analysis of the situation at [redacted].

Our report is substantively supported by expert reports concerning damages, accounting, and an insider trading analysis all prepared by prominent experts in their field, as well as a substantive investigation headed up by our head investigator Al Gumney, a CPA and 20 year veteran of the FBI.

As we discussed in Houston last month about the size and strength of Labaton's infrastructure, I think that you will find that at this early stage in the litigation, we have conducted an extremely comprehensive investigation that puts us at a strategic advantage in the litigation of this case.

I plan to be in Houston during the week of November 26, 2007 and I am available for an in-person meeting to further discuss this case.

Have a good weekend.

Regards,

Eric

From: Belfi, Eric J.
Sent: Friday, November 02, 2007 4:20 PM
To: [redacted]
Cc: 'damon@cmhllp.com'
Subject: [redacted] Report

Dear [redacted]s:

Based on a review of 13-F Filings, it appears that the [redacted] has suffered a significant loss in Merrill Lynch Co., Inc. We estimate that [redacted] has suffered losses in excess of $38 million.

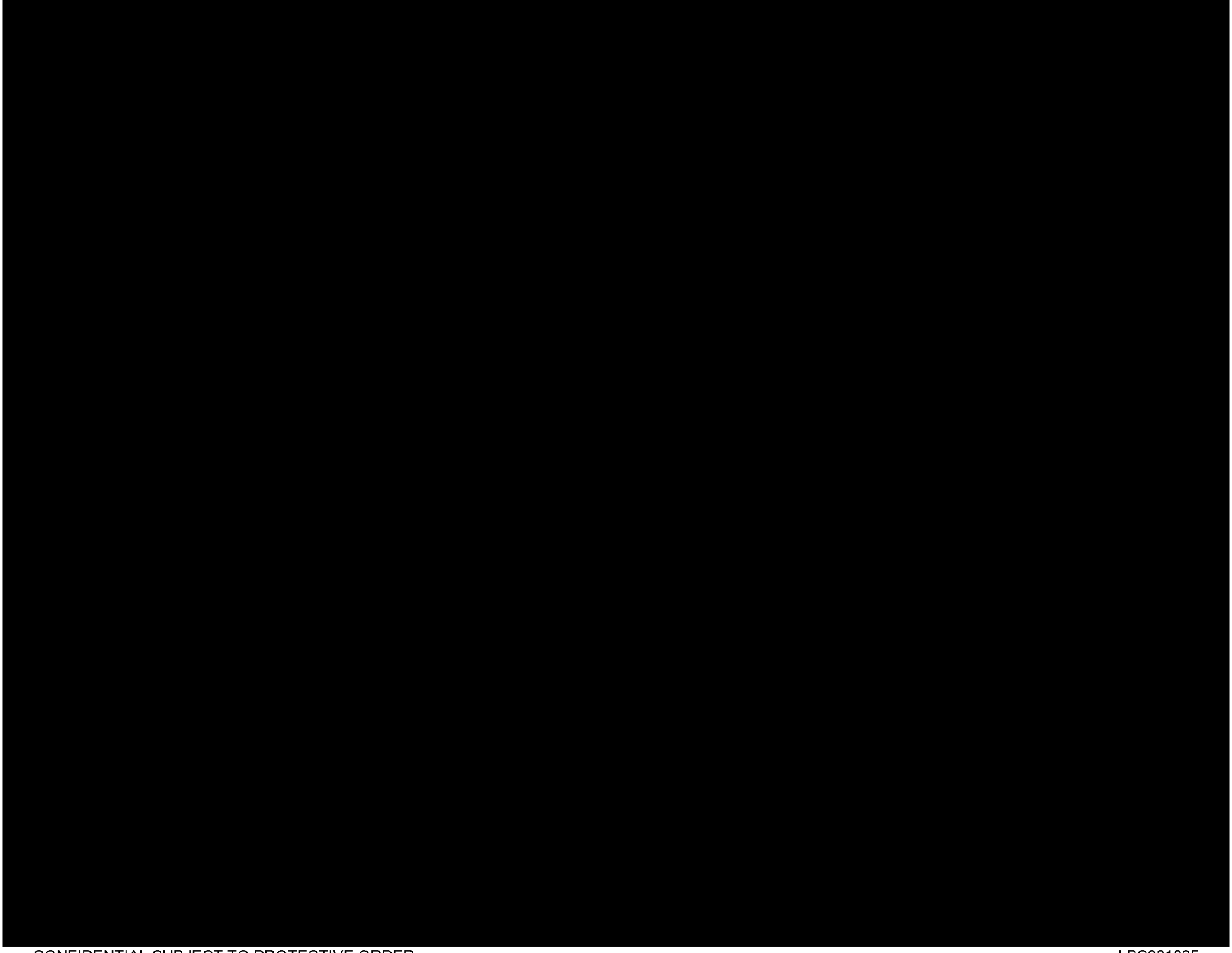
I am providing you with a copy of our initial research report on [redacted] We are working on a more detailed report which we will be able to provide to you shortly.

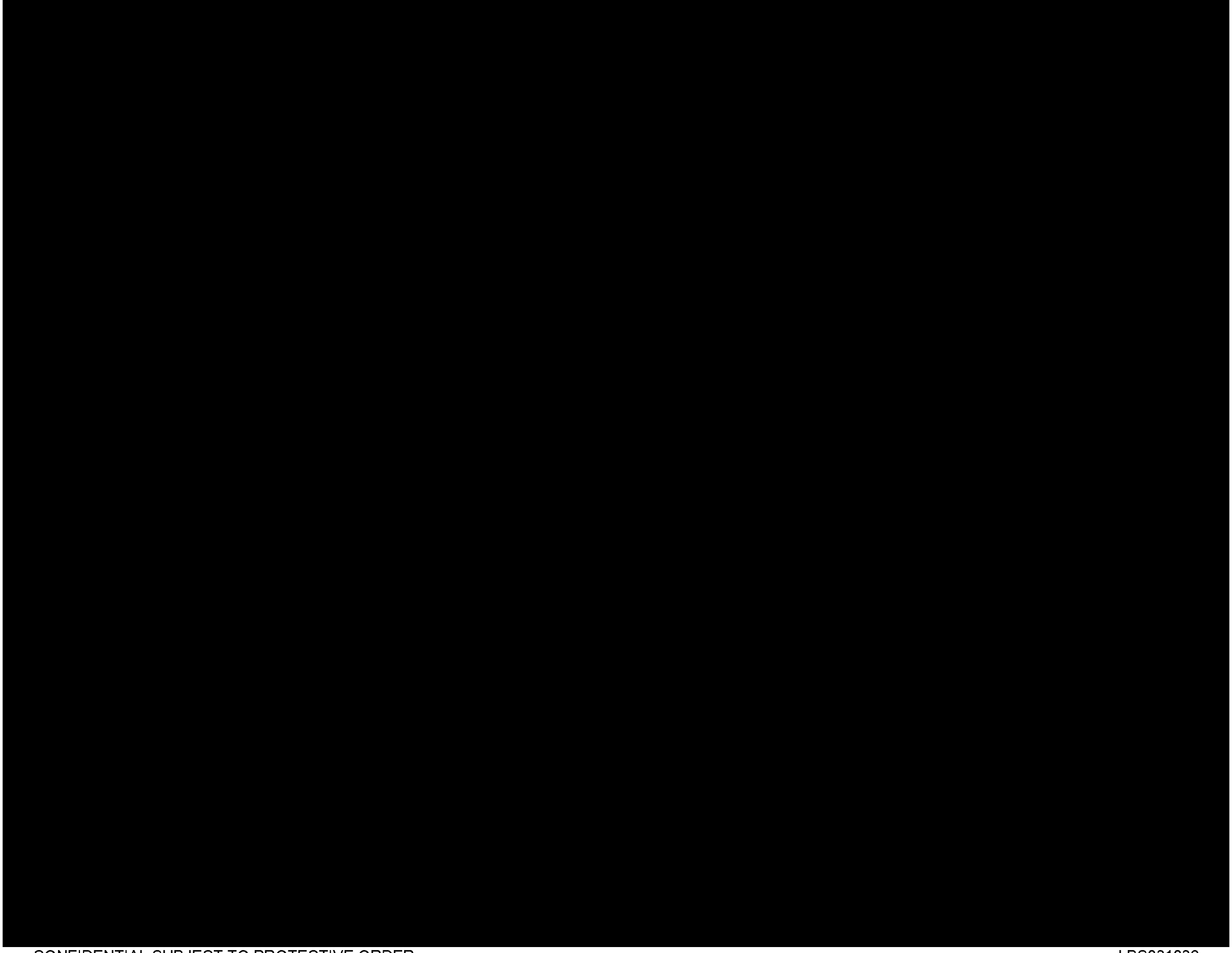
If you would like us to determine your losses in this case, please provide us with the following data:

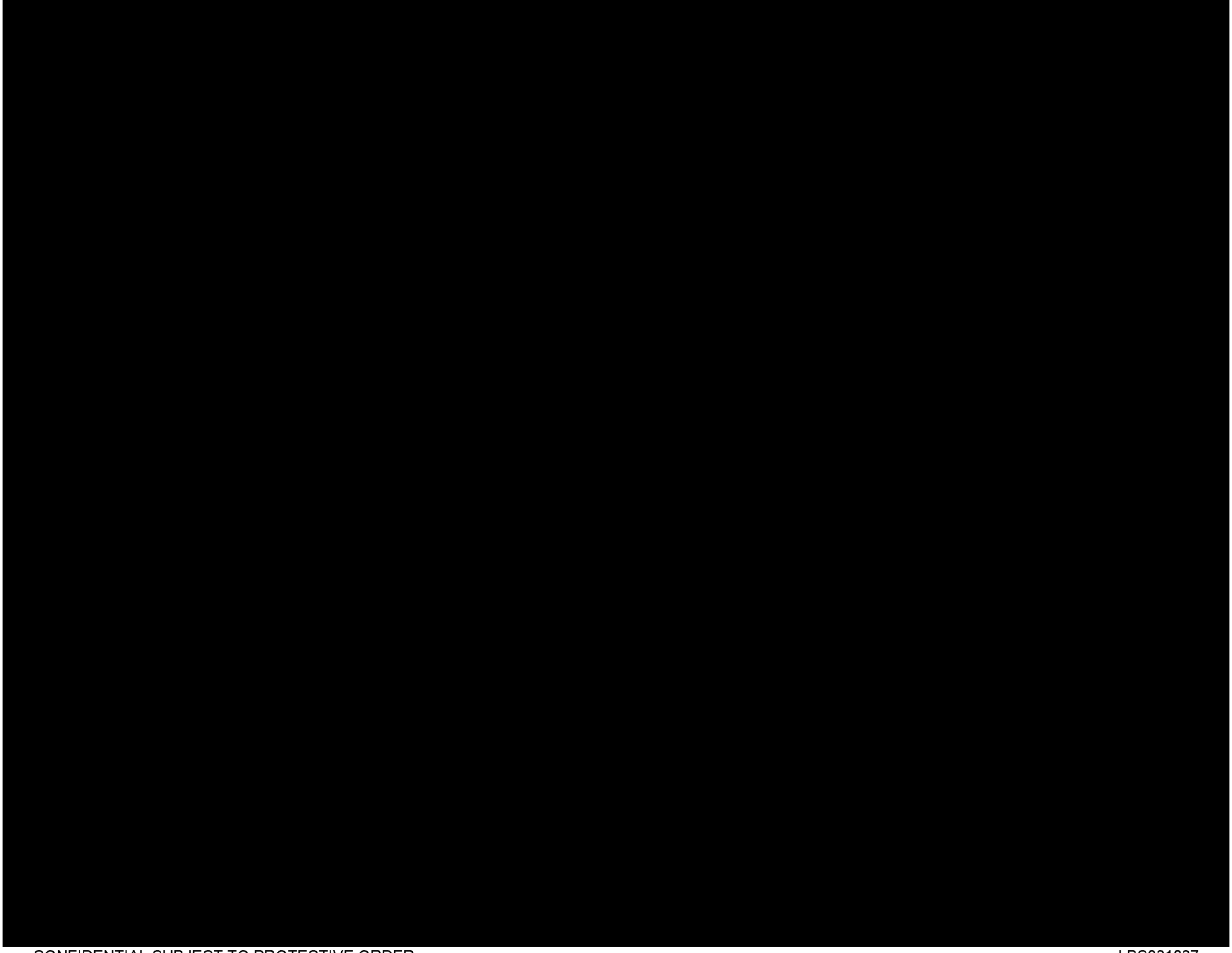
[redacted]

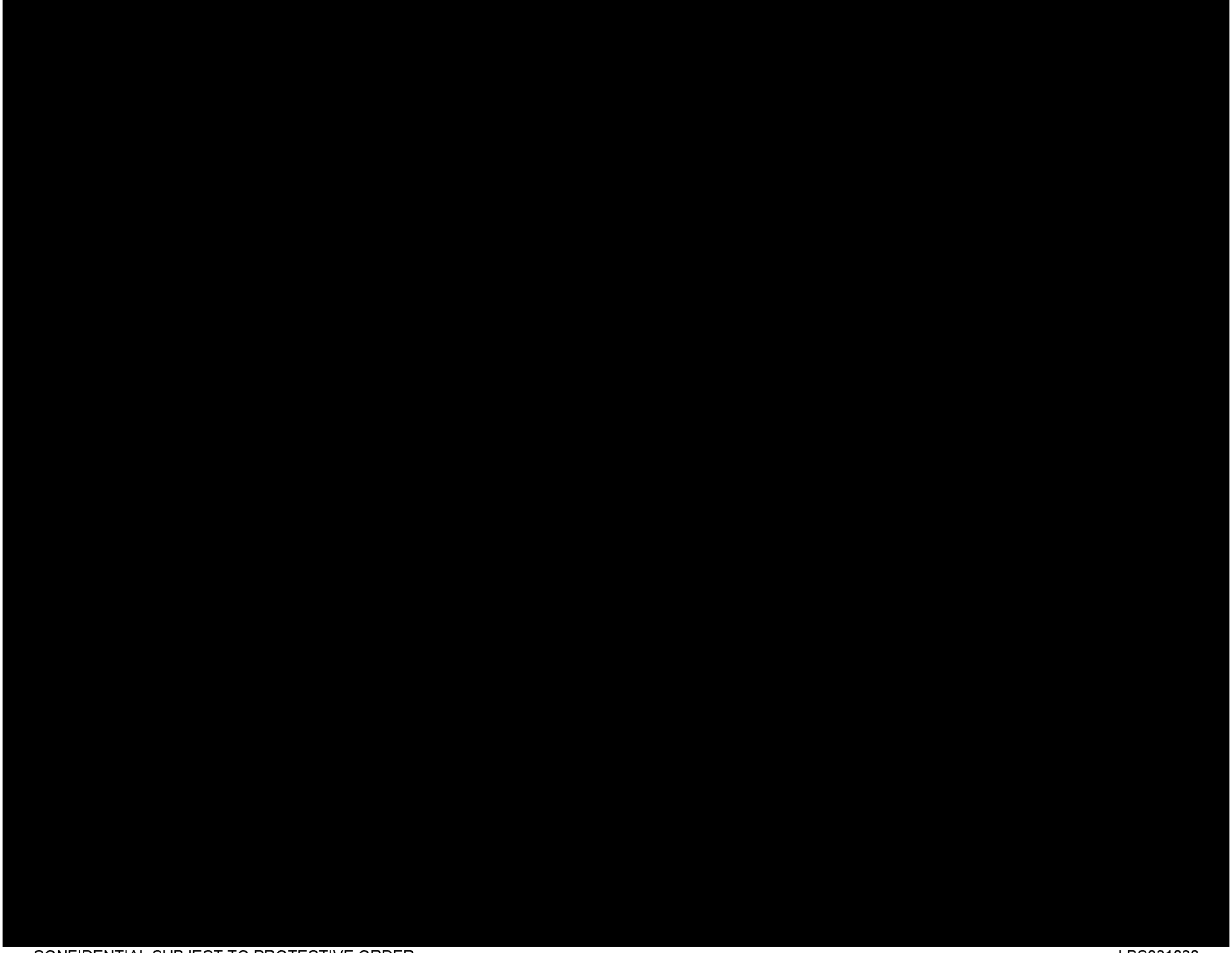
Regards,

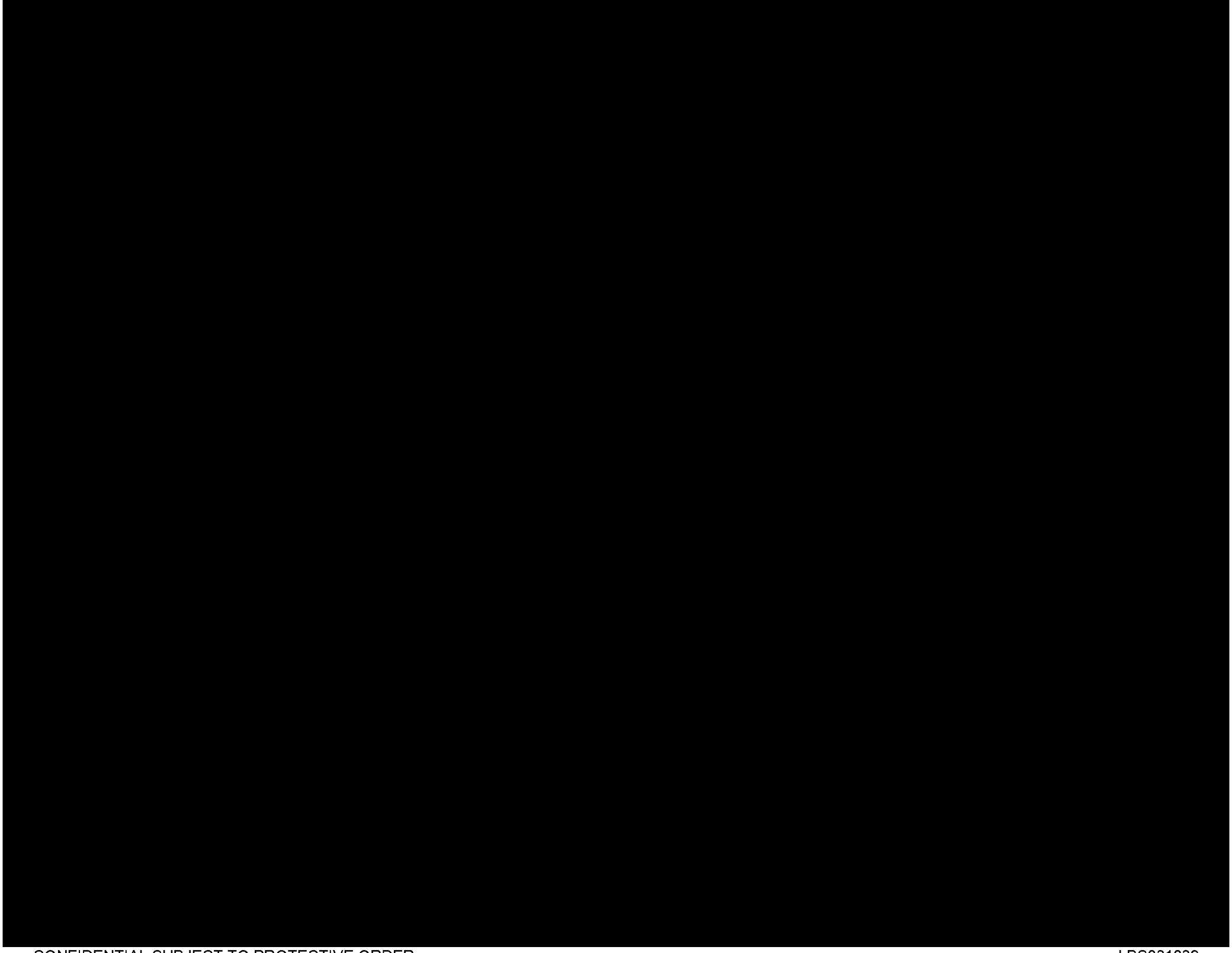
Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

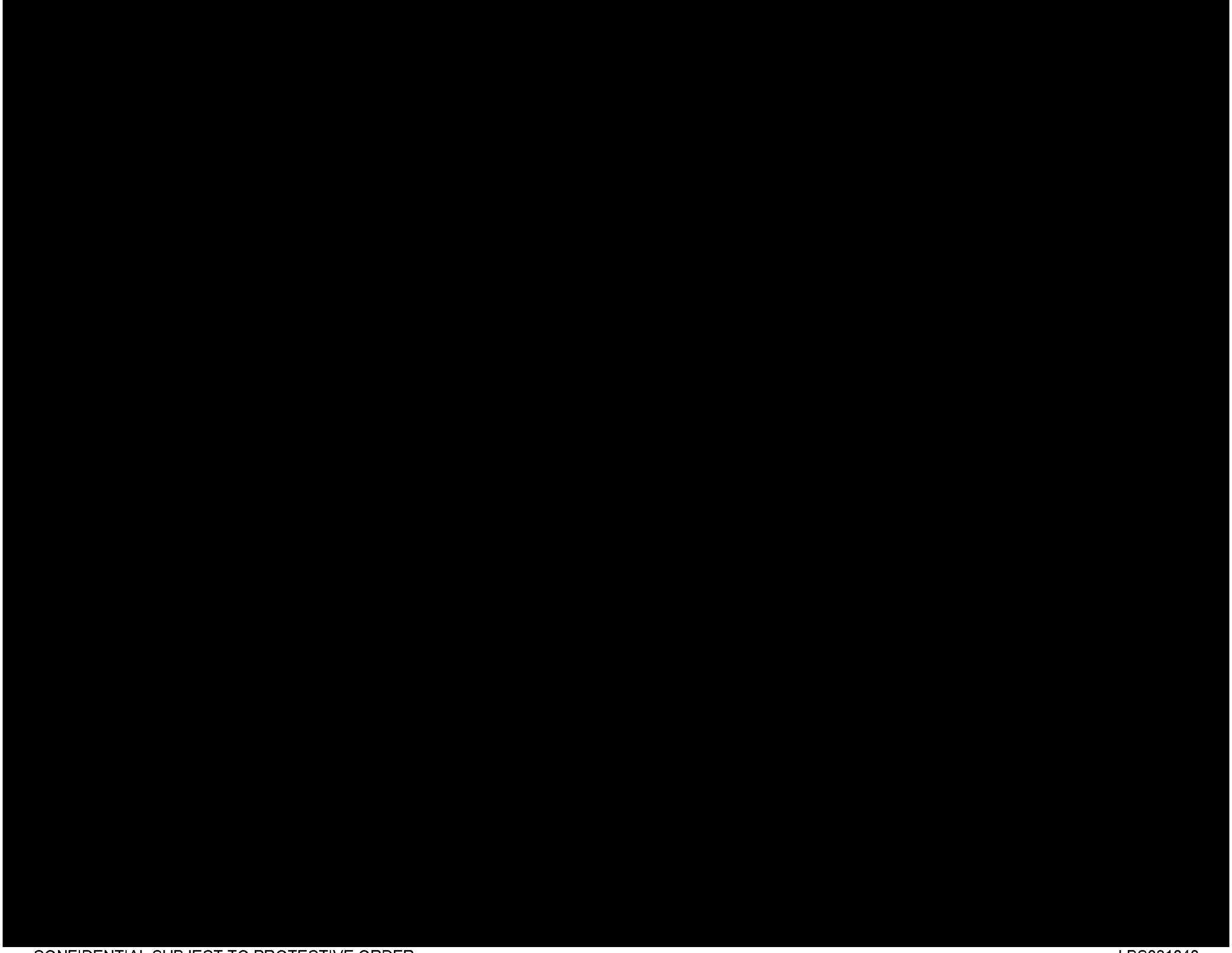


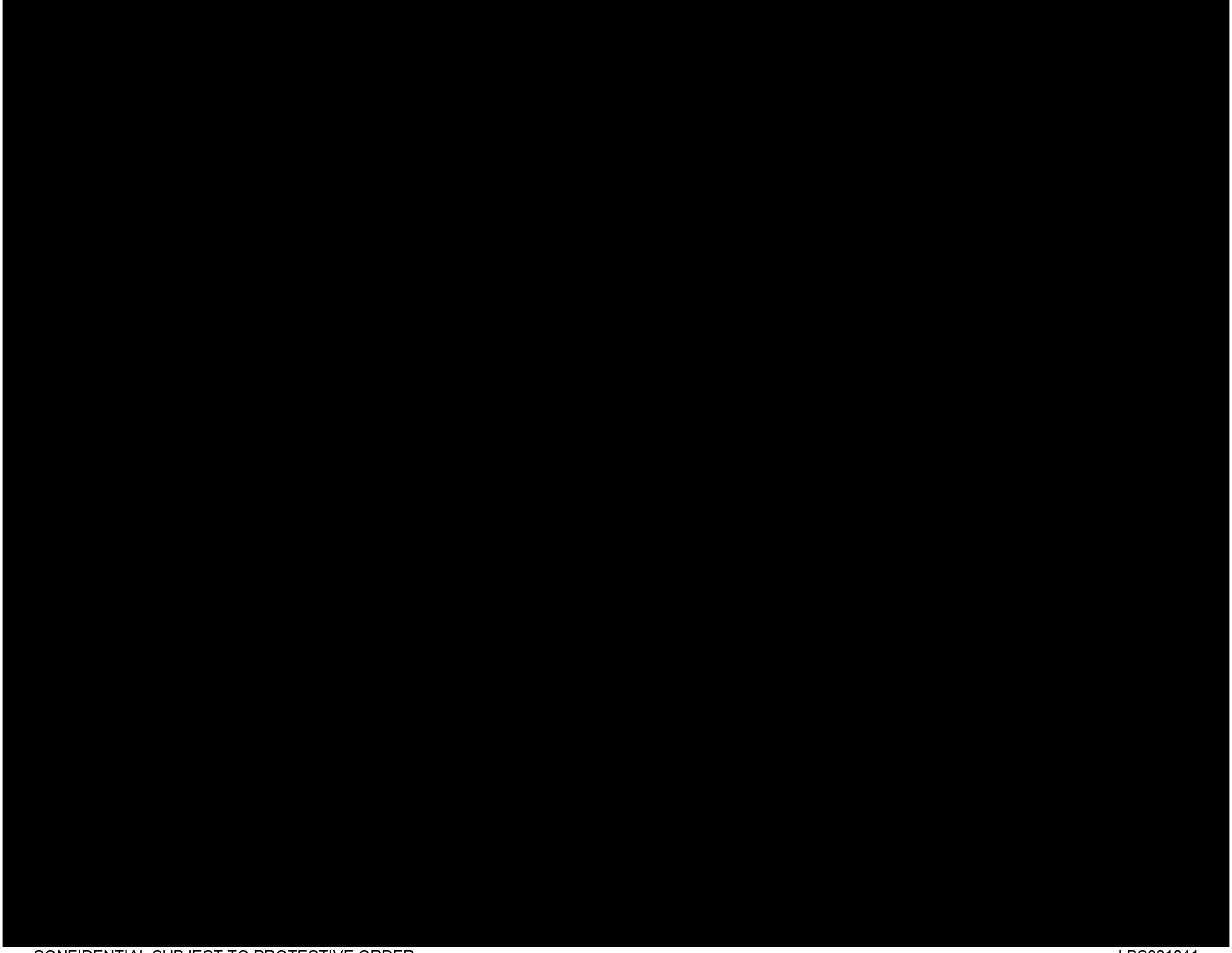


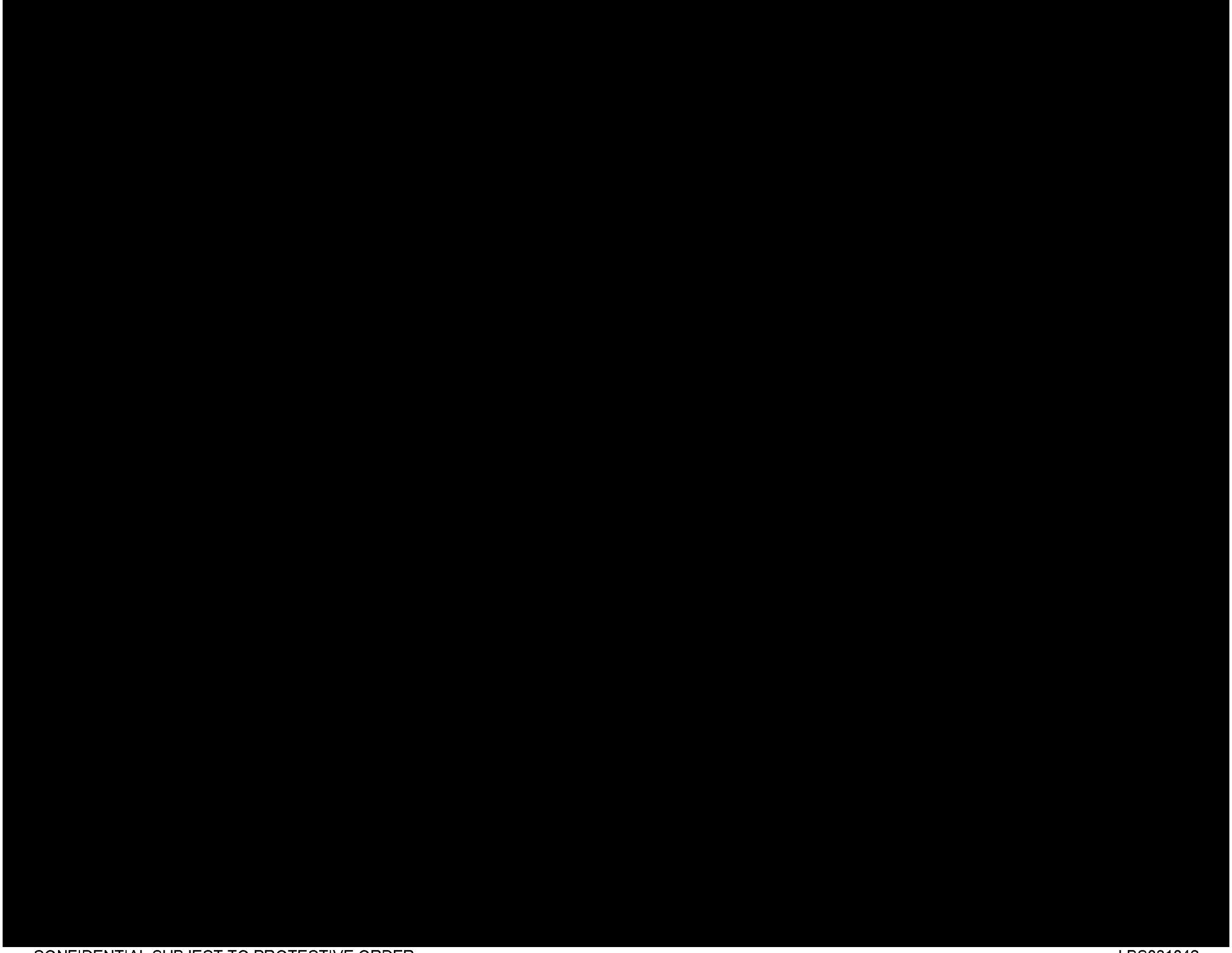


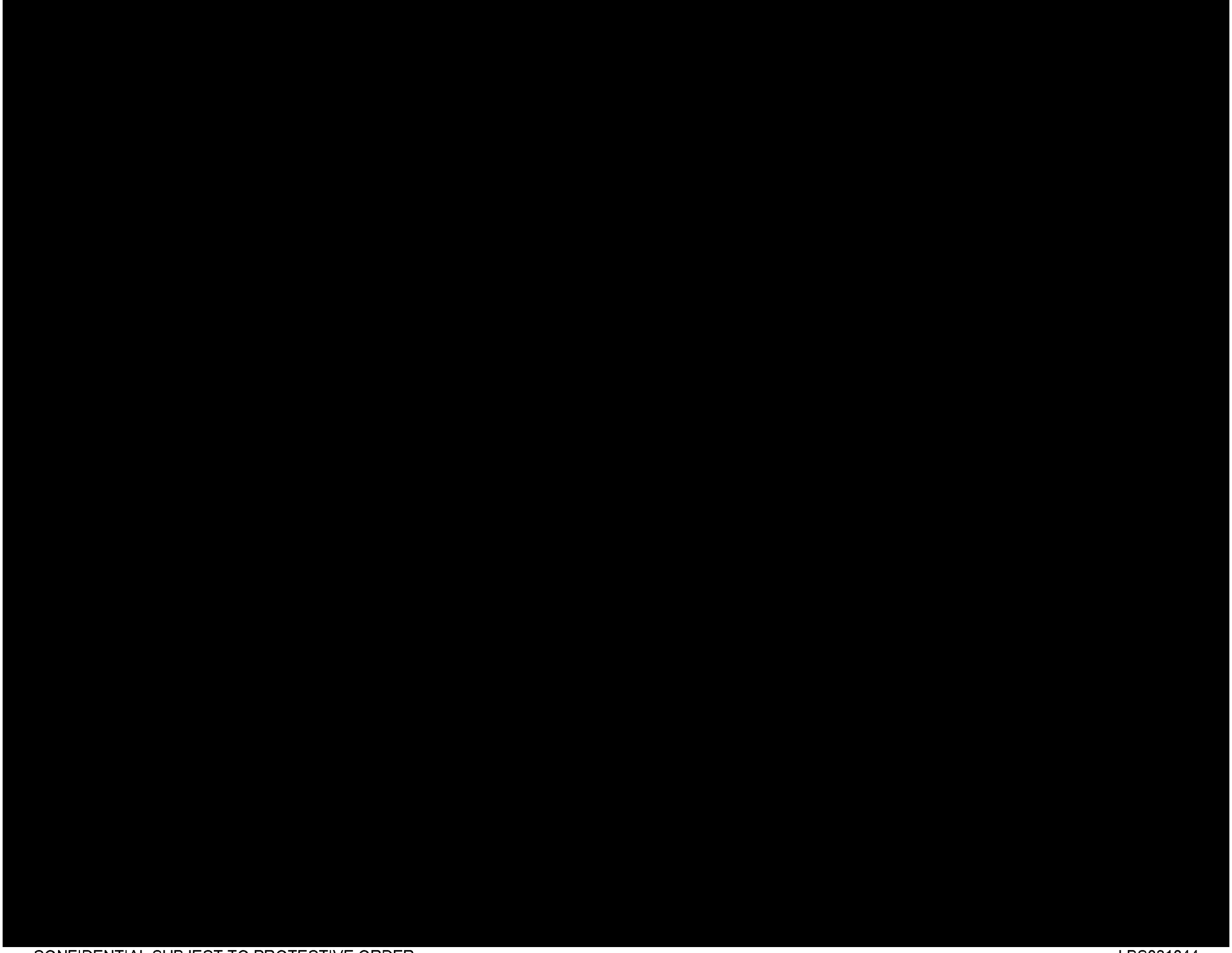


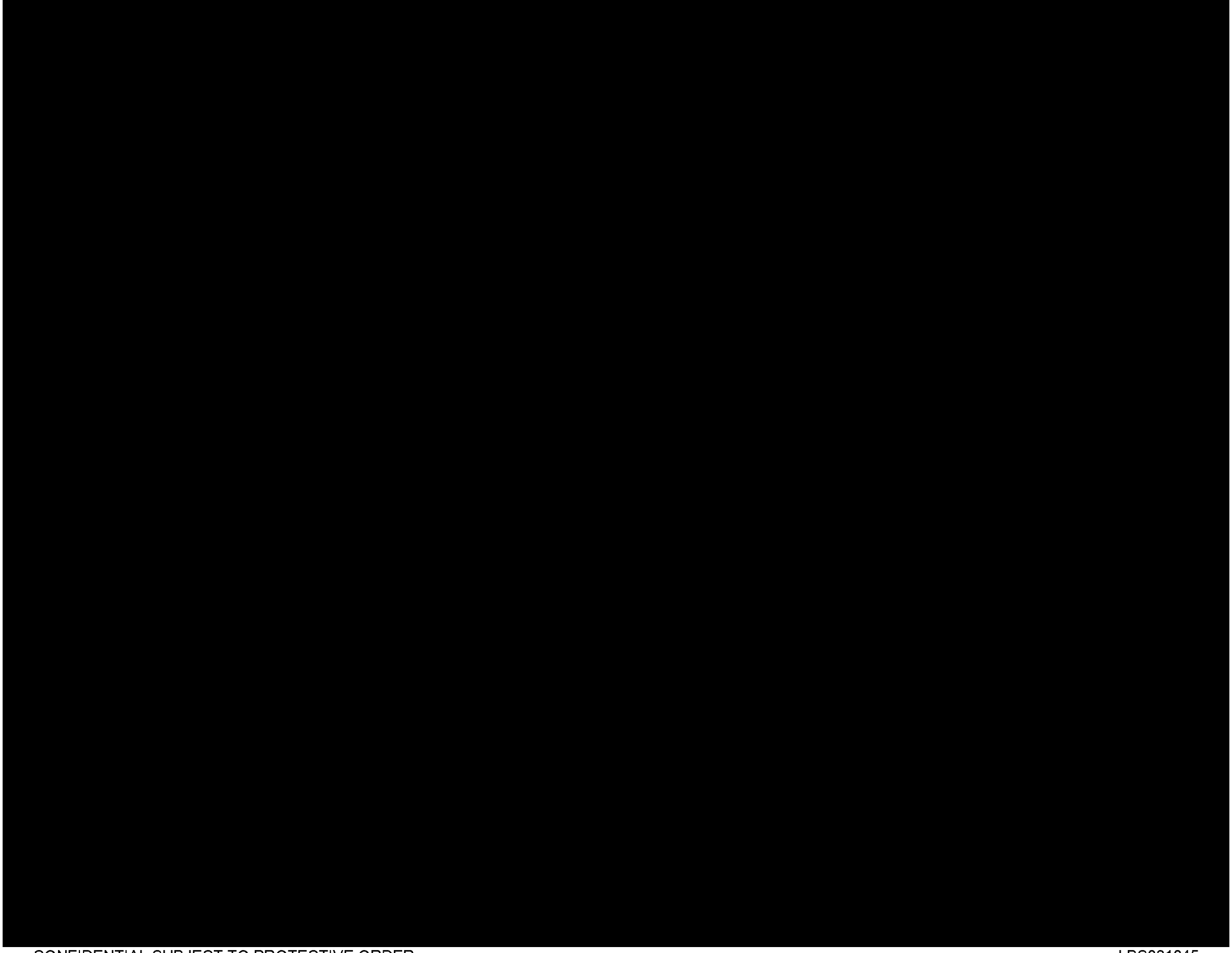


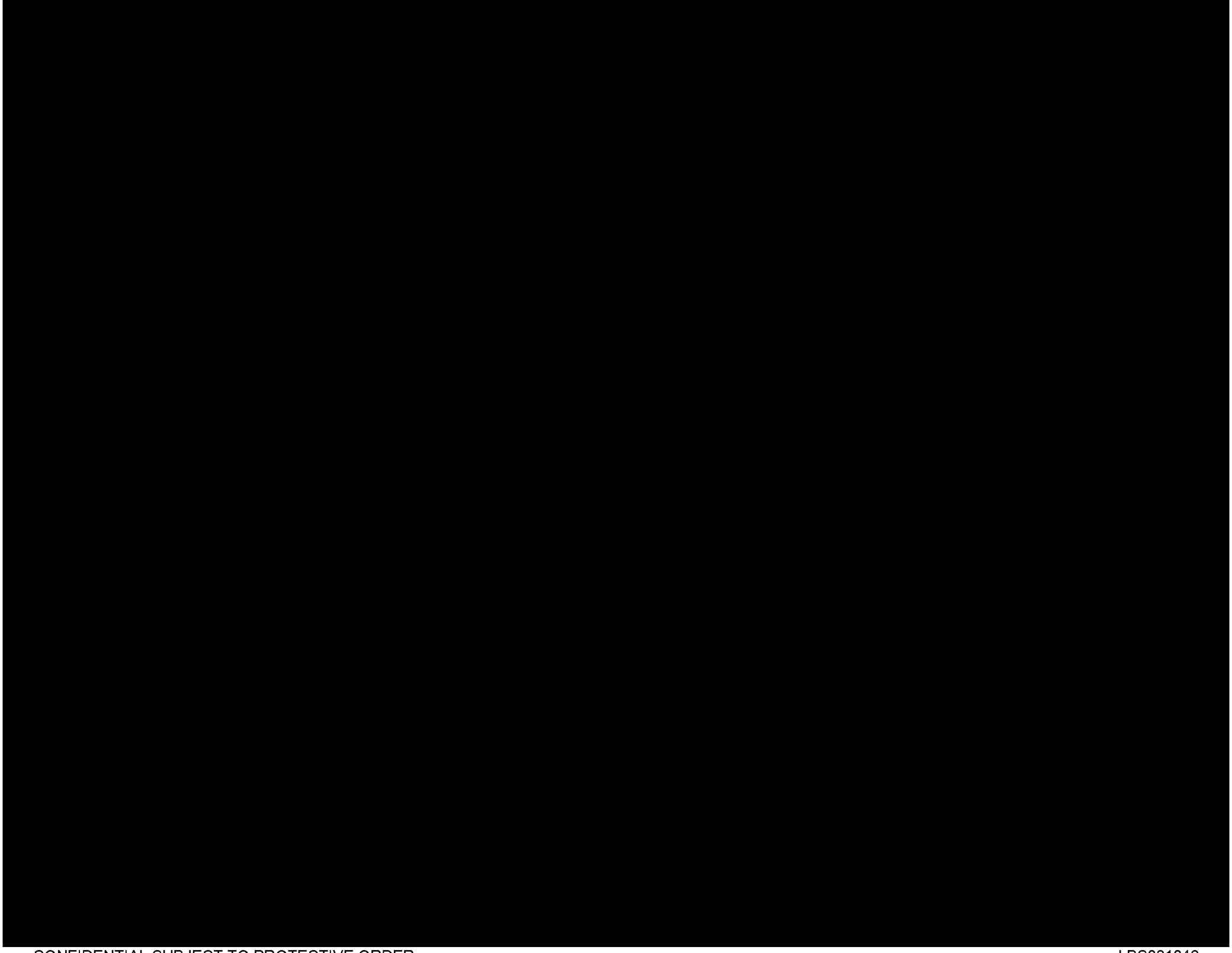


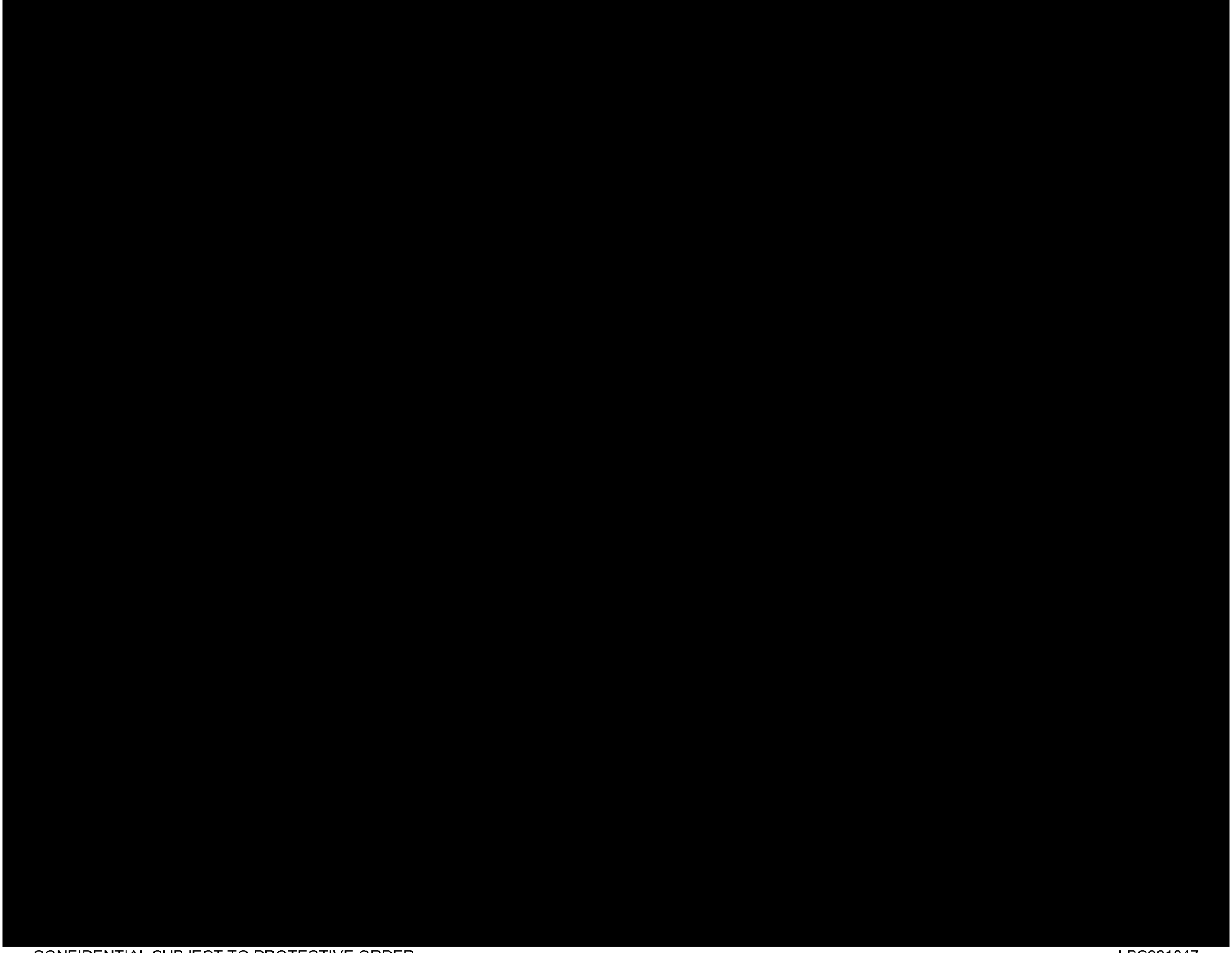


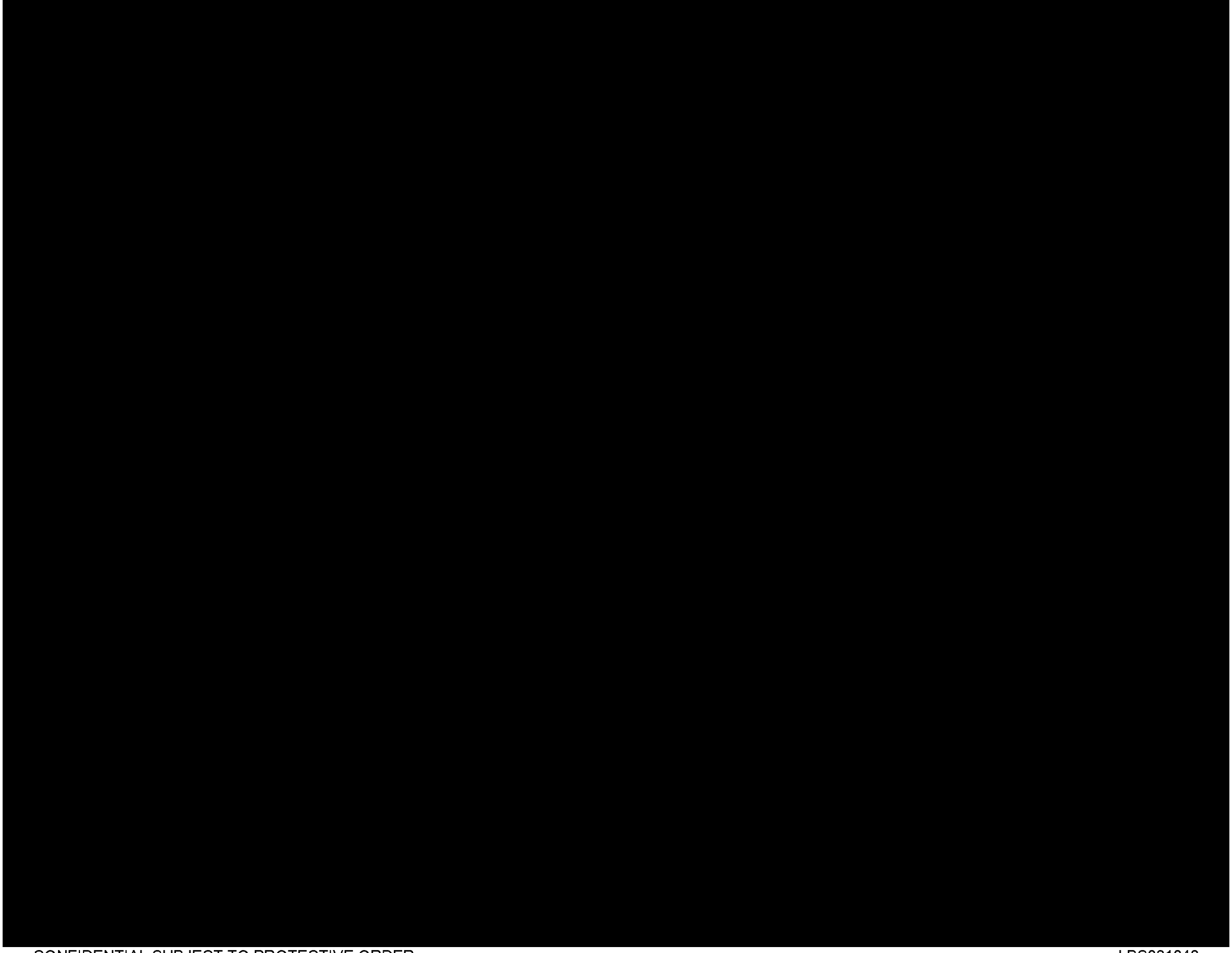












Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/5/2007 4:49:16 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: PLEASE CALL CAMRAN OR DAMON

Who's the one we had lunch with? Camran, right?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Chan, Cindy
To: Keller, Christopher J.
Sent: Mon Mar 05 11:41:30 2007
Subject: PLEASE CALL CAMRAN OR DAMON

RE: 10b options backdating cases/Local Counsel. They said that they met with you in Texas.

Camran Cell: (713) 303-8979
Damon Cell: (832) 671-9993

Office: (281) 444-0604

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/3/2007 1:48:23 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Damon

If this happens - you, me damon and and sucharow in vegas for 4 days - only the best

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 02 21:35:18 2007
Subject: Damon

Spoke to Damon and he left a voicemail message on his office phone, cell phone and with his secretary that it was real important for him to get back to him. He also indicated on the voicemail that we were the right firm and needed to get the case.

As soon as I have more details, I will get back to you.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 4/22/2009 7:04:08 PM
To: =SMTP:damon@cmhllp.com
CC: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)
Attachments: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3).doc

Damon, sorry for the long wait. Here are our proposed changes. Hope you are well. Chris

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

RE: Institutional Investor Business Development Agreement

Dear Eric and Chris:

I hope you guys are doing well up there. Below is my attempt to put our ongoing business relationship in writing.

This letter is to formalize our agreement regarding the sharing of legal fees and/or revenues for any and all pension or retirement fund representation, or any other institutional investor representation ("Clients"), brought or introduced to Labaton, Sucharow, LLP (Labaton), via the activities or connections of members of Chargois, Mashayekh & Herron, LLP, or its agents, assigns, personal relations, or contacts (CMH).

To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

In instances where Clients introduced by CMH serve as sole lead plaintiff or sole class representative, CMH will receive the full 20% fee (the "Fee"). However, there may be instances where one or more clients may be represented by Labaton Sucharow in a particular case and a fee may be owed to other associating counsel. In that event, the amount of the Fee may be reduced commensurate with the contributory losses of the several clients represented by Labaton Sucharow. For instance, if Labaton Sucharow files a motion for the appointment of lead plaintiff with two clients with associating counsel (including a CMH client) with losses totaling $1.5 million, and the CMH client has losses of $1,000,000, then CMH shall receive a Fee of 2/3 of 20%, or 13.35%. Any such arrangement, however, shall be disclosed and agreed to at the inception of the case or at such later date if the need for additional or substitute clients later arises. Labaton Sucharow and CMH are free to discuss other methodologies for an allocation of the Fee under the multiple lead-plaintiff scenario at their mutual discretion.

In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's Fee will fall to ten percent (10%).

Formatted: Indent: First line: 0"

It is agreed that CMH will not bare any costs, expenses or payments of any kind whatsoever in relation to the examination or investigation of a potential cause of action, the litigation of the action or any other related costs, expenses or payments.

The parties hereto expressly understand and agree that information exchanged between the firms may contain confidential information, such as client lists, firm strategies, litigation strategies and other sensitive information constitutes confidential and/or privileged information. Each of the parties mutually agree that they shall not use or disclose such confidential information for any purpose other than in the performance of the services under this Agreement.

Any dispute between the parties hereto shall be resolved by arbitration conducted pursuant to the applicable rules of the American Arbitration Association in Galveston County, Texas or New York City, New York. In any such arbitration, the arbitrator is authorized to award attorney's fees to the prevailing party or parties if the arbitrator finds that the position of the other party or parties was maintained in bad faith.

~~REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.~~

~~Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.~~

~~Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.~~

Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

Eric J. Belfi
Labaton Sucharow, LLP

Christopher J. Keller
Labaton Sucharow, LLP

CHARGOIS & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380

Damon Chargois*
Timothy P. Herron
Che' Williamson, L.L.M., Ph.D**
Kamran Mashayekh*
Kirk A. Chargois*
Carlos A. Fernandez*

Toll Free: 1.866.444.0604
Texas Telephone: 281 444-0604
Facsimile: 281 440-0124

**Licensed in Arkansas & Texas
*Licensed in Texas

April 7, 2009

Eric J. Belfi
Christopher J. Keller
Labaton Sucharow, LLP
140 Broadway
New York, NY 10005

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To summarize, we have agreed that CMH shall receive twenty percent (20%) of the gross attorney fees recovered by Labaton on any litigation or claims process brought on behalf of any pension/retirement fund or institutional investor that Labaton obtains and represents via introduction and cultivation by, through, or as a direct or indirect result of CMH. This includes representation of the Arkansas Teachers Retirement Pension Fund, as well as introductions to funds in Atlanta, Georgia, Richmond and the state of Georgia via Frank Stout, in addition to any other of Chargois & Herron, LLP and Chargois, Mashayekh & Herron, LLP's contacts or relations going forward.

REDUCED ATTORNEY FEE PROVISION. In the event the judge awards a gross attorney fee to Labaton that falls below fifteen percent (15%) of an overall plaintiff class award totaling $25 million or less, CMH's interest will fall to ten percent (10%) of the gross attorney fee award.

Texas law applies to the interpretation of this agreement and any dispute arising from express or implied terms contained herein. We agree to exercise good faith and reasonable means in an effort to resolve any dispute arising out of this agreement without court intervention. If such effort fails, the parties consent to venue and jurisdiction in state court, Galveston County, Texas.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

_____
Damon J. Chargois,
Chargois, Mashayekh & Herron, LLP

_____
Eric J. Belfi
Labaton Sucharow, LLP

_____
Christopher J. Keller
Labaton Sucharow, LLP

Message

From: Chan, Cindy [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=CHANC]
Sent: 1/11/2008 11:11:57 PM
To: 'Glenn Mintzer' [gmintzer@lawpga.com]; 'Louis Angelos' [LFA@lawpga.com]; 'Garrett Bradley' [GBradley@tenlaw.com]; Belfi, Eric J. [EBelfi@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]
Subject: Business Development Summit in Florida- Final Agenda
Attachments: GLRSNY1-687512-v1-Business Development Summit - Meeting Agenda.DOC

Attached please find the final agenda for the Business Development Summit in Florida.

Thank you.

BUSINESS DEVELOPMENT SUMMIT AGENDA

January 13-15, 2007

Attendees: Lou Angelos
Camp Bailey
Eric Belfi
Art Coia
Garrett Bradley
Damon Chargois
Mark Goldman
Chris Keller
Glenn Mintzer

Location: Loews Miami Beach Hotel
1601 Collins Avenue,
Miami Beach, Florida 33139

SUNDAY, JANUARY 13

1:00 p.m. – 3:00 p.m.	Arrival and check into hotel.
3:00 p.m. – 6:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning the subprime mortgage crisis and potential case opportunities.
6:00 p.m. – 9:00 p.m.	Dinner

MONDAY, JANUARY 14

9:00 a.m. – 1:00 p.m.	Fishing
1:00 p.m. – 3:00 p.m.	Lunch
3:00 p.m. – 6:00 p.m.	Client development discussions led by Chris Keller and Eric Belfi. Breakout sessions
6:00 p.m. – 9:00 p.m.	Dinner

PROGRAM AGENDA – Cont'd

TUESDAY, JANUARY 15

9:00 a.m. – 9:30 a.m.	Breakfast
9:30 a.m. – 12:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning Antitrust case opportunities and client development.
12:00 p.m. – 1:00 p.m.	Check out and travel home.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 12/19/2012 7:56:59 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]; Garrett J. Bradley [gbradley@tenlaw.com]; Art Coia [aec@hgk.com]; Mark Goldman [goldman@gskplaw.com]
Subject: RE: BD Trip Florida

It works for me.

Sincerely,

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604 - Telephone

(281) 440-0124 - Facsimile

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, December 17, 2012 9:51 AM
To: Keller, Christopher J.; Damon Chargois; Garrett J. Bradley; 'Art Coia'; 'Mark Goldman'
Subject: BD Trip Florida

Please let me know if Sunday, March 24th - Tuesday March 26th works?

Eric J. Belfi
Partner | | Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

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Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 7/7/2010 8:51:11 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Politano, Ray [rpolitano@labaton.com]; Fonti, Joseph [JFonti@labaton.com]
CC: Gottlieb, Louis [LGottlieb@labaton.com]
Subject: RE: RESUME

As the chair of the litigation control subcommittee, I think we should approve this for no more than six weeks at a weekly rate of $500. Her father, Tim Herron, is an important contact for the firm.

Christopher J. Keller, Esq.
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Wednesday, July 07, 2010 4:25 PM
To: Keller, Christopher J.
Subject: FW: RESUME
This is for Tim Herron.

From: Gottlieb, Louis
Sent: Wednesday, July 07, 2010 3:31 PM
To: Johnson, James
Cc: Belfi, Eric J.; Politano, Ray
Subject: RE: RESUME
For one month, I have no problem. But I will note two things: First, the woman has four names.

Second, and more seriously, she may be a lawyer already -- class of 2009 -- although her resume does not say that she passed the bar. (It looks like an old resume. By the way, it doesn't mention details like class ranking or grades.) I raise this because, if this is a one-month deal for an important contact, we should do it. But we should not suggest that this could lead to a full-time position.

Do we need litigation control approval?

Assuming that the Firm agrees to do this, we should nevertheless ask for a transcript and writing sample.

From: Johnson, James
Sent: Wednesday, July 07, 2010 3:16 PM
To: Gottlieb, Louis
Cc: Belfi, Eric J.; Politano, Ray
Subject: Fw: RESUME

Lou,

This one's for you. Given that the candidate will only be here a month, I have no problem with it but we should run it by Ray.

From: Belfi, Eric J.
To: Johnson, James
Sent: Wed Jul 07 14:35:21 2010
Subject: FW: RESUME

Jim:

An important attorney to the firm, Tim Herron (our Arkansas Teacher contact) has asked if we could hire his daughter from a summer position. She is only available from July 19 to August 20. I know it is really late but he has been very good to the firm and if there is a way that she could have something for the month that would be great. It is not an economic thing but rather an experience issue for her.

Thanks.

Eric

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 2/4/2011 6:07:11 PM
To: 'Garrett Bradley' [GBradley@tenlaw.com]
Subject: RE:

We're trying to get him for 20% of our fee, and then hopefully we can just do an amount off the top to cover it equally.

Christopher J. Keller, Esq.
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Garrett Bradley [mailto:GBradley@tenlaw.com]
Sent: Tuesday, February 01, 2011 4:21 PM
To: Keller, Christopher J.
Subject:

Did you work out the fee issue with Damon on state street pending the Arkansas decision?

Garrett J. Bradley, Esq. | **Thornton and Naumes, LLP**

100 Summer Street, 30th Floor | Boston, MA 02110

Phone: (617) 720-1333 | Fax: (617) 720-2445

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/26/2007 3:05:54 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted]

Working on [redacted] funds now. Good follow up.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:02:19 2007
Subject: RE: [redacted]

TAD knew the guy that Damon told us about. Tom wants to go and meet with them. I working on the follow up meeting.

I am going to arrange a dinner with Ken and set sometime to pick Damon's brain and have Kamran there so we can have an executer.

I working on sending an agenda out tonight to the Texans.

How are we doing on [redacted] Funds, I really need to get that out because I want to propose a follow up - I just need to fees, I will deal with the rest.

Tomorrow, lets talk [redacted] early. Tom suggested that we have McDonald and Natalie work on the allegations in the blue Ribbon - he asked me to clear it with you before I asked so it was not contrary to something that you were doing.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 9:58 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

what in already exists with [redacted]? Good call on getting tad involved.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 21:52:47 2007
Subject: RE: [redacted]

You should be.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 9:15 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Ok I get nervous when I'm not around sometimes

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 20:48:58 2007
Subject: RE: [redacted]

I just spoke with Tom and we are all on the same page.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 8:45 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Somehow I feel like I am coming into the middle of. A conversation but you do know about our current relationship w texas teachers, right?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Sent: Thu Jan 25 19:16:09 2007
Subject: RE: [redacted]

Other than the new case meeting I am free - lets do it in the morning.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 7:15 PM
To: Belfi, Eric J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Subject: FW: [redacted]

We should also have a meeting with Jennifer Re: follow-up on the Texas trip. I'm particularly interested in finding out what happened with [redacted](When Bailey recommended them) and in perhaps setting up a meeting with [redacted]. It seems like the most logical place to start, with the highest likelihood of success.

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:47 PM
To: Ching, Natalie; Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

P.s. this is a kansas city based f und. Is this the one you want?

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:45 PM
To: Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

$6.6 billion

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 4:41 PM
To: Ching, Natalie

Cc: Chan, Cindy; Belfi, Eric J.
Subject: Re: [redacted]

How big is the [redacted]?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Ching, Natalie
To: Keller, Christopher J.
Cc: Chan, Cindy
Sent: Wed Jan 24 16:25:59 2007
Subject: RE: [redacted]

Major net sellers according to the 13F. Fifo loss (all sales offset by open) is $55 million

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 3:53 PM
To: Ching, Natalie
Cc: Chan, Cindy
Subject: [redacted]

What's their loss in [redacted]

Sent from my BlackBerry Wireless Handheld

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/26/2007 3:15:10 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted]

Yes. I needed today big time. I woke up and almost nothing was coming out when I tried to speak.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:13:17 2007
Subject: RE: [redacted]

You feeling better?

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 10:13 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

Push how? Have them work on the blu ribbon for opt out use?
Sure.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:06:20 2007
Subject: RE: [redacted]

So do you want to push [redacted] with Natalie and Chris?

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 10:06 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

Working on [redacted] funds now. Good follow up.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:02:19 2007
Subject: RE: [redacted]

TAD knew the guy that Damon told us about. Tom wants to go and meet with them. I working on the follow up meeting.

I am going to arrange a dinner with Ken and set sometime to pick Damon's brain and have Kamran there so we can have an executer.

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Cc: Chan, Cindy
Subject: Re: [redacted]

Ok I get nervous when I'm not around sometimes

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 20:48:58 2007
Subject: RE: Texas teachers

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-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 8:45 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

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Sent from my BlackBerry Wireless Handheld

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From: Belfi, Eric J.
To: Keller, Christopher J.

Cc: Tetefsky, Jennifer; Chan, Cindy
Sent: Thu Jan 25 19:16:09 2007
Subject: RE: [redacted]

Other than the new case meeting I am free - lets do it in the morning.

-----Original Message-----
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Sent: Thursday, January 25, 2007 7:15 PM
To: Belfi, Eric J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Subject: FW: [redacted]

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-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:47 PM
To: Ching, Natalie; Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

P.s. this is a kansas city based f und. Is this the one you want?

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Sent: Wednesday, January 24, 2007 4:45 PM
To: Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

$6.6 billion

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 4:41 PM
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How big is the [redacted]?

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----- Original Message -----
From: Ching, Natalie
To: Keller, Christopher J.
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Sent: Wed Jan 24 16:25:59 2007
Subject: RE: [redacted]

Major net sellers according to the 13F. Fifo loss (all sales offset by open) is $55 million

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 3:53 PM
To: Ching, Natalie
Cc: Chan, Cindy
Subject: [redacted]

What's their loss in [redacted]

Sent from my BlackBerry Wireless Handheld

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/12/2007 5:36:10 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Damon

I'll go for a walk. Actually I need to get lunch.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Monday, March 12, 2007 1:32 PM
To: Keller, Christopher J.
Subject: RE: Damon
Yes - that is the plan - coffee?

From: Keller, Christopher J.
Sent: Monday, March 12, 2007 1:27 PM
To: Belfi, Eric J.
Subject: RE: Damon
With the [redacted]?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Monday, March 12, 2007 12:06 PM
To: Keller, Christopher J.
Subject: Damon

I had a nice talk with Damon today. He will be meeting with Ken this week and will make sure we get a meeting soon. He will also bring us to Arkansas shortly.

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 7/9/2007 2:45:09 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Houston

What's up with Texas??

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Friday, January 26, 2007 2:14 AM
To: 'kbailey@bpblaw.com'; 'ltien@bpblaw.com'
Cc: 'damon@cmhllp.com'; Keller, Christopher J.
Subject: Houston

Dear Ken & Lawrence:

Thank you for taking the time to meet with us yesterday.

We are in the process of preparing a proposed plan to send to you shortly.

Best regards,

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 7/10/2007 8:16:25 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: [SPAM] RE: Credit rating agencies

You want me on the call tomorrow morning?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Monday, July 09, 2007 8:05 PM
To: Keller, Christopher J.
Subject: Fw: [SPAM] RE: Credit rating agencies

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Belfi, Eric J.
Sent: Mon Jul 09 19:35:01 2007
Subject: RE: [SPAM] RE: Credit rating agencies

damon has been running with the ball on all that and wed would be a good time to discuss the status of his efforts on that end.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Mon 7/9/2007 6:32 PM
To: Kamran Mashayekh
Subject: Re: [SPAM] RE: Credit rating agencies

How are we doing with unions, Arkansas, and Native Americans?

Eric J. Belfi
Partner

Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Belfi, Eric J.
Cc: Damon Chargois <damon@cmhllp.com>; tim@hkhlaw.com <tim@hkhlaw.com>
Sent: Mon Jul 09 19:26:27 2007
Subject: RE: [SPAM] RE: Credit rating agencies

thats a go. Eric, I believe Damon wanted to participate on the call. Name the time and a number to call and we look forward to it. thanks

---

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Mon 7/9/2007 5:39 PM
To: Kamran Mashayekh; Stuart Meissner
Subject: RE: [SPAM] RE: Credit rating agencies

How about Wednesday morning?

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, July 09, 2007 11:56 AM
To: Belfi, Eric J.
Subject: RE: [SPAM] RE: Credit rating agencies

Tomorrow will be tough and anytime the rest of the week from wed on would work. Let me know please.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, July 09, 2007 10:53 AM
To: Kamran Mashayekh
Subject: FW: [SPAM] RE: Credit rating agencies

What is your schedule like later tomorrow?

From: Stuart D. Meissner Esq. [mailto:Meissner@stockesq.com]
Sent: Monday, July 09, 2007 10:36 AM
To: Belfi, Eric J.
Subject: RE: [SPAM] RE: Credit rating agencies

I am preparing for a big conference tomorrow morning how about tomorrow late afternoon.

Stuart D. Meissner Esq.

The Law Offices of Stuart D. Meissner LLC.,
1350 Broadway, Suite 1510, New York, N.Y. 10018, Phone-212-764-3100, Fax-646-607-3071

--- Original Message---
To: "Stuart Meissner"
Cc: "Kamran Mashayekh"
From: "Belfi, Eric J."
Sent: 7/09/2007 10:20AM
Subject: [SPAM] RE: Credit rating agencies

>> Stuart:
>>
>> Are you around this afternoon for a call to discuss with Kamran and me?
>> I am free from 3:15PM EST onward.
>>
>> Eric
>>
>> -----Original Message-----
>> From: Stuart Meissner [mailto:stuart@smeissner.com]
>> Sent: Saturday, July 07, 2007 11:14 AM

>> To: Belfi, Eric J.

>> Subject: Credit rating agencies

>>

>> Eric are you familiar with the current

>> issue of credit rating agencies giving false ratings on various cdo

>> obligations making investors rely on triple A status as supposed safe

>> investments which then blow up often with margin blowing investors out?

>>

>> I have had some calls on this with large losses and it would seem to
>> be

>> a good class action.

>> Stuart Meissner Esq.

>>

>> Sent with Wireless Sync from Verizon Wireless

>>

>>

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>>

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>> PRIVILEGED,

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>> please contact us immediately at 212-907-0700 and take the steps
>> necessary to

>> delete the message completely from your computer system. Thank you.

>>

>>

>>

>>

>>

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/3/2007 1:30:23 PM
To: Sucharow, Lawrence [LSucharow@labaton.com]
Subject: Re: Quick Update on this week

Wow

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tetefsky, Jennifer
To: Belfi, Eric J.
Cc: Keller, Christopher J.; Sucharow, Lawrence
Sent: Wed Oct 03 06:37:13 2007
Subject: Re: Quick Update on this week

Eric, we definitely have to chat re Friday -we have done certain things in some of those states in the past so I at least want you to know the history since some of our partners have met with people still in office amd in case that were to ever come up in conversaation. Thanks.

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer
Cc: Keller, Christopher J.; Sucharow, Lawrence
Sent: Tue Oct 02 23:31:32 2007
Subject: Quick Update on this week

Monday - Las Vegas

[redacted]

Tuesday - Utah

[redacted]

On the antitrust side, he represents a number of manufacturers and his happy to refer us clients.

[redacted]e

[redacted]

Damon is really moving all of the fronts.

On Arkansas, the Senator is going to come visit us at the end of the month or early November - Tim and possibly Damon will come up as well up.

[redacted]

This is quickly becoming a crazy trip like the European trips we all know and love.

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 11:05:48 PM
To: 'langelos@lawpga.com' [langelos@lawpga.com]; 'Glenn Mintzer' [gmintzer@lawpga.com]
Subject: FW: Florida - 1/13-1/15/08

I may have given you incorrect dates for the business development Summit in Florida. I believe the correct dates are January 13-15.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Chan, Cindy
Sent: Thursday, November 15, 2007 3:47 PM
To: Keller, Christopher J.; Belfi, Eric J.
Subject: FW: Florida - 1/13-1/15/08

Please see below for the confirmation info. Everyone is booked in the Luxury Oceanfront Room with One King Bed & Balcony at a daily rate of $489. Cancellation policy is 72 hours prior to arrival. The address and phone number for Loews Miami Beach Hotel is 1601 Collins Avenue, Miami Beach, Florida 33139, Phone: (305) 604-1601.

Chris Keller - 97552457
Eric Belfi - 91104830
Chris D'Amato -92752552
Garrett Bradley -94061617
Damon Chargois -89359410
Lou Angelos - 89795765
Glenn Mintzer - 91541185

-----Original Message-----
From: Keller, Christopher J.
Sent: Monday, November 12, 2007 2:39 PM
To: Chan, Cindy
Subject: FW: Florida

Can you call the first one and see if it can accommodate seven rooms for three days, January 13th through the 15th.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Monday, November 12, 2007 2:33 AM
To: Keller, Christopher J.
Subject: Florida

From Damon on Florida - Leows South Beach or, if you want small and elegant, The Delano.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
on behalf of Belfi, Eric J. [/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie]
Sent: 7/6/2010 5:03:29 PM
To: Keller, Christopher J. [ckeller@labaton.com]
Subject: FW:

Is this correct?

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, July 06, 2010 12:06 PM
To: Elaine Doyal
Cc: Belfi, Eric J.
Subject:

Elaine, please keep track of the pension fund cases that we have with Labaton, Sucharow. I am happy to say that the number of cases is growing. So far, we have secured for Labaton representation of the Arkansas Teacher's Retirement Pension Fund in the Colonial Bank case, the Hartford case, and against Goldman-Sachs. Our deal is CMH gets 20% of Labaton, Sucharow's gross attorney fees plus expenses and they get the remaining 80% plus expenses. If the overall gross attorney fees fall below 10% of the overall settlement in a case, then our percentage of Labaton's gross attorney fees falls to 15%. For example, if Goldman-Sachs settles for $1 billion and the attorney fee is $150 million, with Labaton receiving $75 million, then CMH gets 20% of $75 million (NOT 20% of $150 million). However, if the overall attorney fee is $90 million, then Labaton gets $45 million and CMH gets 15% of $45 million, instead of 20%.

Eric, I typed this email from memory, so I may have missed something. If so, please correct me in your reply. Otherwise, would you please reply with your agreement to the above?

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

Message

From: Fonti, Joseph [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=FONTIJ]
Sent: 7/7/2010 8:54:27 PM
To: Keller, Christopher J. [ckeller@labaton.com]; Belfi, Eric J. [EBelfi@labaton.com]; Politano, Ray [rpolitano@labaton.com]
CC: Gottlieb, Louis [LGottlieb@labaton.com]
Subject: Re: RESUME

I concur.

From: Keller, Christopher J.
To: Belfi, Eric J.; Politano, Ray; Fonti, Joseph
Cc: Gottlieb, Louis
Sent: Wed Jul 07 16:51:11 2010
Subject: RE: RESUME
As the chair of the litigation control subcommittee, I think we should approve this for no more than six weeks at a weekly rate of $500. Her father, Tim Herron, is an important contact for the firm.

Christopher J. Keller, Esq.
Partner || Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Wednesday, July 07, 2010 4:25 PM
To: Keller, Christopher J.
Subject: FW: RESUME
This is for Tim Herron.

From: Gottlieb, Louis
Sent: Wednesday, July 07, 2010 3:31 PM
To: Johnson, James
Cc: Belfi, Eric J.; Politano, Ray
Subject: RE: RESUME
For one month, I have no problem. But I will note two things: First, the woman has four names.

Second, and more seriously, she may be a lawyer already -- class of 2009 -- although her resume does not say that she passed the bar. (It looks like an old resume. By the way, it doesn't mention details like class ranking or grades.) I raise this because, if this is a one-month deal for an important contact, we should do it. But we should not suggest that this could lead to a full-time position.

Do we need litigation control approval?

Assuming that the Firm agrees to do this, we should nevertheless ask for a transcript and writing sample.

From: Johnson, James
Sent: Wednesday, July 07, 2010 3:16 PM
To: Gottlieb, Louis
Cc: Belfi, Eric J.; Politano, Ray
Subject: Fw: RESUME

Lou,

This one's for you. Given that the candidate will only be here a month, I have no problem with it but we should run it by Ray.

From: Belfi, Eric J.
To: Johnson, James
Sent: Wed Jul 07 14:35:21 2010
Subject: FW: RESUME

Jim:

An important attorney to the firm, Tim Herron (our Arkansas Teacher contact) has asked if we could hire his daughter from a summer position. She is only available from July 19 to August 20. I know it is really late but he has been very good to the firm and if there is a way that she could have something for the month that would be great. It is not an economic thing but rather an experience issue for her.

Thanks.

Eric

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 7/12/2010 11:20:42 AM
To: Gottlieb, Louis [LGottlieb@labaton.com]; Johnson, James [JJohnson@labaton.com]
CC: Politano, Ray [rpolitano@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]
Subject: RE: RESUME
Attachments: writing sample-Appellate Brief.doc; Samford University.docx

Here is her writing sample and transcript.

From: Gottlieb, Louis
Sent: Wednesday, July 07, 2010 3:31 PM
To: Johnson, James
Cc: Belfi, Eric J.; Politano, Ray
Subject: RE: RESUME

For one month, I have no problem. But I will note two things: First, the woman has four names.

Second, and more seriously, she may be a lawyer already -- class of 2009 -- although her resume does not say that she passed the bar. (It looks like an old resume. By the way, it doesn't mention details like class ranking or grades.) I raise this because, if this is a one-month deal for an important contact, we should do it. But we should not suggest that this could lead to a full-time position.

Do we need litigation control approval?

Assuming that the Firm agrees to do this, we should nevertheless ask for a transcript and writing sample.

From: Johnson, James
Sent: Wednesday, July 07, 2010 3:16 PM
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Cc: Belfi, Eric J.; Politano, Ray
Subject: Fw: RESUME

Lou,

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900179976 Hillary C. Herron Meador
Jul 08, 2010 05:35 pm

Academic Transcript

This is not an official transcript. Courses which are in progress may also be included on this transcript.

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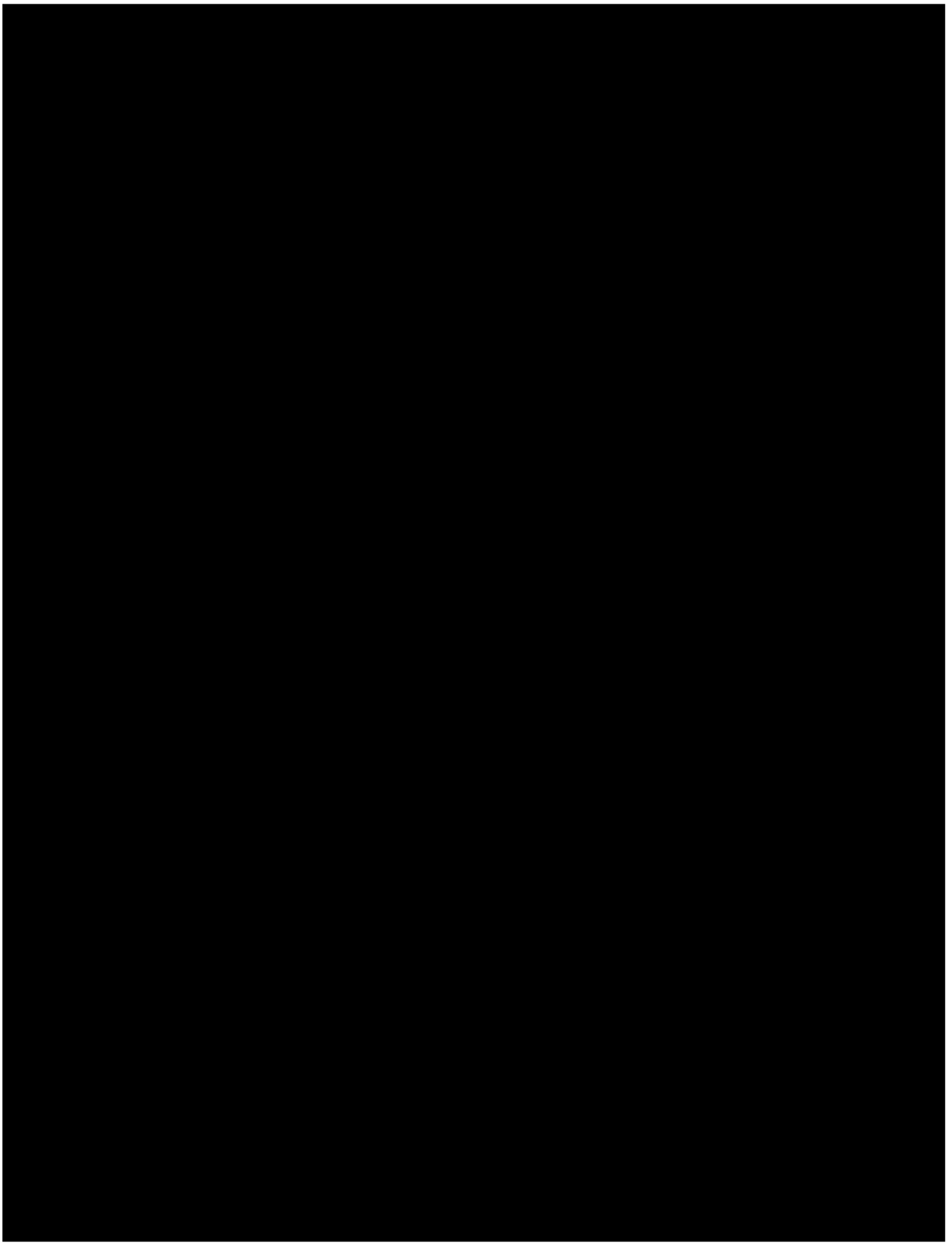
Transcript Data

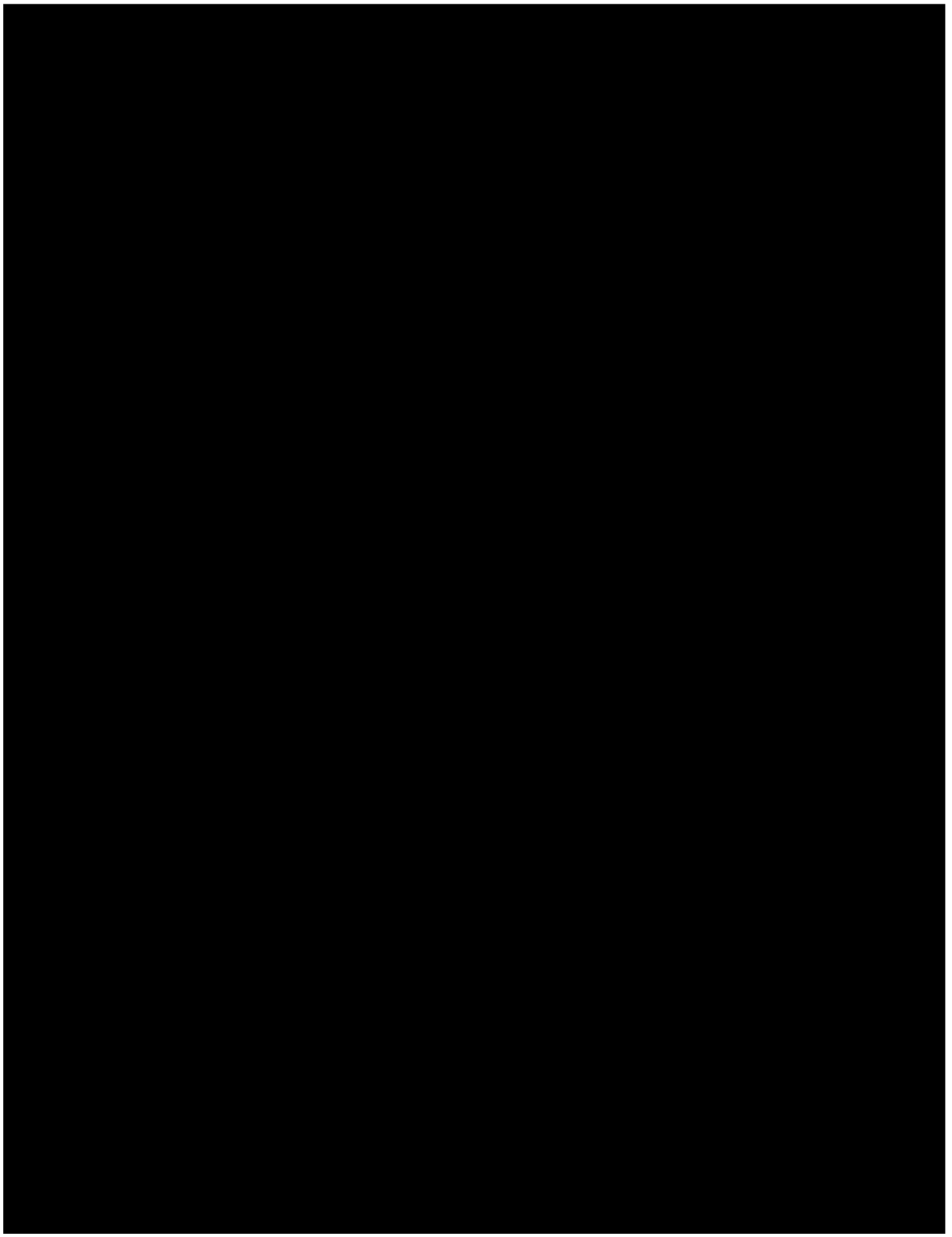
STUDENT INFORMATION

Name : Hillary C. Herron Meador
Birth Date: [redacted]

Curriculum Information

Current Program
Juris Doctor
Program: Juris Doctor
College: Cumberland School of Law





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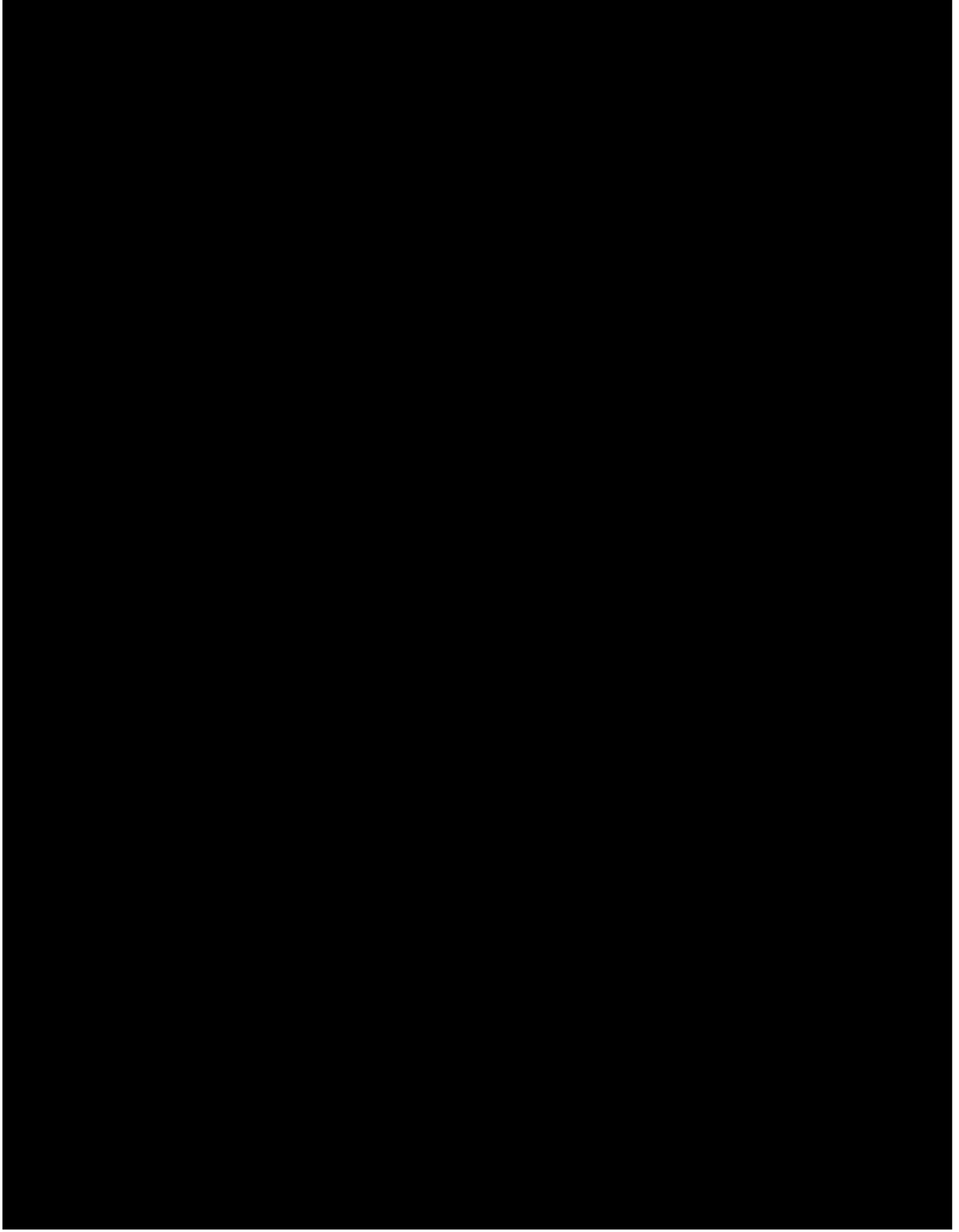
RELEASE: 8.1



Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 7/13/2010 8:23:33 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]; Elaine Doyal [Elaine@cmhllp.com]
Subject: Re:

Thank you, Eric. Good talking to you, today. I will work on [redacted] for your antitrust stuff. Get me the details as soon as you can. Take care.

Sent from my iPhone

On Jul 13, 2010, at 10:30 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
Damon:

Your memory is pretty good.

Here are the details on the cases:

1. Colonial Bank

We had to make a deal at the lead plaintiff stage because there was a competing movant group so we have approximately 60 percent of the case.

Movant Name	FIFO LOSS	PECENTAGE
Arkansas Teacher	($639,144.00)	36.39%
[redacted]		

Further, as the chart above reflects, ATRS had 36.39 percent of the Labaton lead plaintiff losses so your interest in the case is 20 percent of 36.39 percent of the net fees to Labaton.

With the caveat that the fees are above 10 percent, an example would be as follows: if the court awarded plaintiffs' counsel a $25 million fee, Labaton would received $15 million (60 percent of $25 million) and CMH fee allocation would be based on 36.39 percent of $15 million or $5,458,500 so CMH would receive $1,091,700 which reflects 20 percent of $5,458,500.

2. Hartford

We have 50/50 split with Nix Patterson and there are no other plaintiffs involved in the case so CMH would received 20 percent of Labaton's net fees as long as the fee awarded is above 10 percent. There is a competing lead plaintiff motion but we believe that ATRS will prevail.

3. Goldman

ATRS moved with West Virginia Investment Management Board, and Plumbers & Pipefitters National Pension Fund. There is a competing lead plaintiff group but we believe that ATRS' group will prevail. Labaton has approximately a 50 percent interest in this case and CMH would receive 20 percent of Labaton's net fees as long as the fee awarded is above 10 percent.

Please let us know if you have any questions.

Eric

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, July 06, 2010 12:06 PM
To: Elaine Doyal
Cc: Belfi, Eric J.
Subject:

Elaine, please keep track of the pension fund cases that we have with Labaton, Sucharow. I am happy to say that the number of cases is growing. So far, we have secured for Labaton representation of the Arkansas Teachers Retirement Pension Fund in the Colonial Bank case, the Hartford case, and against Goldman-Sachs. Our deal is CMH gets 20% of Labaton, Sucharows gross attorney fees plus expenses and they get the remaining 80% plus expenses. If the overall gross attorney fees fall below 10% of the overall settlement in a case, then our percentage of Labatons gross attorney fees falls to 15%. For example, if Goldman-Sachs settles for $1 billion and the attorney fee is $150 million, with Labaton receiving $75 million, then CMH gets 20% of $75 million (NOT 20% of $150 million). However, if the overall attorney fee is $90 million, then Labaton gets $45 million and CMH gets 15% of $45 million, instead of 20%.

Eric, I typed this email from memory, so I may have missed something. If so, please correct me in your reply. Otherwise, would you please reply with your agreement to the above?

Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Fax

Message

From: Zeiss, Nicole [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=ZEISSN]
Sent: 4/1/2008 5:31:58 PM
To: 'damon@cmhllp.com' [damon@cmhllp.com]; Tountas, Stephen W. [STountas@labaton.com]
CC: 'Elaine@cmhllp.com' [Elaine@cmhllp.com]
Subject: Re: Bacas, et al. v. Stephen L. Way, et al.

Great. Thanks for the info.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: Zeiss, Nicole; Tountas, Stephen W.
Cc: Elaine Doyal <Elaine@cmhllp.com>
Sent: Tue Apr 01 12:50:53 2008
Subject: Bacas, et al. v. Stephen L. Way, et al.

Nicole,

I attended this morning's hearing before Judge Harmon on the motion for final settlement approval of the derivative claims against our defendants. Judge Harmon overruled the objection filed by an attorney named Armbruster (on behalf of certain derivative claimants). Mr. Armbruster didn't appear, nor had he responded to inquiries from the parties.

Judge Harmon approved the settlement order without amendment or inquiry.

Damon J. Chargois

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 11/13/2012 5:08:02 PM
To: Graciela Saenz [saenzassociates@gmail.com]; Elizabeth Burkhardt [burkhardtlaw@comcast.net]; Damon Chargois [damon@cmhllp.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]; Elaine Doyal [Elaine@cmhllp.com]
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

it will be 3:30 pm and elaine will circulate a call in number for everyone...talk then

---

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Tue 11/13/2012 9:54 AM
To: Kamran Mashayekh; 'Elizabeth Burkhardt'; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Let's schedule for something after 2 p.m. today. I will be at Elizabeth's place to work on some files. Thanks, Gracie

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Friday, November 09, 2012 3:57 PM
To: saenzassociates@gmail.com; Elizabeth Burkhardt; Damon Chargois
Subject: RE: Great job Gracie and Elizabeth and plans for next friday

Gracie and Elizabeth:

Fabulous job today even though I was only there in spirit and not in body. Eric is flying in at 11:56 am next friday and Damon will pick him up and bring him to the lunch meeting wherever you decide that location shall be. In an abundance of caution, is it possible to schedule the lunch for one pm or better one thirty pm as to give eric sufficient time to get there and to make allowances for any unforseen contingencies and delays that might be associated with flying? As Al says: UAL- you aint leaving airlines can be so a propos in this instance.

Also, it behooves us to have a call with eric before friday as to brush up on any loose ends that might be out there, but the way it appears is that you two have done a fabulous job in selling labaton and all eric has to do is to convince [redacted] that time is of the essence and their engagement will serve the highest and best interest of his organization.

With the above rant, I thank you both and wish you a happy weekend.

Senor K

From: saenzassociates@gmail.com [mailto:saenzassociates@gmail.com]
Sent: Fri 11/2/2012 12:46 PM
To: Elizabeth Burkhardt; Kamran Mashayekh; Damon Chargois
Subject: Mtg [redacted]

Got the call from [redacted] He would prefer mtg on Fridays. He wants to meet w me first on Friday the 9th and then ok to bring in Labaton rep (Eric?) for the following Friday the 16th. We'll huddle tmrw at gala.
Gracie
Gracie Saenz

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 5/8/2013 12:05:49 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: RE:

I'll reach out via phone tomorrow.

Sent from my iPhone

On May 7, 2013, at 4:53 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

> Have you heard anything back?
>
> -----Original Message-----
> From: Damon Chargois [mailto:damon@cmhllp.com]
> Sent: Tuesday, April 30, 2013 6:37 PM
> To: [redacted]; Graciela@saenzburkhardt.com
> Cc: Belfi, Eric J.
> Subject:
>
> Thank you for meeting with us yesterday, [redacted] I hope that it is the start of a wonderful relationship with you and [redacted] I am including Eric and Gracie on this email and invite you to contact any of us anytime. I can also be reached on my cellphone at [redacted].
>
>
> ***Privilege and Confidentiality Notice***
>
> This electronic message contains information that is (a) LEGALLY PRIVILEGED, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not the Addressee(s), or the person responsible for delivering this to the Addressee(s), you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please contact us immediately at 212-907-0700 and take the steps necessary to delete the message completely from your computer system. Thank you.
>
>

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 4/30/2013 10:36:45 PM
To: [redacted] Graciela@saenzburkhardt.com
CC: Belfi, Eric J. [EBelfi@labaton.com]

Thank you for meeting with us yesterday, [redacted] I hope that it is the start of a wonderful relationship with you and [redacted] I am including Eric and Gracie on this email and invite you to contact any of us anytime. I can also be reached on my cellphone at [redacted]

Message

From: Auld, Dominic J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=AULDD]
Sent: 2/18/2014 11:23:37 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]
CC: Avan, Rachel [RAvan@labaton.com]
Subject: RE: [redacted]

Spoke with Chris – strategy in place for the near-term, let's manage the landscape as it presents itself. thanks

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 6:12 PM
To: Keller, Christopher J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: [redacted]

Our application was with [redacted] One of their lawyers was a former State Legislator and he had been working the political angle but we have not been able to get them to rule on now two RFPs. I had heard that there had been a second cleaning at [redacted] so I am not sure that we have any real strategy anymore. Damon does not have any contacts left there. Let me reach out to the lawyer at [redacted] to see if he has anything new to report.

From: Keller, Christopher J.
Sent: Tuesday, February 18, 2014 6:08 PM
To: Belfi, Eric J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: [redacted]

We should discuss and strategize. Did we go in through Damon? Do we have an existing strategic relationship?

Christopher J. Keller

Partner | Labaton Sucharow LLP

140 Broadway, 34th Fl

New York, NY 10005

Ph. 212-907-0853

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 5:42 PM
To: Auld, Dominic J.; Business Development--Group
Cc: Avan, Rachel
Subject: RE: [redacted]

Dom:

We still have an outstanding RFP with [redacted] Rachel can provide when it was submitted.

Eric

From: Auld, Dominic J.
Sent: Tuesday, February 18, 2014 5:40 PM
To: Business Development--Group
Subject: [redacted]

Hi all,

I'm meeting up with the General Counsel, [redacted], in Austin on Thursday. I was introduced (and graciously recommended) last year by a mutual friend who is a partner at [redacted] former firm [redacted] and have seen her socially a couple of times before. Does anyone at the firm have historical contact with this entity that I should know about? Any context that might be helpful? Anyone else I should look up while in Austin?

Thanks

Dom

Dominic J. Auld

Partner

Labaton Sucharow LP

140 Broadway

New York, NY, 10005

212 907 0619 - direct

917 515 2456 - mobile

dauld@labaton.com

www.labaton.com <http://www.labaton.com/>

Message

From: Auld, Dominic J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=AULDD]
Sent: 2/19/2014 7:24:51 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]
Subject: Re: [redacted]

They seem to have accomplished exactly nothing in two-plus years - so it doesn't sound like there is anything to "back off". Perhaps we should review the approach.

Also, I asked you about [redacted] last year and you did not point out that we have local influence-peddlers working on it - you merely mentioned a stale RFP.

Reaching out to them immediately prior to my meeting with the General Counsel is about as sensible as my giving you no notice, so in that respect, we are both at fault. For my failure there, I apologize.

From: Belfi, Eric J.
To: Auld, Dominic J.
Cc: Keller, Christopher J.
Sent: Wed Feb 19 14:18:53 2014
Subject: Re: [redacted]
Dom:

We have jointly worked with them to secure this client for the past 2 years. We submitted a joint response with them to a RFP.

You cannot show up the right before you have arranged a meeting and have me tell them to back off.

First, a little notice would have been helpful here. Second, we may be stuck with them.

However, he is checking the political channels so I do not think it will conflict with anything that you are doing.

Eric Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1.516.509.5236

On Feb 19, 2014, at 2:09 PM, "Auld, Dominic J." <DAuld@labaton.com> wrote:

That is not a good answer - that means they have gassed up the machine again - please dissuade them from any further efforts on our behalf at this time.

From: Belfi, Eric J.
To: Auld, Dominic J.

Cc: Keller, Christopher J.
Sent: Wed Feb 19 13:57:02 2014
Subject: RE: [redacted]
He said that he would get back to us in a couple of days.

From: Auld, Dominic J.
Sent: Wednesday, February 19, 2014 10:24 AM
To: Belfi, Eric J.
Cc: Keller, Christopher J.
Subject: RE: [redacted]

OK but lets keep it that way please, I really don t need/want any helpon this right now. This is not an opportune moment to get them interested in hustling for us again. Please let us know what they say when you hear back. Thanks

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 10:49 PM
To: Auld, Dominic J.
Cc: Keller, Christopher J.
Subject: Re: [redacted]

I already reached out to them to get a status report. I am sure it will come back as nothing going on.

Eric Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1.516.509.5236

On Feb 18, 2014, at 10:47 PM, "Auld, Dominic J." <DAuld@labaton.com> wrote:
Please don't reach out to [redacted] until I have reported back. No point in rekindling their interest until we need it.

On Feb 18, 2014, at 6:24 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
Let us know what you find out.

Labaton
Sucharow

Eric J. Belfi | **Partner**
Labaton Sucharow LLP
140 Broadway, New York, New York 10005
T: (212) 907-0878 | F: (212) 883-7078
E: ebelfi@labaton.com | W:www.labaton.com

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Dom

Dominic J. Auld
Partner
Labaton Sucharow LP
140 Broadway
New York, NY, 10005
212 907 0619 - direct
917 515 2456 - mobile
dauld@labaton.com
www.labaton.com

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Partner

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Let us know what you find out.

Labaton
Sucharow

Eric J. Belfi | **Partner**

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140 Broadway, New York, New York 10005

T: (212) 907-0878 | F: (212) 883-7078

E: ebelfi@labaton.com | W:www.labaton.com

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Sent: Tuesday, February 18, 2014 6:12 PM
To: Keller, Christopher J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: Texas Teachers

Our application was with [redacted] One of their lawyers was a former State Legislator and he had been working the political angle but we have not been able to get them to rule on now two RFPs. I had heard that there had been a second cleaning at [redacted] so I am not sure that we have any real strategy anymore. Damon does not have any contacts left there. Let me reach out to the lawyer at [redacted] to see if he has anything new to report.

From: Keller, Christopher J.
Sent: Tuesday, February 18, 2014 6:08 PM
To: Belfi, Eric J.; Auld, Dominic J.
Cc: Avan, Rachel
Subject: RE: [redacted]

We should discuss and strategize. Did we go in through Damon? Do we have an existing strategic relationship?

Christopher J. Keller

Partner | Labaton Sucharow LLP

140 Broadway, 34th Fl

New York, NY 10005

Ph. 212-907-0853

From: Belfi, Eric J.
Sent: Tuesday, February 18, 2014 5:42 PM
To: Auld, Dominic J.; Business Development--Group
Cc: Avan, Rachel
Subject: RE: [redacted]

Dom:

We still have an outstanding RFP with [redacted]. Rachel can provide when it was submitted.

Eric

From: Auld, Dominic J.
Sent: Tuesday, February 18, 2014 5:40 PM
To: Business Development--Group
Subject: [redacted]

Hi all,

Im meeting up with the General Counsel, [redacted], in Austin on Thursday. I was introduced (and graciously recommended) last year by a mutual friend who is a partner at [redacted] former firm [redacted] and have seen her socially a couple of times before. Does anyone at the firm have historical contact with this entity that I should know about? Any context that might be helpful? Anyone else I should look up while in Austin?

Thanks

Dom

Dominic J. Auld

Partner

Labaton Sucharow LP

140 Broadway

New York, NY, 10005

212 907 0619 - direct

917 515 2456 - mobile

dauld@labaton.com

www.labaton.com

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 4/12/2011 3:55:57 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Investment

No problemo. I am going to speak to Kherkher about connecting Sean to the right people over the various [redacted]. If you recall, Steve is adhd and rarely maintains focus, so it will be a challenge.

-----Original Message-----
From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, April 12, 2011 10:26 AM
To: Damon Chargois
Subject: Re: Investment

Thank you for talking to my brother.

Eric Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1.516.509.5236

On Apr 12, 2011, at 10:15 AM, "Damon Chargois" <damon@cmhllp.com> wrote:

> Cool. The sooner the better, as I am putting off others. Say, within the next 2-4 weeks?
>
> Sent from my iPhone
>
> On Apr 12, 2011, at 8:21 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
>
>> Chris and me are interested - what is the timing?
>>
>> Eric Belfi
>> Partner
>> Labaton Sucharow LLP
>> 140 Broadway
>> New York, N.Y. 10005
>> o: 1.212.907.0878
>> c: 1.516.509.5236
>>
>> P Please consider the environment before printing this email.
>> ***Privilege and Confidentiality Notice***
>>
>> This electronic message contains information that is (a) LEGALLY PRIVILEGED, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not the Addressee(s), or the person responsible for delivering this to the Addressee(s), you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please contact us immediately at 212-907-0700 and take the steps necessary to delete the message completely from your computer system. Thank you.
>>
>>

Message

From: /o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=belfie [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 5/3/2013 3:11:58 AM
To: R[redacted]
CC: Damon Chargois [damon@cmhllp.com]; Graciela@saenzburkhardt.com
Subject: RE:

Dear Rhonda:

Thank you for taking time to meet with us and walk through some of issues facing pension funds on the monitoring/litigation side.

Please let me know if you need any addition information on potential International or Domestic claims.

Best regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

-----Original Message-----
From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, April 30, 2013 6:37 PM
To: Rsmith@hmeps.org; Graciela@saenzburkhardt.com
Cc: Belfi, Eric J.
Subject:

Thank you for meeting with us yesterday, Rhonda. I hope that it is the start of a wonderful relationship with you and [redacted] I am including Eric and Gracie on this email and invite you to contact any of us anytime. I can also be reached on my cellphone at 832-671-9993.

Message

From: Asciolla, Gregory S. [GAsciolla@labaton.com]
Sent: 4/4/2017 8:55:04 PM
To: =SMTP:kamran@cmhllp.com
CC: =SMTP:damon@cmhllp.com; Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Antitrust Investigation Alert: [redacted]UPDATE

Thanks Kamran, much appreciated.

Greg

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, April 04, 2017 3:33 PM
To: Asciolla, Gregory S.
Cc: Damon Chargois; Belfi, Eric J.
Subject: Re: Antitrust Investigation Alert: [redacted] UPDATE

My apologies Greg for reading the email too fast and putting my brain into over-drive. I will ask folks who have investments with those named defendants to see if they would be suitable and willing candidates to move forward.

Regards,

Kamran

From: Asciolla, Gregory S. <GAsciolla@labaton.com>
Sent: Tuesday, April 4, 2017 2:25 PM
To: Kamran Mashayekh
Cc: Damon Chargois; Belfi, Eric J.
Subject: RE: Antitrust Investigation Alert: [redacted] UPDATE

Hi Kamran,

In this case, the banks ([redacted]) are the defendants. So we need people who dealt directly with them, to have more direct injuries. Any other leads welcome!

Best

Greg

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, April 04, 2017 3:14 PM
To: Asciolla, Gregory S.
Cc: Damon Chargois; Belfi, Eric J.
Subject: Re: Antitrust Investigation Alert: [redacted]UPDATE

Hi Greg:

Thank you for your email. I have a very good friend who is a [redacted] I could contact her regarding this matter, but I am sure she will have to gain clearance from [redacted] In-house and outside counsel before she can agree to talk to us. As my experience has shown, big institutions are often loathe to entertain being "Plaintiffs" in matters of high-profile litigation.

How do you suggest I proceed?

Regards,

Kamran

From: Asciolla, Gregory S. <GAsciolla@labaton.com>
Sent: Tuesday, April 4, 2017 2:03 PM
To: Asciolla, Gregory S.
Subject: Antitrust Investigation Alert: [redacted] UPDATE

UPDATED INVESTIGATION ALERT: URGENT

[redacted]

In consideration of the Judge's order, we are looking to speak with any of the following entities or persons regarding the case:

[redacted]

Please call me if you have any questions.

Thank you,

Greg

Labaton Sucharow

Gregory Asciolla | Partner

140 Broadway, New York, New York 10005

T: (212) 907-0827 | F: (212) 883-7527

E: gasciolla@labaton.com | W: www.labaton.com

Privilege and Confidentiality Notice

This electronic message contains information that is (a) LEGALLY PRIVILEGED, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not the Addressee(s), or the person responsible for delivering this to the Addressee(s), you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please contact us immediately at 212-907-0700 and take the steps necessary to delete the message completely from your computer system. Thank you.

Message

From: [redacted]
Sent: 10/10/2007 4:49:28 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [SPAM] - RE: Labaton Sucharow/Portfolio Monitoring - Found word(s) list error in the Text body

Eric,

I have a 30 minute slot available at 10:00. If you would like more time than that please call me.

James

[redacted]

"Belfi, Eric J." <EBelfi@labaton.com>

10/10/2007 07:20 AM

To: [redacted]
cc: [redacted]
Subject: [SPAM] - RE: Labaton Sucharow/Portfolio Monitoring - Found word(s) list error in the Text body

Dear James:

I will be in [redacted] on Thursday, October 18 and would be happy to meet with you. We are currently scheduled to meet with [redacted] on the 18th but we have not yet set a time.

I will be in the office tomorrow until 3PM EST - my number is 212-907-0878 or you can reach me by email.

Regards,

Eric

From: [redacted]
Sent: Tuesday, October 09, 2007 3:18 PM
To: Belfi, Eric J.
Cc: damon@cmhllp.com; [redacted]
Subject: Re: Labaton Sucharow/Portfolio Monitoring

Mr. Belfi:

I represent the Board of Directors of the [redacted] some members of which would likely be interested in your presentation. [redacted]

[redacted]

[redacted]

"Belfi, Eric J."
<EBelfi@labaton.com>

10/04/2007 11:01 PM

To
[redacted]
cc
[redacted]
<damon@cmhllp.com>
Subject
Labaton Sucharow/Portfolio Monitoring

Dear [redacted]:

I had the pleasure of meeting with [redacted] yesterday concerning the portfolio monitoring of [redacted] He suggested that I should contact you concerning this issue.

In order for you to better understand our program, I have attached a summary on our portfolio monitoring system - LPAS. LPAS cross-checks our clients' holdings and flags those instances where the client is a shareholder in a company accused of misconduct or other wrongdoing. When we identify potential opportunities for loss recovery, we examine the data thoroughly, compute losses based on multiple methodologies, and carefully evaluate each potential case. We only contact clients to see if they wish to take an active role in potential cases that are meritorious and appear to have a good chance of success. In this way, we are able to serve as "eyes and ears" on the ground for clients that oversee significant portfolios and simply cannot afford interruption of their day-to-day business activities.

As you can see, we not only provide our institutional clients with information on pending cases but also ensure that our clients are collecting all of the settlement funds that they are entitled to. With over $17 billion made available to investors last year, it is more important than ever to make sure that the funds are monitoring these claims. In "Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions

to Participate in Securities Class Action Settlements," 58 Stan. L. Rev. 411, 450 (2005), the authors found that of the twenty public pension funds they polled, seventeen entrusted claim filings to custodial banks, a system that simply does not work, as is evidenced by the low percentage of recovered funds:

"We learned that most institutions relied on their custodian banks to file claims for them in securities fraud class action settlements, that many of these institutions did little monitoring of whether the custodian actually performed these services, and that custodians had financial disincentives to file claims on behalf of their clients. Nevertheless, virtually every respondent reported that their institution filed claims in all settlements in which it was a class member."

Clearly, the institutions themselves need to become involved in the process or begin to more adequately police their custodians to ensure that claims are filed. We would be happy to conduct a test to see if your custodian is filing all of the proof of claims that they should be. If you provide us with a list of settlements that the custodian has filed proof of claim forms for your funds in the past 12 months, we will cross reference it with our settlement list and send you an analysis.

As part of our service, we provide a quarterly report advising the client of the activity during the past quarter (see attached sample quarterly report). I have also attached our firm resume.

I plan to be in [redacted] between Wednesday, October 17 and Friday, October 19. Please let me know if you would have time to meet and discuss these issues.

Thank you for your time and consideration in the matter.

Regards,

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: [redacted]
Sent: 10/9/2007 1:28:41 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Labaton Sucharow/Portfolio Monitoring

[redacted]

"Belfi, Eric J." <EBelfi@labaton.com>

10/08/2007 03:48 PM

To
[redacted]

cc
[redacted]

Subject
Re: Labaton Sucharow/Portfolio Monitoring

Dear David:

How about 11AM on Thursday, October 18th?

Regards,

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: [redacted]
To: Belfi, Eric J.
Cc: [redacted]
Sent: Mon Oct 08 15:56:15 2007
Subject: Re: Labaton Sucharow/Portfolio Monitoring

Eric

[redacted]

"Belfi, Eric J." <EBelfi@labaton.com>

10/04/2007 11:01 PM
To
[redacted]
cc
[redacted] <damon@cmhllp.com>
Subject
Labaton Sucharow/Portfolio Monitoring

Dear J[redacted]

I had the pleasure of meeting with Tom yesterday concerning the portfolio monitoring of [redacted] He suggested that I should contact you concerning this issue.

In order for you to better understand our program, I have attached a summary on our portfolio monitoring system - LPAS. LPAS cross-checks our clients' holdings and flags those instances where the client is a shareholder in a company accused of misconduct or other wrongdoing. When we identify potential opportunities for loss recovery, we examine the data thoroughly, compute losses based on multiple methodologies, and carefully evaluate each potential case. We only contact clients to see if they wish to take an active role in potential cases that are meritorious and appear to have a good chance of success. In this way, we are able to serve as "eyes and ears" on the ground for clients that oversee significant portfolios and simply cannot afford interruption of their day-to-day business activities.

As you can see, we not only provide our institutional clients with information on pending cases but also ensure that our clients are collecting all of the settlement funds that they are entitled to. With over $17 billion made available to investors last year, it is more important than ever to make sure that the funds are monitoring these claims. In "Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements," 58 Stan. L. Rev. 411, 450 (2005), the authors found that of the twenty public pension funds they polled, seventeen entrusted claim filings to custodial banks, a system that simply does not work, as is evidenced by the low percentage of recovered funds:

> "We learned that most institutions relied on their custodian banks to file claims for them in securities fraud class action settlements, that many of these institutions did little monitoring of whether the custodian actually performed these services, and that custodians had financial disincentives to file claims on behalf of their clients. Nevertheless, virtually every respondent reported that their institution filed claims in all settlements in which it was a class member."

Clearly, the institutions themselves need to become involved in the process or begin to more adequately police their custodians to ensure that claims are filed. We would be happy to conduct a test to see if your custodian is filing all of the proof of claims that they should be. If you provide us with a list of settlements that the custodian has filed proof of claim forms for your funds in the past 12 months, we will cross reference it with our settlement list and send you an analysis.
As part of our service, we provide a quarterly report advising the client of the activity during the past quarter (see attached sample quarterly report). I have also attached our firm resume.

I plan to be in [redacted] between Wednesday, October 17 and Friday, October 19. Please let me know if you would have time to meet and discuss these issues.

Thank you for your time and consideration in the matter.

Regards,

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 7/18/2016 2:36:37 PM
To: Keller, Christopher J. [ckeller@labaton.com]
Subject: Spectrum allocation

We need to go to Houston to work a deal out with Damon. Let me know if you want me to go.

We just got our Korean meeting so will kill a week in August but I could do the weeks of the 8th or 15th - may be you want to go from Cleveland or to Cleveland if that works.

From: Keller, Christopher J.
Sent: Monday, July 18, 2016 10:35 AM
To: Ng, Cindy <CNg@labaton.com>
Cc: Politano, Ray <rpolitano@labaton.com>; Stroock, Naomi <nstroock@labaton.com>; Belfi, Eric J. <EBelfi@labaton.com>
Subject: Re: Spectrum allocation

Not yet. Eric and I need to deal with this.

Christopher Keller

Partner || Labaton Sucharow LLP

140 Broadway

New York, NY 10005

212-907-0853

On Jul 18, 2016, at 10:13 AM, Ng, Cindy <CNg@labaton.com <mailto:CNg@labaton.com> > wrote:

Chris,

Do you have any update on the final referral fee? Thanks.

From: Keller, Christopher J.
Sent: Tuesday, June 21, 2016 2:41 PM
To: Sarduy, Olga
Cc: Belfi, Eric J.; Gardner, Jonathan; Politano, Ray; Stroock, Naomi; Ng, Cindy
Subject: Re: Spectrum allocation

Yes with the understanding that we will have to pay a referral fee in an estimated 15% to 20%

Christopher Keller

Partner || Labaton Sucharow LLP

140 Broadway

New York, NY 10005

212-907-0853

On Jun 21, 2016, at 2:20 PM, Sarduy, Olga <OSarduy@labaton.com <mailto:OSarduy@labaton.com> > wrote:

Mr. Keller, please approve allocation below. Thank you.

Fees					
Expenses					
Fee Int					
Exp Int					
Interest					
Total					
Labaton Sucharow	$1,656,064.00	$69,222.77	$2,387.01	$99.78	$2,486.79	$1,727,773.56
Goldman Scarlato	$51,723.50	$2,162.02	$74.55	$3.12	$77.67	$53,963.19
The O'Mara Law Firm	$42,212.50	$1,764.46	$60.84	$2.54	$63.38	$44,040.34

Total

$1,750,000.00

$73,149.25

$2,522.40

$105.44

$2,627.84

$1,825,777.09

Total Distribution

$1,825,777.09

Further Breakdown:

Fees

Expenses

Fee Int

Exp Int

Interest

Total

Labaton Sucharow

$1,324,851.20

$69,222.77

$2,387.01

$99.78

$2,486.79

$1,396,560.76

ATRS

$331,212.80

$331,212.80

held 20% subject to change

$1,656,064.00

$69,222.77

$2,387.01

$99.78

$2,486.79

$1,727,773.56

<http://labaton.com/> <image001.jpg>

Olga Sarduy| Assistant Controller

140 Broadway, New York, New York 10005

T: (212) 907-0655 | F: (212) 883-7551

E: osarduy@labaton.com <mailto:osarduy@labaton.com> | W: <http://www.labaton.com> www.labaton.com

<http://www.linkedin.com/company/labaton-sucharow-llp> <image002.jpg>
<https://twitter.com/LabatonSucharow> <image003.jpg> <https://www.facebook.com/pages/Labaton-Sucharow-LLP/443111702425065> <image004.jpg>

Message

From: Asciolla, Gregory S. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=ASCIOLG]
on behalf of Asciolla, Gregory S. [/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=asciolg]
Sent: 7/21/2010 4:04:35 PM
To: 'damon@cmhllp.com' [damon@cmhllp.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted]

Thanks much Damon.

From: Damon Chargois
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Sent: Wed Jul 21 12:05:08 2010
Subject: RE: [redacted]

I have visited with [redacted], President of [redacted]. He negotiates contracts on behalf of many unions, including [redacted]r. [redacted] is the largest. I have him working to secure what you want.

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Tuesday, July 20, 2010 11:05 AM

To: Damon Chargois
Cc: Belfi, Eric J.
Subject: [redacted]

Hi Damon,

Did you have any luck setting up a meeting with the [redacted]?

Thanks for any updates,

Greg

Gregory S. Asciolla, Esq.
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Direct Dial: 212.907.0827
Direct Fax: 212.883.7527
gasciolla@labaton.com
www.labaton.com

Message

From: Asciolla, Gregory S. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=ASCIOLG]
on behalf of Asciolla, Gregory S. [/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=asciolg]
Sent: 8/4/2010 9:32:02 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: [redacted]

Yes. We still want to follow our other leads, but this one looks dead.

From: Belfi, Eric J.
Sent: Wednesday, August 04, 2010 5:31 PM
To: Asciolla, Gregory S.
Subject: Fw: [redacted]

Should I tell him that it is not worth it.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Damon Chargois
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Sent: Wed Aug 04 14:29:29 2010
Subject: RE: [redacted]

I keep getting rerouted to the same lawyer that you guys are dealing with [redacted]

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Wednesday, July 21, 2010 11:05 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: Re: [redacted]

Thanks much Damon.

From: Damon Chargois
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Sent: Wed Jul 21 12:05:08 2010
Subject: RE: [redacted]

I have visited with [redacted], President of [redacted]. He negotiates contracts on behalf of many unions, including [redacted] is the largest. I have him working to secure what you want.

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Tuesday, July 20, 2010 11:05 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: [redacted]

Hi Damon,

Did you have any luck setting up a meeting with the [redacted]?

Thanks for any updates,

Greg

Gregory S. Asciolla, Esq.
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Direct Dial: 212.907.0827
Direct Fax: 212.883.7527
gasciolla@labaton.com
www.labaton.com


Please consider the environment before printing this email.

Message

From: Asciolla, Gregory S. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=ASCIOLG]
on behalf of Asciolla, Gregory S. [/o=Goodkin Labaton Rudoff Sucharow/ou=First Administrative Group/cn=Recipients/cn=asciolg]
Sent: 8/4/2010 9:39:49 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; 'damon@cmhllp.com' [damon@cmhllp.com]
Subject: RE: [redacted]

Thanks Damon for your efforts.

From: Belfi, Eric J.
Sent: Wednesday, August 04, 2010 5:38 PM
To: 'damon@cmhllp.com'; Asciolla, Gregory S.
Subject: Re: [redacted]

Thank you for your effort - sounds like you should probably stand down.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Damon Chargois
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Sent: Wed Aug 04 14:29:29 2010
Subject: RE: [redacted]

I keep getting rerouted to the same lawyer that you guys are dealing with [redacted]

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Wednesday, July 21, 2010 11:05 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: Re: [redacted]

Thanks much Damon.

From: Damon Chargois
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Sent: Wed Jul 21 12:05:08 2010
Subject: RE: Fenders

I have visited with [redacted], President of [redacted]. He negotiates contracts on behalf of many unions, including [redacted] is the largest. I have him working to secure what you want.

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Tuesday, July 20, 2010 11:05 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: [redacted]

Hi Damon,

Did you have any luck setting up a meeting with the [redacted]?

Thanks for any updates,

Greg

Gregory S. Asciolla, Esq.
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Direct Dial: 212.907.0827
Direct Fax: 212.883.7527
gasciolla@labaton.com
www.labaton.com


Please consider the environment before printing this email.

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 9/29/2010 2:30:00 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Asciolla, Gregory S. [GAsciolla@labaton.com]
CC: Lerner, Kellie [KLerner@labaton.com]
Subject: RE: [redacted]

The last conversation that you and i had led me to believe that there was a time crunch and i relayed my thought that my contact would not be helpful on short notice.

-----Original Message-----
From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wed 9/29/2010 9:21 AM
To: Damon Chargois; Asciolla, Gregory S.
Cc: Lerner, Kellie
Subject: RE: [redacted]

What ever happened with [redacted]

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Wednesday, July 21, 2010 12:05 PM
To: Asciolla, Gregory S.
Cc: Belfi, Eric J.
Subject: RE: [redacted]

I have visited with [redacted] He negotiates contracts on behalf of many unions, [redacted] is the largest. I have him working to secure what you want.

Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Fax

From: Asciolla, Gregory S. [mailto:GAsciolla@labaton.com]
Sent: Tuesday, July 20, 2010 11:05 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: [redacted]

Hi Damon,

Did you have any luck setting up a meeting with the [redacted]?

Thanks for any updates,

Greg

Gregory S. Asciolla, Esq.
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Direct Dial: 212.907.0827
Direct Fax: 212.883.7527
gasciolla@labaton.com<mailto:gasciolla@labaton.com>
www.labaton.com<http://www.labaton.com/>

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Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 12/6/2010 3:47:16 PM
To: Lerner, Kellie [KLerner@labaton.com]
CC: Chaz De La Garza [chaz@cdlglaw.com]; Damon Chargois [damon@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: conference call today at ten thirty central time to discuss a potential new antitrust case

Kellie:

I trust you had a nice Thanksgiving. I am writing to follow up on our last conversation and to see if we can assist with your firm's investigation of the potential antitrust matter that Chaz initiated. If so, please let us know and if you could kindly provide a status of the investigation we would be grateful for your efforts.

Warm Regards
Kamran

From: Lerner, Kellie [mailto:KLerner@labaton.com]
Sent: Wed 11/17/2010 11:03 AM
To: Kamran Mashayekh
Cc: Chaz De La Garza; Damon Chargois; Belfi, Eric J.
Subject: RE: conference call today at ten thirty central time to discuss a potential new antitrust case
Kamran/Chaz,

Thank you again for bringing this potential case to our attention. [redacted]

We will thoroughly investigate these issues and aim to report back shortly after the holiday.

Best regards,

Kellie Lerner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
+ 212.907.0885

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Wednesday, November 17, 2010 10:55 AM

To: Lerner, Kellie
Cc: Chaz De La Garza; Damon Chargois; Belfi, Eric J.
Subject: conference call today at ten thirty central time to discuss a potential new antitrust case
Kellie:

How are you? [redacted]

Warm Regards

Kamran

Kamran Mashayekh
Chargois, Mashayekh & Herron
2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380
281 444-0604
281 440-0124 (fax)
kamran@cmhllp.com


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Message

From: Lerner, Kellie [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SAFARK]
Sent: 12/7/2010 8:17:41 PM
To: 'Kamran Mashayekh' [kamran@cmhllp.com]
CC: Chaz De La Garza [chaz@cdlglaw.com]; Damon Chargois [damon@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: conference call today at ten thirty central time to discuss a potential new antitrust case

Kamran,

Thanks for your email. My holiday was very nice. We have been investigating this potential claim and intend to report back by the end of the week.

Best,

Kellie

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, December 06, 2010 10:47 AM
To: Lerner, Kellie
Cc: Chaz De La Garza; Damon Chargois; Belfi, Eric J.
Subject: RE: conference call today at ten thirty central time to discuss a potential new antitrust case
Kellie:

I trust you had a nice Thanksgiving. I am writing to follow up on our last conversation and to see if we can assist with your firm's investigation of the potential antitrust matter that Chaz initiated. If so, please let us know and if you could kindly provide a status of the investigation we would be grateful for your efforts.

Warm Regards
Kamran

From: Lerner, Kellie [mailto:KLerner@labaton.com]
Sent: Wed 11/17/2010 11:03 AM
To: Kamran Mashayekh
Cc: Chaz De La Garza; Damon Chargois; Belfi, Eric J.
Subject: RE: conference call today at ten thirty central time to discuss a potential new antitrust case
Kamran/Chaz,

Thank you again for bringing this potential case to our attention. [redacted]

We will thoroughly investigate these issues and aim to report back shortly after the holiday.

Best regards,

Kellie Lerner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
+ 212.907.0885

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Wednesday, November 17, 2010 10:55 AM
To: Lerner, Kellie
Cc: Chaz De La Garza; Damon Chargois; Belfi, Eric J.
Subject: conference call today at ten thirty central time to discuss a potential new antitrust case
Kellie:

How are you? [redacted]

Warm Regards

Kamran

Kamran Mashayekh
Chargois, Mashayekh & Herron
2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380
281 444-0604
281 440-0124 (fax)
kamran@cmhllp.com


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Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 1/6/2010 8:39:51 PM
To: Keller, Christopher J. [ckeller@labaton.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Tarrant

Ok. Let's talk tomorrow. Call my cell anytime

Sent from my iPhone

On Jan 6, 2010, at 1:39 PM, "Keller, Christopher J." <ckeller@labaton.com
> wrote:

> we are thinking about filing a new case there.
>
>
>
>
> Christopher J. Keller, Esq.
> Partner
> Labaton Sucharow LLP
> 140 Broadway
> New York, NY 10005
> Phone: (212) 907-0853
> Fax: (212) 883-7053
> e-mail: ckeller@labaton.com
> www.Labaton.com
>
>
>
>
>
> -----Original Message-----
> From: Damon Chargois [mailto:damon@cmhllp.com]
> Sent: Wednesday, January 06, 2010 2:33 PM
> To: Keller, Christopher J.
> Cc: Belfi, Eric J.
> Subject: Re: Tarrant
>
> Worked as head of litigation of a plaintiff's law firm for 7 years in
> Tarrant County. Which judge?
>
> Sent from my iPhone
>
> On Jan 6, 2010, at 12:48 PM, "Keller, Christopher J." <ckeller@labaton.com
> > wrote:
>
>> Damon, how's your juice in this county?
>>
>>
>>
>> Christopher Keller, Esq.
>> Labaton Sucharow LLP
>> 140 Broadway
>> New York, NY 10005
>> 212-907-0853
>> Ckeller@labaton.com
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>> system. Thank you.
>>
>>

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 2/21/2009 2:46:43 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Atlanta

Ok.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 20 Feb 2009 21:11:04 -0500
To: <damon@cmhllp.com>
Subject: RE: Atlanta
Yes - chris will get back to you.

I am available by cell next week if you want to touch base.

From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, February 20, 2009 9:06 PM
To: Belfi, Eric J.
Subject: Re: Atlanta
I've got it covered. Did u get my email about closure on our agreement?

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 20 Feb 2009 20:49:09 -0500
To: <damon@cmhllp.com>
Subject: Re: Atlanta

In Kansas unfortunately but I have full faith in your persuasive abilities.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Belfi, Eric J.
Sent: Fri Feb 20 20:42:33 2009
Subject: Re: Atlanta

Confirmed with Frank a bit ago. Can you come down for lunch Wednesday?
------Original Message------
From: Belfi, Eric J.
To: damon@cmhllp.com
Sent: Feb 20, 2009 7:35 PM
Subject: Atlanta

Did you track down Kwanza today?
P Please consider the environment before printing this email.
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Sent via BlackBerry by AT&T

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 3/4/2009 3:00:16 PM
To: kwanzahall1@yahoo.com; Belfi, Eric J. [EBelfi@labaton.com]; Frank Stout [frankstout@reganriley.com]; Serendipity Media Group [eb@dipitypr.com]
CC: Ching, Natalie [NChing@labaton.com]
Subject: RE:

Thank you, Kwanza.

-----Original Message-----
From: Kwanza Hall [mailto:kwanzahall1@yahoo.com]
Sent: Wednesday, March 04, 2009 8:35 AM
To: Eric J. Belfi; Frank Stout; Damon Chargois; Serendipity Media Group
Cc: Ching, Natalie
Subject:

The board is meeting now. I just spoke to [redacted] representative and the board Chair. [redacted] will have to issue an rfp. Will make motion to move forward @ end of meeting.
Sent via BlackBerry by AT&T

Message

From: Che Williamson [che@cmhllp.com]
Sent: 3/7/2009 10:25:53 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Tim Herron [tim@cmhllp.com]
Subject: [redacted]

Eric
Could you let me know if Labaton is at all interested in the lady who purchased [redacted] I need to let them know something or refer them to someone. [redacted] has filed a class complaint in the litigation in Dallas.
Thanks
Che

Che' D. Williamson
Chargois & Herron
2201 Timberloch Suite 110
Houston, Texas 77380
281-444-0604

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 3/25/2009 12:25:48 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted]

I'm happy to go wherever I can help.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Tue, 24 Mar 2009 19:52:02 -0400
To: <damon@cmhllp.com>
Subject: Fw: [redacted]

How do you want to handle the business end?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Antwaun Griffin <antwaungriffin@gmail.com>
To: Belfi, Eric J.
Cc: damon@cmhllp.com <damon@cmhllp.com>
Sent: Tue Mar 24 16:56:21 2009
Subject: RE: [redacted]

Hey Eric.

First, I think someone on your end should contact the [redacted] pension funds consultant. I say that because I think hed probably ask questions that I couldnt answer re: your work. If you do want me to schedule this meeting, however, let me know.

[redacted]

Also, Im in [redacted] later this week and will be meeting with the Deputy Mayor and also reaching out to one of the city funds board members through a mutual acquaintance. That board member, [redacted] is also the [redacted] and is active with the [redacted] Due to the relative success of the [redacted] and [redacted] funds lately, hes starting to gain some notoriety within that

community and should be able to help with getting in front of other fund directors.

Finally, Im in negotiations with a national government affairs firm with pre-existing contacts with many jurisdictions to do work in their shop. If youd like to explore formalizing a relationship and have me put together a more organized program to get you in front of these funds/managers, please let me know.

Call me if you want to chat..

Antwaun

[redacted]

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, March 23, 2009 9:48 PM
To: antwaungriffin@gmail.com
Cc: damon@cmhllp.com
Subject: [redacted]

Antwaun:

What are the next steps with [redacted] - I may be down there in the next couple of weeks?

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

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Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 4/4/2009 3:32:47 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: frankstout@reganriley.com
Subject: Re: Antwaun

Sounds good.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 3 Apr 2009 23:08:03 -0400
To: <damon@cmhllp.com>
Subject: Antwaun

Damon:

I had lunch with Antwaun on Wednesday and he introduced me to his friend Bendele McQueen of McKenna Long Aldgridge - he is a lawyer at a lobbying firm. Give me a call when you have a chance so we can go over next moves.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 4/14/2009 3:21:21 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Frank Stout [frankstout@reganriley.com]
CC: eb@dipitypr.com; Tim Herron [tim@cmhllp.com]
Subject: RE: Meeting

That'll work/

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, April 14, 2009 9:52 AM
To: Damon Chargois; Frank Stout
Cc: eb@dipitypr.com; Tim Herron
Subject: RE: Meeting

We can have some materials shipped to Atlanta for the meetings.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, April 14, 2009 10:41 AM
To: Belfi, Eric J.; Frank Stout
Cc: eb@dipitypr.com; Tim Herron
Subject: RE: Meeting

One thing I don't have are your updated Labaton brochures with performance statistics. I have no ego and don't mind waiting.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, April 14, 2009 9:35 AM
To: Damon Chargois; Frank Stout
Cc: eb@dipitypr.com; Tim Herron
Subject: RE: Meeting

If you can handle - that works for me.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, April 14, 2009 10:34 AM
To: Belfi, Eric J.; Frank Stout
Cc: eb@dipitypr.com; Tim Herron
Subject: RE: Meeting

Eric, I can do next week, unless you really think you need to be there personally.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, April 14, 2009 9:30 AM
To: Frank Stout
Cc: Damon Chargois; eb@dipitypr.com; Tim Herron
Subject: RE: Meeting

Anyway we can do it the following week, April 28th - my schedule is little tight next week.

From: Frank Stout [mailto:frankstout@reganriley.com]
Sent: Monday, April 13, 2009 6:20 PM
To: Belfi, Eric J.
Cc: <damon@cmhllp.com>; <eb@dipitypr.com>; <tim@cmhllp.com>
Subject: Re: Meeting

I called and am waiting to match up calendars. I should hear back shortly

Frank

Frank Stout

Partner

Regan&Riley

Tel: (404) 323-3846

On Apr 13, 2009, at 5:08 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

I could travel Tuesday.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: frankstout@reganriley.com <frankstout@reganriley.com>; Belfi, Eric J.
Cc: eb@dipitypr.com <eb@dipitypr.com>; Tim Herron <tim@cmhllp.com>
Sent: Mon Apr 13 15:01:50 2009
Subject: RE: Meeting

Either one of us, I say. Time should be the determining factor. I can travel just about any day next week.

From: frankstout@reganriley.com [mailto:frankstout@reganriley.com]
Sent: Monday, April 13, 2009 1:52 PM
To: Belfi,Eric J.
Cc: Damon Chargois; eb@dipitypr.com; Tim Herron
Subject: Meeting

Eric/Damon-

Ebony has been working hard on setting up meetings with individuals in charge or involved in the pension program. She has been sending me names and contacts and I have been making contact to set up meetings ASAP. Please let me know if you both would like to come into town or if only one of you would like to come into town. In my humble opinion, one you will have to be here.

Please let me know

Frank

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 4/20/2009 2:24:50 PM
To: [redacted] Belfi, Eric J. [EBelfi@labaton.com]
CC: Tim Herron [tim@cmhllp.com]
Subject: RE: [redacted]

Thank you, Frank. Let me know when I need to get out there.

From: [redacted]
Sent: Monday, April 20, 2009 8:13 AM
To: Belfi,Eric J.
Cc: Damon Chargois; Tim Herron
Subject: RE: [redacted]

The meeting went well and we are making progress. I sent [redacted] an e-mail as well requesting assistance and am waiting to hear back from her.

I hope to push this forward and come to some closure

All my best

[redacted]

-------- Original Message --------
Subject: Re: [redacted]
From: "Belfi, Eric J." <EBelfi@labaton.com>
Date: Mon, April 20, 2009 8:14 am
To: [redacted]
Cc: <damon@cmhllp.com>, <tim@cmhllp.com>

[redacted]:

How did the meeting go?

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: [redacted]
To: Belfi, Eric J.
Cc: Damon Chargois <damon@cmhllp.com>; Tim Herron <Tim@cmhllp.com>
Sent: Fri Apr 17 12:13:23 2009
Subject: RE: [redacted]

Eric-

I understand and I am trying to clear up any confusion this afternoon. I am meeting with [redacted] at 8:00AM on Saturday morning. I am also setting up a meeting with [redacted].

My best

Frank

> -------- Original Message --------
> Subject: RE: [redacted]
> From: "Belfi, Eric J." <EBelfi@labaton.com>
> Date: Fri, April 17, 2009 10:45 am
> To: [redacted]
> Cc: "Damon Chargois" <damon@cmhllp.com>, "Tim Herron" <Tim@cmhllp.com>
>
> it seems that there is a real disconnect because the service that [redacted] offers is different then what we offer. I describe our service as complimentary to [redacted] Many of our clients have the [redacted] service.
>
> ---
>
> From: [redacted]
> Sent: Friday, April 17, 2009 10:39 AM
> To: Belfi, Eric J.
> Cc: Damon Chargois; Tim Herron
> Subject: [redacted]
>
> Eric-
>
> I talked with [redacted] last night and found out what was going on. One of the city councilmen requested to squash the RFP because [redacted], whom manages the fund, offers this

service. [redacted] has already made note that the service is free of charge and also commented this week how the bank might offer the service, yet never followed through on the service. [redacted] is going to propose the RFP option at the next meeting.

I am also working on setting up a meeting with other key individuals within the city in an effort to quickly close this up and allow us to move forward.

Frank

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Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 4/24/2009 8:38:02 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)

Please email Frank and Tim for details.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 24 Apr 2009 16:21:56 -0400
To: <damon@cmhllp.com>
Subject: Re: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)

I can - what time?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Belfi, Eric J.
Sent: Fri Apr 24 15:59:30 2009
Subject: Re: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)

Eric. Frank wants to know if you can make it to Atl monday night. I cannot bc of jury.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Thu, 23 Apr 2009 01:43:51 -0400
To: Keller, Christopher J.<ckeller@labaton.com>; <damon@cmhllp.com>
Subject: RE: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)

I made one little edit on Georgia as we already independently represent the State of Georgia.

From: Keller, Christopher J.
Sent: Wednesday, April 22, 2009 3:04 PM
To: 'damon@cmhllp.com'
Cc: Belfi, Eric J.
Subject: Ltr to Eric Belfi and Chris Keller - Draft Agreement 04-07-09 (3)

Damon, sorry for the long wait. Here are our proposed changes. Hope you are well. Chris

P Please consider the environment before printing this email.

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 5/29/2009 2:37:57 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted] Update

Excellent. Looking forward to it.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 29 May 2009 10:24:43 -0400
To: <damon@cmhllp.com>
Subject: RE: [redacted] Update

I would love to do that. We will find a place down here if that is OK as that is my only day in the office next week and I want to maximize the day.

From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, May 29, 2009 10:20 AM
To: Belfi, Eric J.
Subject: Re: [redacted] Update

Cool. Let's meet for lunch somewhere, okay?

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Fri, 29 May 2009 10:08:39 -0400
To: <damon@cmhllp.com>
Subject: RE: [redacted] Update

I will be in NY on June 4th - I believe Larry is here as well.

From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, May 29, 2009 10:02 AM
To: Belfi, Eric J.
Subject: Re: [redacted] Update

Eric, are you and/or Larry going to be in nyc on June 3-5th? I will be up there and want to meet with you, Larry, Gary and Tracey.

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Tue, 26 May 2009 16:25:38 -0400

To: [redacted]
Subject: Re: [redacted] Update

Thank you for the update.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: [redacted]
To: Belfi, Eric J.
Cc: Tim Herron <Tim@cmhllp.com>; Damon Chargois <damon@cmhllp.com>
Sent: Tue May 26 13:59:01 2009
Subject: [redacted] Update

Guys:

I met with Senator Adelman last Friday. He is going to connect me with the CFO of [redacted] whom he believes can make the decision about the pension fund. I hope to have a meeting set up ASAP.

I will let you know as soon as possible

Frank

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 9/9/2009 10:06:07 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; mwheg@aol.com
Subject: Re: Casinos

Good deal, Eric. Hi, Mark. My info:

Damon J. Chargois
Damon@cmhllp.com
832-671-9993 cell
281-444-0604 work
Chargois, Mashayekh & Herron, LLP
2201 Timberloch Place #110
The Woodlands, Texas 77380

Sent via BlackBerry by AT&T

From: "Belfi, Eric J."
Date: Wed, 9 Sep 2009 15:22:23 -0400
To: Damon Chargois<damon@cmhllp.com>; <mwheg@aol.com>
Subject: Casinos

Damon/Mark:

Please exchange your contact information so that you might have an opportunity to speak.

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 3/3/2010 3:54:57 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: [redacted] - Monitoring Agreements

Hey, Eric. I'm looking forward to Florida, brother. I have some housekeeping stuff to cover with you. Below is an email exchange between us regarding our fee split agreement [redacted] matters. Question, did we ever reduce this to writing and/or create a document between us that says all pension funds that we help you obtain result in an 80/20 fee split? If we have, then I'm just lost and ask you to please send again. If not, let's wrap one up, okay?

Damon J. Chargois

Chargois & Herron, LLP

2201 Timberloch Place

Suite 110

The Woodlands, Texas 77380

(281) 444-0604

(281) 440-0124 - Fax

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, September 01, 2009 11:33 AM
To: Damon Chargois; Tim Herron
Subject: RE: [redacted] - Monitoring Agreements

Correct.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Tuesday, September 01, 2009 12:31 PM
To: Belfi, Eric J.; Tim Herron
Subject: RE: [redacted] - Monitoring Agreements

Thank you, Eric. We are also confirming our agreement that any attorney fee award realized by your firm as a result of representing either of these funds, or any related funds where Labaton's representation came about as a result of Chargois, Mashayekh & Herron's efforts and/or contacts (or our agents, assigns, friends, etc.) will be treated the same as our agreement on the Arkansas Teacher Retirement Fund, namely that gross attorney fees will be divided 80/20 (80% to Labaton, Sucharow and 20% to Chargois, Mashayekh & Herron).

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, September 01, 2009 11:19 AM
To: Damon Chargois; Tim Herron
Subject: [redacted] - Monitoring Agreements

Damon/Tim:

Attached please find the Word and PDF versions of the monitoring agreements for [redacted]

Let me know if you need anything else.

Eric

Please consider the environment before printing this email.

Message

From: tim@cmhllp.com [tim@cmhllp.com]
Sent: 6/29/2010 11:09:36 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Tomorrow

Wow. Sounds good. I have three tax hearings on real estate in the morning. Hook up with tomorrow.
------Original Message------
From: Eric J. Belfi
To: Tim Herron
To: Damon Chargois
Subject: RE: Tomorrow
Sent: Jun 29, 2010 6:01 PM

Let me know if you are both up for dinner - it is on me.

-----Original Message-----
From: Tim Herron [mailto:tim@cmhllp.com]
Sent: Tuesday, June 29, 2010 2:35 PM
To: Belfi, Eric J.
Subject: RE: Tomorrow

I should be.

-----Original Message-----
From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, June 29, 2010 1:29 PM
To: Tim Herron
Subject: Tomorrow

I meeting up with Damon tomorrow in houston - I wanted to see if you are around.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com
P Please consider the environment before printing this email.

Sent via BlackBerry by AT&T

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 6/30/2010 3:12:18 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Tim Herron [tim@cmhllp.com]
Subject: Re: Tomorrow

I can catch up to you guys after 8

Sent from my iPhone

On Jun 29, 2010, at 6:01 PM, "Belfi, Eric J." <EBelfi@labaton.com>
wrote:

> Let me know if you are both up for dinner - it is on me.
>
> -----Original Message-----
> From: Tim Herron [mailto:tim@cmhllp.com]
> Sent: Tuesday, June 29, 2010 2:35 PM
> To: Belfi, Eric J.
> Subject: RE: Tomorrow
>
> I should be.
>
> -----Original Message-----
> From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
> Sent: Tuesday, June 29, 2010 1:29 PM
> To: Tim Herron
> Subject: Tomorrow
>
> I meeting up with Damon tomorrow in houston - I wanted to see if you
> are around.
>
> Eric J. Belfi
> Partner
> Labaton Sucharow LLP
> 140 Broadway
> New York, N.Y. 10005
> Telephone: +1.212.907.0878
> Facsimile: +1.212.883.7078
> ebelfi@labaton.com
> www.labaton.com
> P Please consider the environment before printing this email.
> ***Privilege and Confidentiality Notice***
>
> This electronic message contains information that is (a) LEGALLY
> PRIVILEGED, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW
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> (s) named herein. If you are not the Addressee(s), or the person
> responsible for delivering this to the Addressee(s), you are hereby
> notified that reading, copying, or distributing this message is
> prohibited. If you have received this electronic mail message in
> error, please contact us immediately at 212-907-0700 and take the
> steps necessary to delete the message completely from your computer
> system. Thank you.
>
>

Message

From: Gottlieb, Louis [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=GOTTLIL]
Sent: 7/13/2010 7:22:21 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Politano, Ray [rpolitano@labaton.com]; Irlin, Katerina [KIrlin@labaton.com]; Andros, Judith [JAndros@labaton.com]
Subject: Hillary Claire Herron Meandor

She will be joining the firm as a summer associate for the period July 20 - August 19.

Please call me if you have any questions.

Lou

Message

From: Damon Chargois [damon@cmhllp.com]
Sent: 12/1/2011 6:04:40 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Graciela Saenz [saenzassociates@gmail.com]; Kamran Mashayekh [kamran@cmhllp.com]; burkhardtlaw@comcast.net
Subject: RE: Application - TXPRS

Excellent, Eric.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Thursday, December 01, 2011 10:47 AM
To: Damon Chargois
Subject: Fwd: Application - TXPRS

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1:516.509.5236

Begin forwarded message:

From: "Giles, Matthew S." <MGiles@labaton.com>
Date: December 1, 2011 8:44:02 AM PST
To: "Belfi, Eric J." <EBelfi@labaton.com>
Subject: RE: Application - TXPRS

They did receive our application, and we are on the list to be considered today in the board meeting.

From: Belfi, Eric J.
Sent: Thursday, December 01, 2011 10:32 AM
To: Giles, Matthew S.
Subject: RE: Application - TXPRS

Thank you.

From: Giles, Matthew S.
Sent: Thursday, December 01, 2011 10:31 AM
To: Belfi, Eric J.
Subject: RE: Application - TXPRS

We did. The email used was your own, so I would expect follow up from them to go to you. I will call this morning to confirm their receipt.

From: Belfi, Eric J.
Sent: Thursday, December 01, 2011 7:22 AM
To: Giles, Matthew S.
Subject: Re: Application - TXPRS

Did we send the application in?

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1:516.509.5236

On Nov 29, 2011, at 1:03 PM, "Giles, Matthew S." <MGiles@labaton.com> wrote:

No, the online application wants contact information for firm and for you, what type of business we are, whether we currently have TEXPERS members as clients, whether we have an office in Texas, and whether we currently have any public pension funds as clients. There's also a note informing us that membership is $5,000/yr.

From: Belfi, Eric J.
Sent: Tuesday, November 29, 2011 3:52 PM
To: Giles, Matthew S.
Subject: Fwd: Application - TXPRS

Is the same application?

Eric J. Belfi

Partner

Labaton Sucharow LLP

140 Broadway

New York, N.Y. 10005

o: 1.212.907.0878

c: 1:516.509.5236

Begin forwarded message:

From: Elaine Doyal <Elaine@cmhllp.com>
Date: November 29, 2011 12:08:36 PM EST
To: "Belfi, Eric J." <EBelfi@labaton.com>
Cc: Damon Chargois <damon@cmhllp.com>
Subject: Application - TXPRS

Eric:

As a followup to the conference call this morning and in preparation of the application process to TXPRS, please find attached our firm resume. Please let me know if you need any additional information.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Facsimile

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 11/28/2011 11:34:58 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Damon Chargois [damon@cmhllp.com]
Subject: FW: summation of our meeting with Gracie Saenz and Max Patterson

Eric:

I trust you had a nice thanksgiving holiday. Please see below in preparation for our call tomorrow.

Thank you
Kamran

From: Graciela Saenz [mailto:saenzassociates@gmail.com]
Sent: Sat 11/19/2011 8:25 AM
To: Kamran Mashayekh
Cc: Damon Chargois; 'Elizabeth Burkhardt'
Subject: RE:

Dear Kamran & Damon:

As per our conversation with [redacted] yesterday, I outline the following points of interest and then would request that we set up time for conference call with Eric – hopefully by Monday or Tuesday:

1) First – find out what the existing programs and education extended to clients thru Labaton and whether there are any held in Texas; find out what they spend in marketing as well;

2) Become a member of the [redacted] This would need to be done quickly since [redacted] would need to present list to Board by the December 1st meeting. I can call [redacted] to see if she would help push the membership forward as well as [redacted] from the [redacted] The purpose of membership would be to get ready for two conferences next year with the hope that Labaton can be a presenter; Help us break through the existing close knit industry gate keepers;

3) I am to contact [redacted], who chairs the [redacted] to see about who is their Securities Litigation attorneys; Roberrt is good friend and former fellow of the American Leadership Forum which I currently chair.

1) I am to contact to contact [redacted] also of the [redacted] to find out who their Securities Litigation team is as well;

2) I would also like to coordinate with Damon and go thru key firms in Texas and see who they use as Securities ligation support.

I am to get back to [redacted] on a special request.

Let me know if there are any other points of interest I missed.

Thanks, Gracie


Saenz & Burkhardt P.L.L.C.
ATTORNEYS AT LAW
GRACIELA G. SAENZ
The Midtown Plaza | 5225 Katy Fryw., Ste 540
Houston, TX 77007 OFC. 281.888.4409

Message

From: Elaine Doyal [Elaine@cmhllp.com]
Sent: 11/29/2011 5:08:36 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Damon Chargois [damon@cmhllp.com]
Subject: Application - TXPRS
Attachments: Firm Resume - 04-08-10.pdf

Eric:

As a followup to the conference call this morning and in preparation of the application process to TXPRS, please find attached our firm resume. Please let me know if you need any additional information.

Sincerely,

M. Elaine Doyal
Paralegal to Damon J. Chargois
Chargois & Herron, LLP
2201 Timberloch Place
Suite 110
The Woodlands, Texas 77380
(281) 444-0604
(281) 440-0124 - Facsimile

CHARGOIS, MASHAYEKH & HERRON, L.L.P.
ATTORNEYS AT LAW

2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380
(Office) 281-444-0604
(Fax) 281-440-0124

FIRM RESUME

Partners

DAMON J. CHARGOIS was born on December 26, 1966. He was admitted to the Texas Bar on November 4, 1994, and the Arkansas Bar in 2006. Mr. Chargois received his undergraduate degree in English Literature in 1991 and received his Doctor of Jurisprudence from the University of Houston Law Center in May, 1994. Mr. Chargois is licensed to practice in all Texas and Arkansas Courts, as well as Federal District Courts and the U.S. 5th Circuit Court of Appeals. Additionally, he has successfully tried a federal case to unanimous positive verdict that was subsequently affirmed by the 5th Circuit Court of Appeals and, then, had writ of certiorari denied by the U.S. Supreme Court, resulting in a final ruling affirming Mr. Chargois' verdict.

Mr. Chargois has handled a variety of class action and mass tort litigation cases, including a commercial, occupational, mass torts, including business transactions, products liability, pharmaceutical, class action, asbestos and benzene chemical exposures.

Upon graduating as class captain from his law school, Mr. Chargois worked as a corporate and insurance defense attorney in Dallas, Texas, with the law firm Cowles & Thompson, P.C., while also serving as criminal prosecutor for the townships of Rockwall, Rowlette, and Heath, Texas. In 1996, he became a mass tort plaintiff's trial lawyer, ultimately rising to Head of Litigation for national law firm Foster & Sear, L.L.P.

In 2004, the law firm Chargois & Herron was founded with Damon Chargois and Timothy P. Herron. In 2006, Chargois, Mashayekh & Herron was formed to specialize in commercial and class action

lawsuits, and expand the firm's commercial and financial business interests. Mr. Chargois' practice is multi jurisdictional and he oversees litigation in several states on the federal and state level. He is a member of the State Bar of Texas Litigation Section; the American Association for Justice; and Texas Trial Lawyers Association. Chargois, Mashayekh & Herron has offices in the Woodlands, Texas; Little Rock, Arkansas; and New York, New York.

Mr. Chargois is a member of the Board of Directors for the University of Houston Law Alumni Foundation. Additionally, he is a member of the Advisory Board of Directors for Houston Achievement Place, a charity specializing in caring for the needs of at risk foster children. He has also served as a guest lecturer on a number of legal topics, including mass tort litigation and bankruptcy to the University of Arkansas—Little Rock Law School.

TIMOTHY P. HERRON was born in Hot Springs, Arkansas, on October 18, 1952. He was admitted to the Texas Bar in 1980. Mr. Herron did his undergraduate and graduate education at Texas Christian University receiving a Bachelor of Fine Arts in Speech and Communication in 1974 and a Master of Science in Speech and Communication in 1975. He taught as a professor at Samford University before being awarded a Fulbright Scholarship to attend Baylor Law School in Waco, Texas where he obtained his Juris Doctor Degree in 1980 (cum laude).

In law school, he was voted the most outstanding trial advocate in the nation and was on Baylor's national winning mock trial team. Mr. Herron began as an attorney with Baker & Botts in Houston in the employment litigation section. He left Baker Botts, to become a partner in the firm of Hope & Mays and later Crews & Herron in Conroe, Texas. In 1990, along with Don Wetzel, he formed the law firm of Wetzel & Herron which specialized in insurance defense and commercial litigation.

After representing mainly defense and commercial clients for eighteen years, Mr. Herron changed his practice to handle only plaintiffs' mass torts. In 1998, he started the law firm of Hissey Kientz & Herron with Rob Kientz, and Mike Hissey, which since that time continues to handle

mass tort litigation. Their cases include a wide range of occupational and mass torts, including asbestos and pharmaceutical litigation.

In 2004, the law firm Chargois & Herron was founded with Damon Chargois and Timothy P. Herron. In 2006, the firm expanded to specialize in commercial and class action lawsuits, and expand the firm's commercial and financial business interests. Mr. Herron's practice is multi jurisdictional and he oversees litigation in several states on the federal and state level. He is licensed Texas and Arkansas. He is board certified in Civil Trial Litigation since 1989 and is, licensed to practice in the Federal Courts of Texas, and is a member of the State Bar of Texas in the Litigation Section and the AAJ and TTLA. In addition, he is chairman of the Unauthorized Practice of Law Committee of the State Bar of Texas, Region 5A. Chargois & Herron has offices in the Woodlands, Texas; Little Rock, Arkansas; and New York, New York.

Mr. Herron has expanded his business interests to include commercial banking and real estate. He was also involved in the founding of Post Oak Bank in Houston in 2003. He has been involved in the development and funding of commercial property development for the past four years in Texas, Oklahoma and Alabama.

Tim Herron has resided in Montgomery County, Texas for the past 26 years and has six children and one grandchild.

KAMRAN MASHAYEKH was admitted to the Texas State Bar on November 11, 1990. Mr. Mashayekh received his undergraduate degree in Political Science from Rice University in 1987 and received his Doctor of Jurisprudence from South Texas College of Law in August 1989.

In 2006, Kamran Mashayekh joined the law firm of Chargois & Herron to specialize in commercial and class action lawsuits and expand the firm's commercial and financial business interest. Mr. Mashayekh is fluent in English, Arabic, French and Spanish.

CHE D. WILLIAMSON was born on November 25, 1964. She is married to Tim Herron and has 2 children and one grandchild. Ms. Williamson earned her Juris Doctor degree from South Texas College of Law in 1989. She has practiced law with her husband, Tim Herron since 1989. Ms. Williamson

teaches mass torts at the Bowen Law School in Little Rock. She is also board certified in Civil Trial Litigation and holds a Ph.D. degree in criminal justice from Sam Houston State University and an L.L.M. in environmental law and policy from the University Houston Law School.

Associates

KIRK A. CHARGOIS was born on November 15, 1967 in Houston, Texas. Mr. Chargois received his undergraduate degree in History from the University of Houston in 2003 and, after earning his law degree from Texas Southern University, Thurgood Marshall School of Law, joined the firm on June 1, 2006. Mr. Chargois is licensed to practice in the Southern District of Texas.

Message

From: Che Williamson [chedatty@aol.com]
Sent: 3/7/2012 1:22:15 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Next week

Sounds great!

Che Williamson,
Chargois & Herron
2201 Timberloch suite 110
Woodlands, Texas 77381

On Mar 6, 2012, at 8:31 AM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

> Do you want to say 5pm?
>
> Eric Belfi
> Partner
> Labaton Sucharow LLP
> 140 Broadway
> New York, N.Y. 10005
> o: 1.212.907.0878
> c: 1.516.509.5236
>
> On Mar 5, 2012, at 4:26 PM, "Che Williamson" <chedatty@aol.com> wrote:
>
>> That would be awesome Eric! Anytime next Friday is great, just. Let me know what time is good for you!
>>
>> Che Williamson,
>> Chargois & Herron
>> 2201 Timberloch suite 110
>> Woodlands, Texas 77381
>>
>> On Mar 5, 2012, at 12:56 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:
>>
>>> Che:
>>>
>>> I am traveling most of next week but I will be in the office Friday afternoon - do you time to come by and see the view and get a coffee in the afternoon or even a drink if you come late enough in the afternoon.
>>>
>>> Eric Belfi
>>> Partner
>>> Labaton Sucharow LLP
>>> 140 Broadway
>>> New York, N.Y. 10005
>>> o: 1.212.907.0878
>>> c: 1.516.509.5236
>>>
>>> On Mar 5, 2012, at 1:47 PM, "Che Williamson" <chedatty@aol.com> wrote:
>>>
>>>> Eric
>>>> Do you have time for lunch next week? I will be in town all week for a criminal justice conference. Any day would be good! Hope to see you!
>>>> C;)
>>>>
>>>> Che Williamson,
>>>> Chargois & Herron
>>>> 2201 Timberloch suite 110
>>>> Woodlands, Texas 77381
>>>
>>> P Please consider the environment before printing this email.
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Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 11:00:40 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; =SMTP:damon@cmhllp.com
CC: Chan, Cindy [CChan@labaton.com]
Subject: [redacted]

ok, we will email it to you for sending to [redacted] The cover e-mail I was going to send was going to generally express our their belief that the case is extraordinarily strong, highlighting the off-balance-sheet comparison to [redacted] and note that our report was substantively supported by the expert reports concerning damages, accounting, and an insider trading analysis all prepared by prominent experts in their field, as well as a substantive investigation headed up by [redacted] and 20 year veteran of the FBI. All this is in the report (including the expert reports), but it doesn't hurt to start out with what really sets our approach and analysis apart from the rest that he has or will see.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, November 16, 2007 5:55 PM
To: Keller, Christopher J.; 'damon@cmhllp.com'
Subject: Re: [redacted]

I am back and can send it if you have not sent it yet.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: 'damon@cmhllp.com' <damon@cmhllp.com>
Cc: Belfi, Eric J.
Sent: Fri Nov 16 17:20:47 2007
Subject: RE: [redacted]

ok. Do you have him email. And should I address him as Jarvis even though we have not met?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, November 16, 2007 5:08 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

Probably emailing it to me and Jarvis is good.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Fri, 16 Nov 2007 16:51:17
To:<damon@cmhllp.com>
Cc:"Belfi, Eric J." <EBelfi@labaton.com>
Subject: RE: [redacted]

Damon: the report is done. Should we send it directly to Jarvis? By e-mail or federal express? If just to you, how do you want it? We could send it by overnight FedEx so you have it tomorrow morning. We could of course e-mail it or send it for FedEx Monday. Just let me know.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Thursday, November 15, 2007 9:07 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

Big thank you.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 20:15:14
To:<damon@cmhllp.com>
Subject: Re: [redacted]

Ok. You will have [redacted] report tomorrow. Its impressive.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Keller, Christopher J.
Sent: Thu Nov 15 15:11:25 2007
Subject: Re: [redacted]

Spoke to Eric and its probably better that no Labaton person is there, since I will be trashing your competitor heavily.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 13:45:49
To:<damon@cmhllp.com>
Subject: RE: [redacted]

Damon, following up on our conversation towards the end of the mediation, do you think a lunch next Monday or Tuesday is Doable?

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com <mailto:damon@cmhllp.com>]
Sent: Wednesday, November 14, 2007 8:52 AM
To: Keller, Christopher J.
Subject: Re: [redacted]

Hey Chris. How's your dad? Also, give me your PIN so that we can communicate w/o going through server.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Tue, 13 Nov 2007 22:13:22
To:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, <damon@cmhllp.com>
Subject: Re: [redacted]

Ill be in around 930 and to hotel at 10.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tountas, Stephen W.
To: Schochet, Ira; Keller, Christopher J.; 'damon@cmhllp.com' <damon@cmhllp.com>
Sent: Tue Nov 13 21:56:02 2007
Subject: [redacted]

FYI -- The mediation is scheduled to start at 9:30 a.m. tomorrow morning in the Flagler ballroom, which is only accessible via the elevator in the main lobby -- take the elevator to floor C2.

Chris -- we are meeting for breakfast in the hotel at 8 am if you would like to join us.

Steve

Privilege and Confidentiality Notice

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 2/12/2009 10:40:28 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Sucharow, Lawrence [LSucharow@labaton.com]
Subject: Damon

yes, pls call

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com <http://www.labaton.com/>

From: Belfi, Eric J.
Sent: Thursday, February 12, 2009 5:34 PM
To: Keller, Christopher J.; Sucharow, Lawrence
Subject: RE: Damon

It is amazing he has made as much as he has but he could made a lot more.

From: Keller, Christopher J.
Sent: Thursday, February 12, 2009 5:12 PM
To: Belfi, Eric J.; Sucharow, Lawrence
Subject: RE: Damon

ok, just so you know [redacted] is standing in the way of our making a deal in [redacted] which would have made it incrementally more likely that we get the case and [redacted] a role in it. [redacted] said no" to the deal we are told, despite the support of [redacted] now has no shot. A great job he is doing for the client.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com <http://www.labaton.com/>

From: Belfi, Eric J.
Sent: Thursday, February 12, 2009 4:57 PM

To: Keller, Christopher J.
Subject: Damon

I spoke to Damon and we are on the same page as far as making adjustments if necessary.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway

New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com <http://www.labaton.com/>

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 11/17/2007 4:52:46 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; 'Jarvis [redacted]
CC: 'damon@cmhllp.com' [damon@cmhllp.com]; Keller, Christopher J. [ckeller@labaton.com]
Subject: RE: [redacted]
Attachments: Labaton Sucharow [redacted] Case Analysis.pdf

Dear Jarvis:

As a follow up to our initial report that we provided to you a couple of weeks ago, please find our updated report that is a much more detailed analysis of the situation at [redacted]

I plan to be in Houston during the week of November 26, 2007 and I am available for an in-person meeting to further discuss this case.

Have a good weekend.

Regards,

Eric

From: Belfi, Eric J.
Sent: Friday, November 02, 2007 4:20 PM
To: Jarvis [redacted]
Cc: 'damon@cmhllp.com'
Subject: [redacted] Report

Dear Jarvis:

Based on a review of 13-F Filings, it appears that [redacted] has suffered a significant loss in [redacted] We estimate that [redacted] has suffered losses in excess of $38 million.

I am providing you with a copy of our initial research report on [redacted] We are working on a more detailed report which we will be able to provide to you shortly.

If you would like us to determine your losses in this case, please provide us with the following data:

[redacted]

Regards,

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Labaton Sucharow

Analysis of Claims in the Securities Class Action Against [redacted]

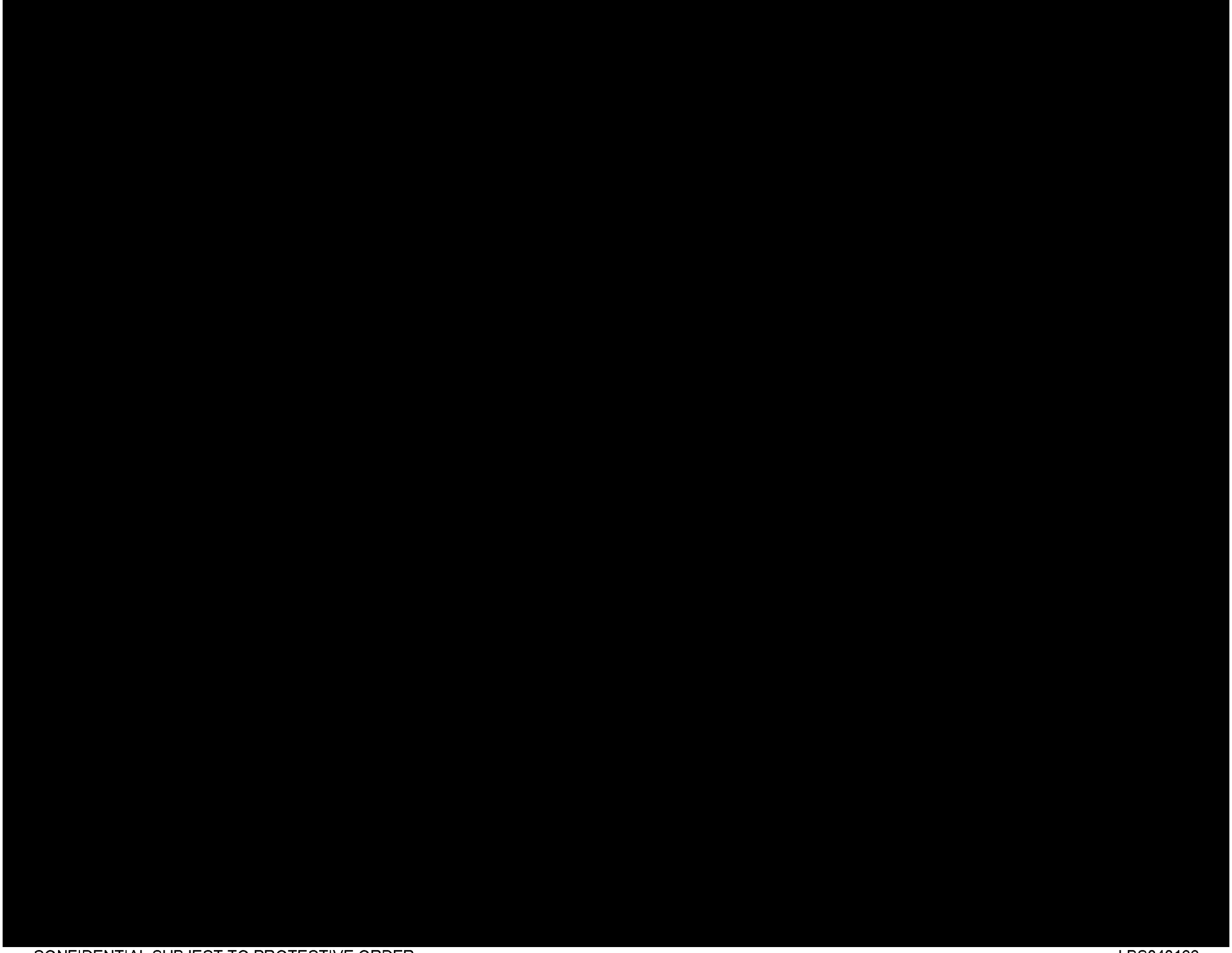
Privileged and Confidential

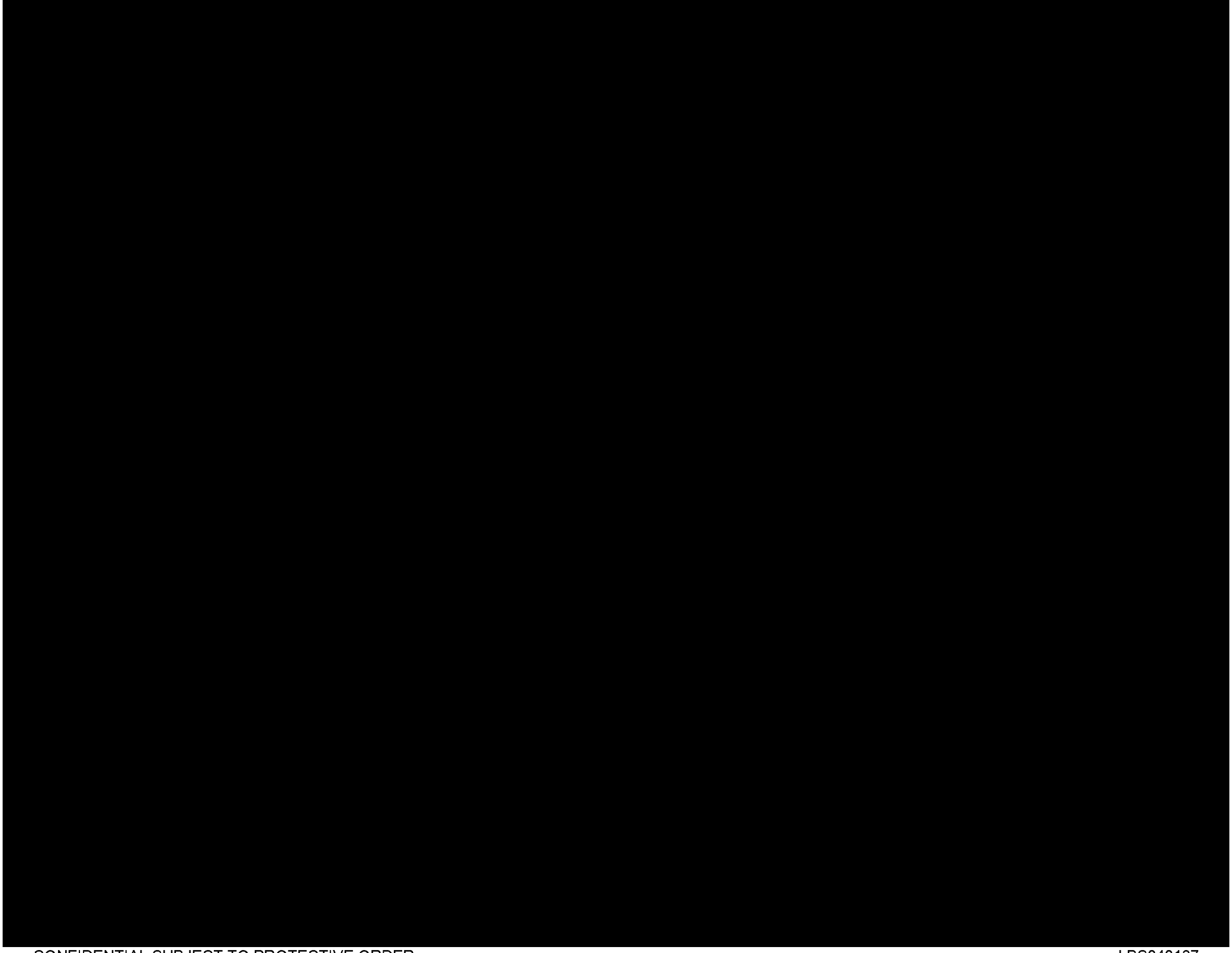
November 16, 2007

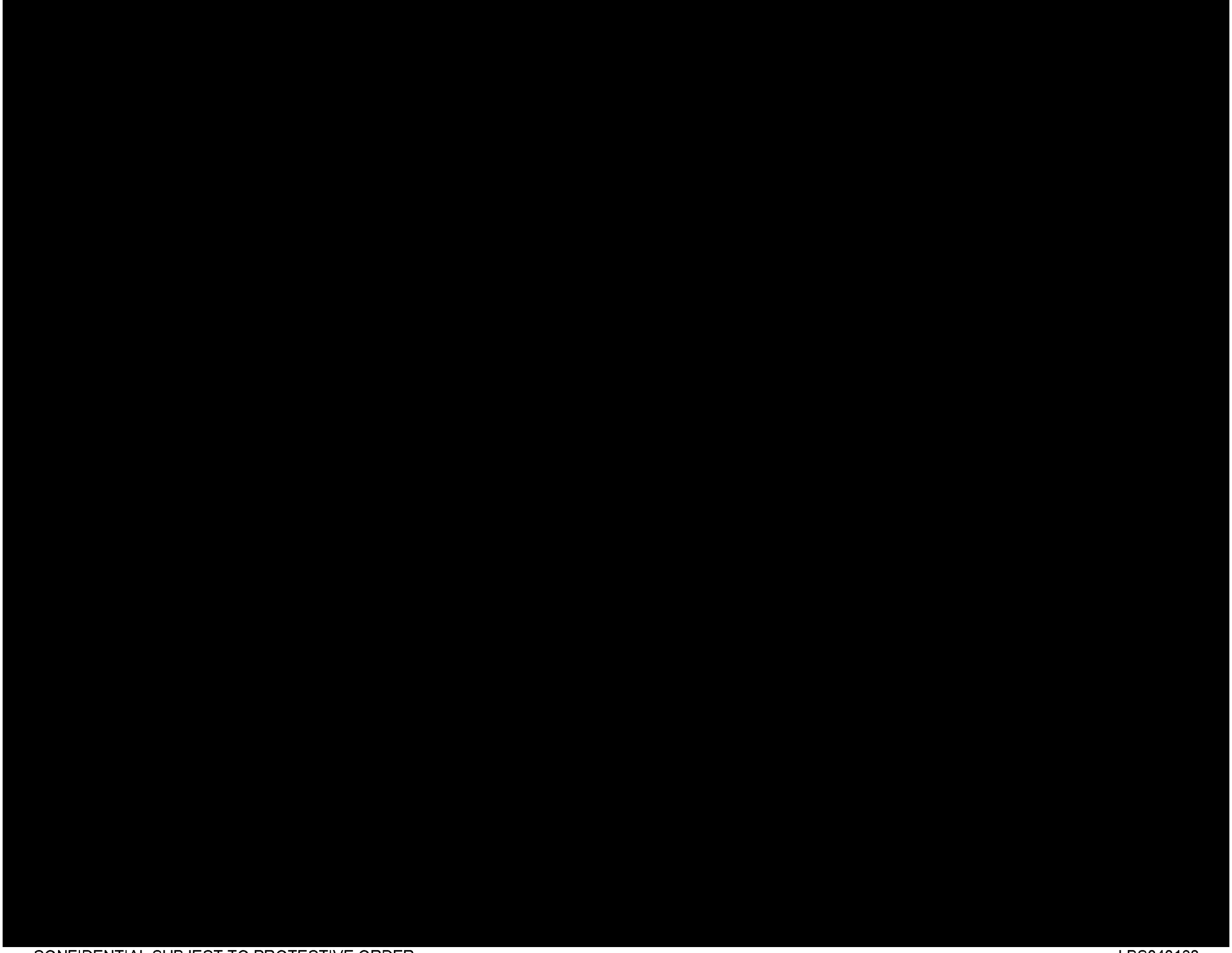
[redacted]

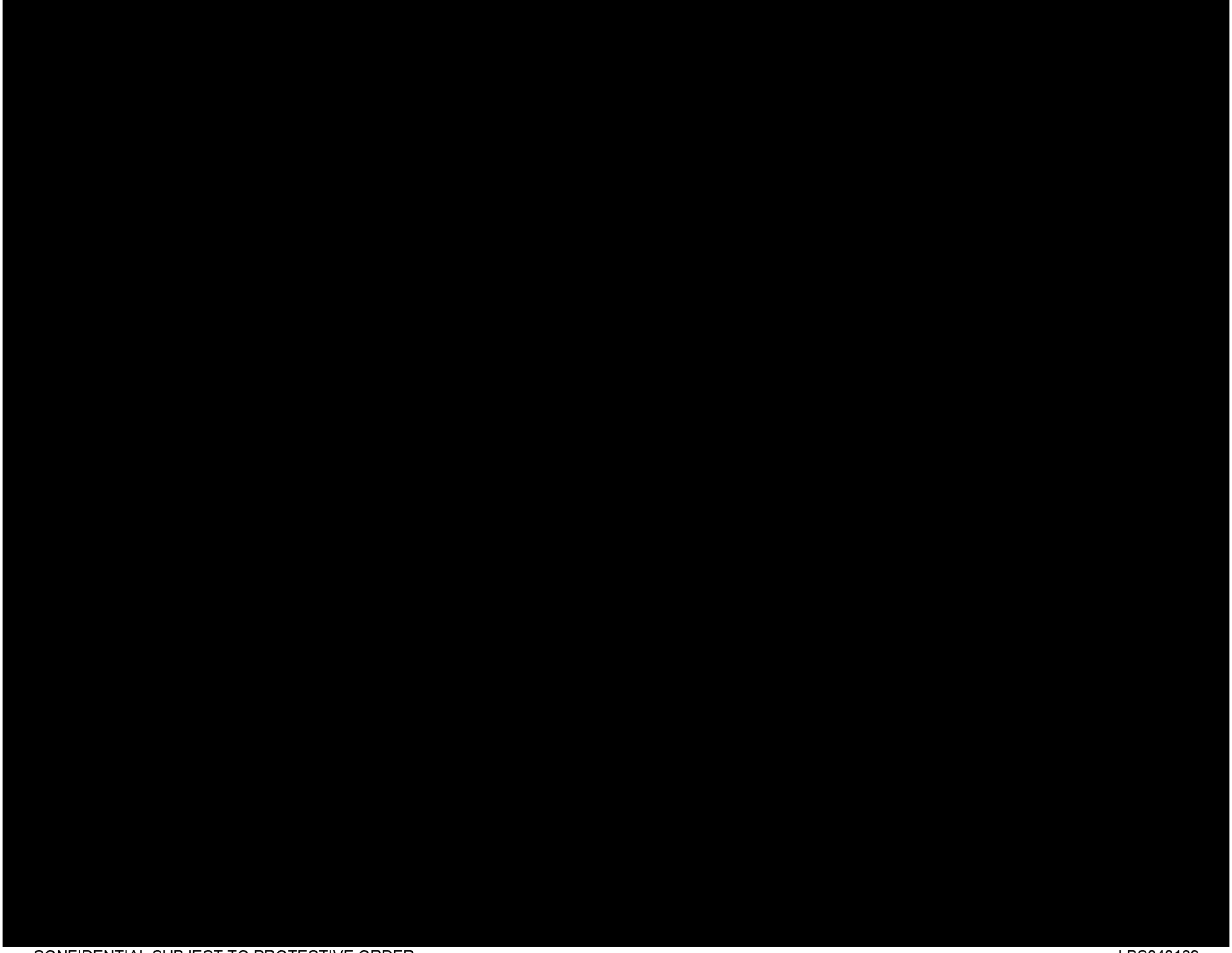
I. SUMMARY OF THE CASE

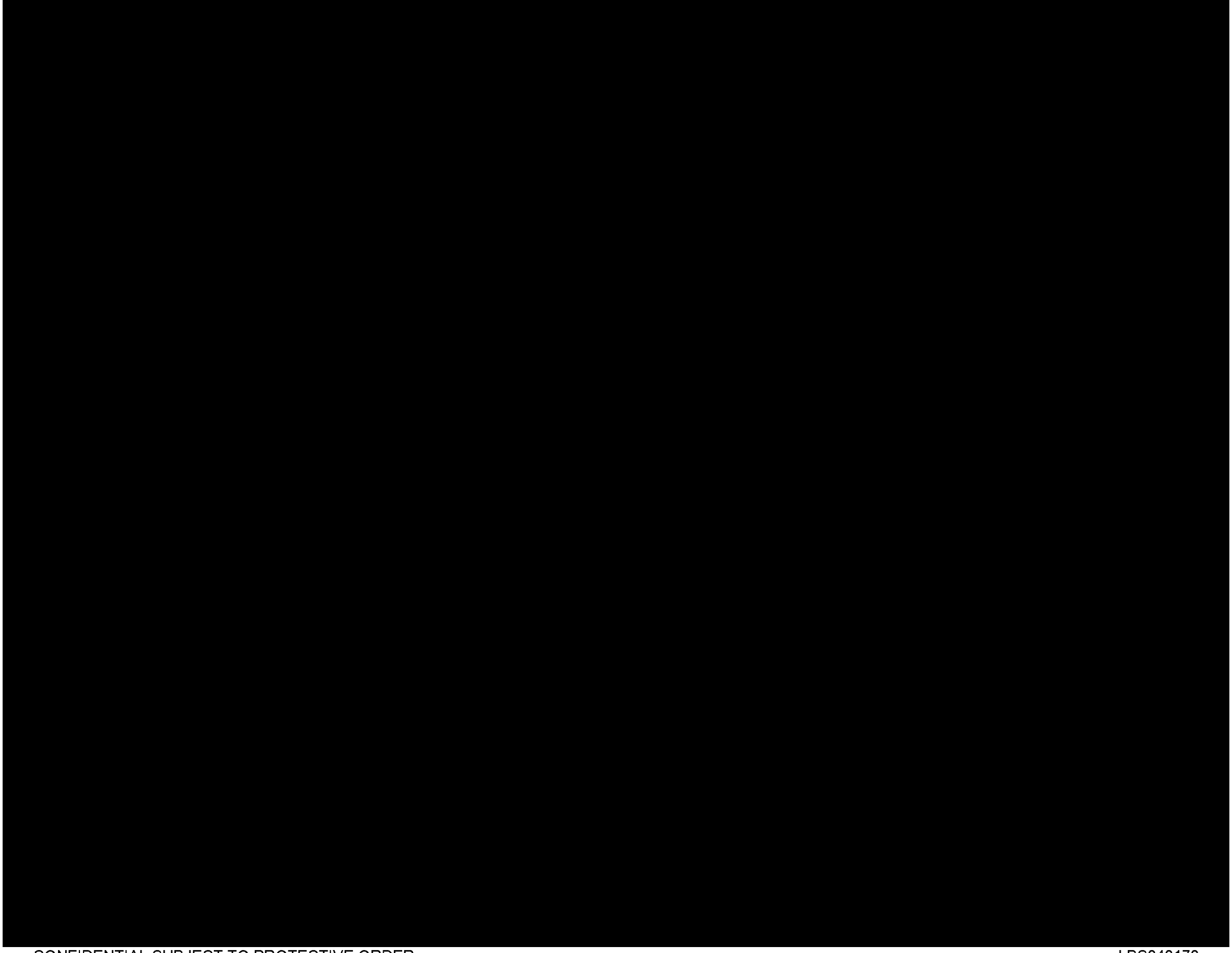
[redacted]

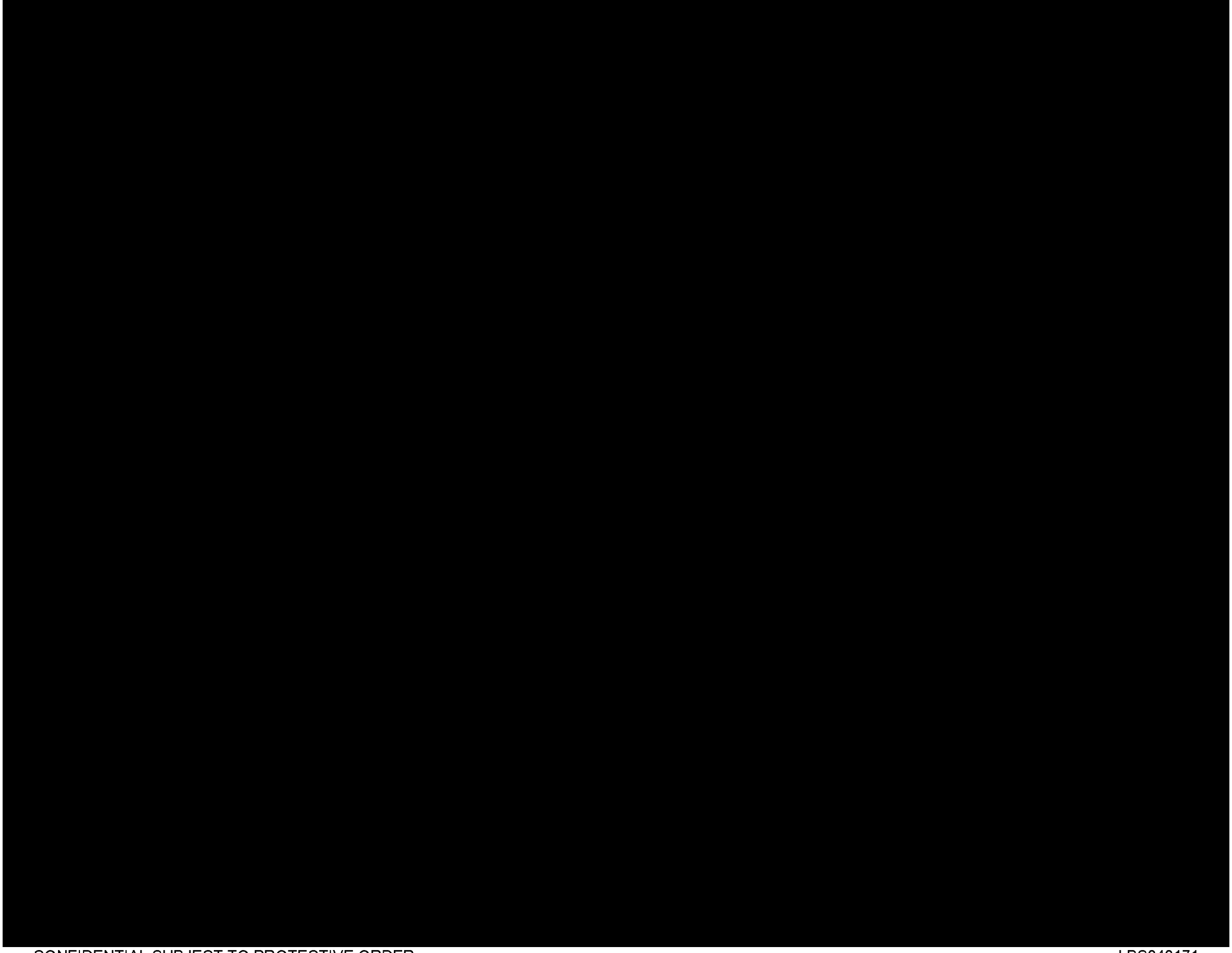


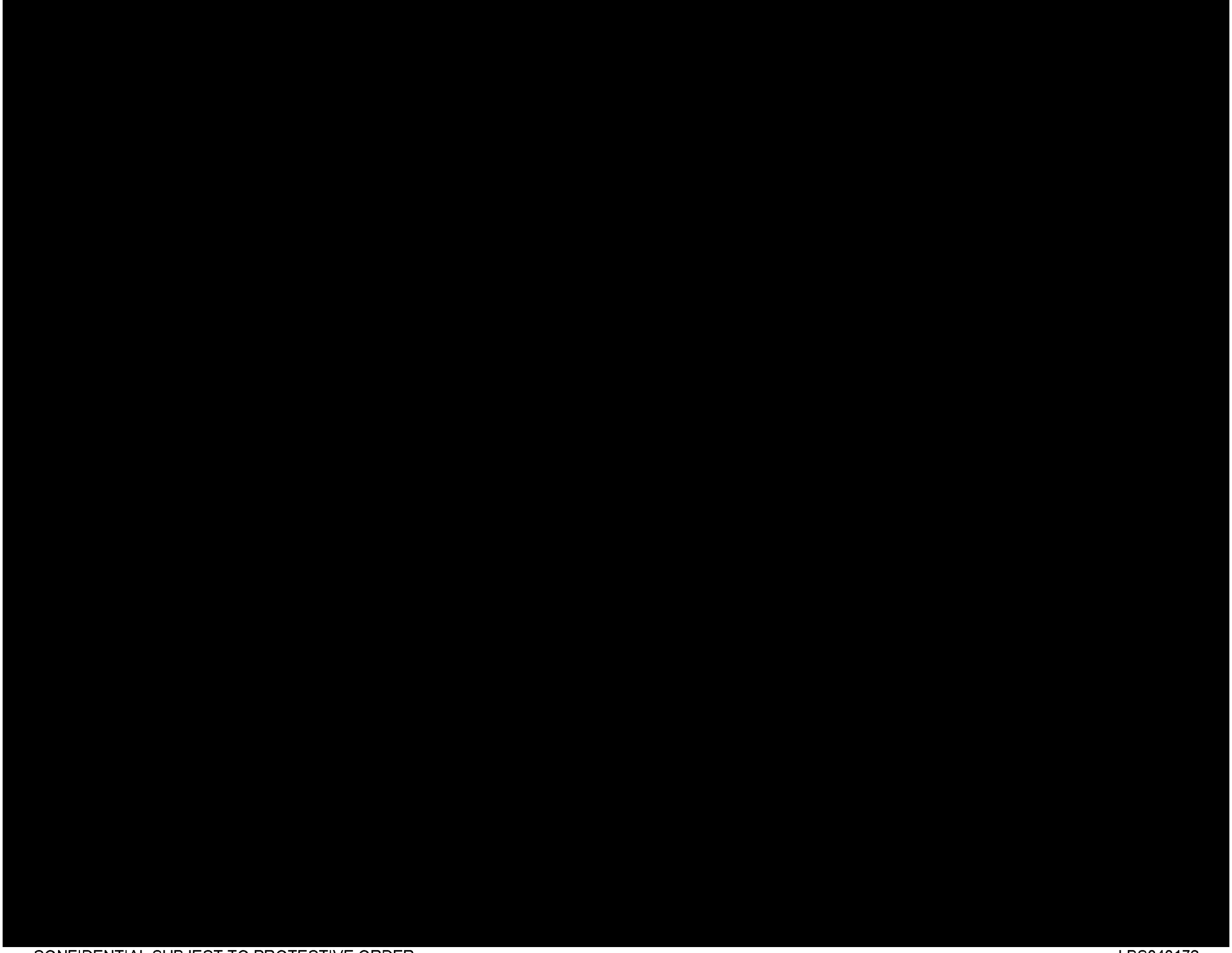


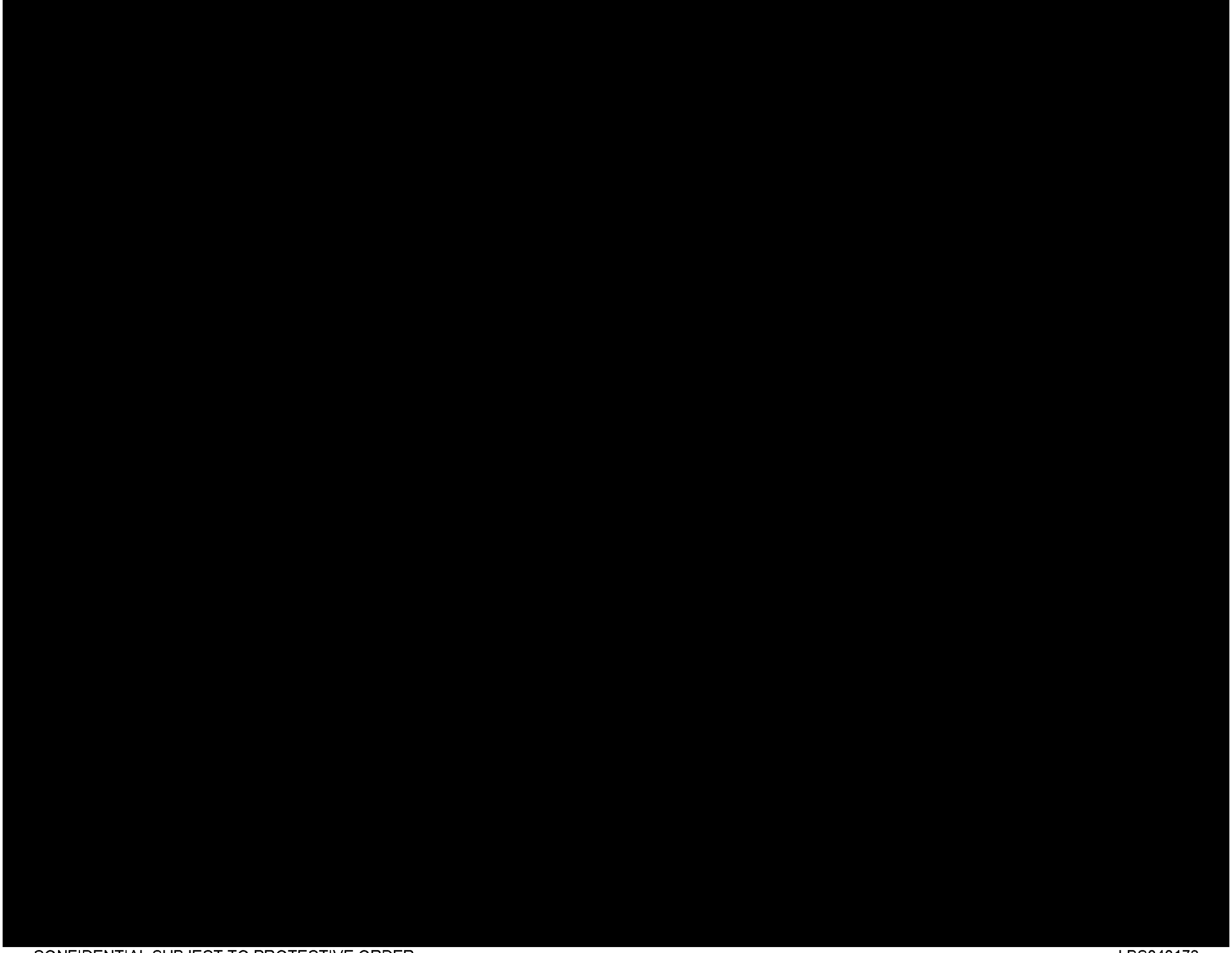


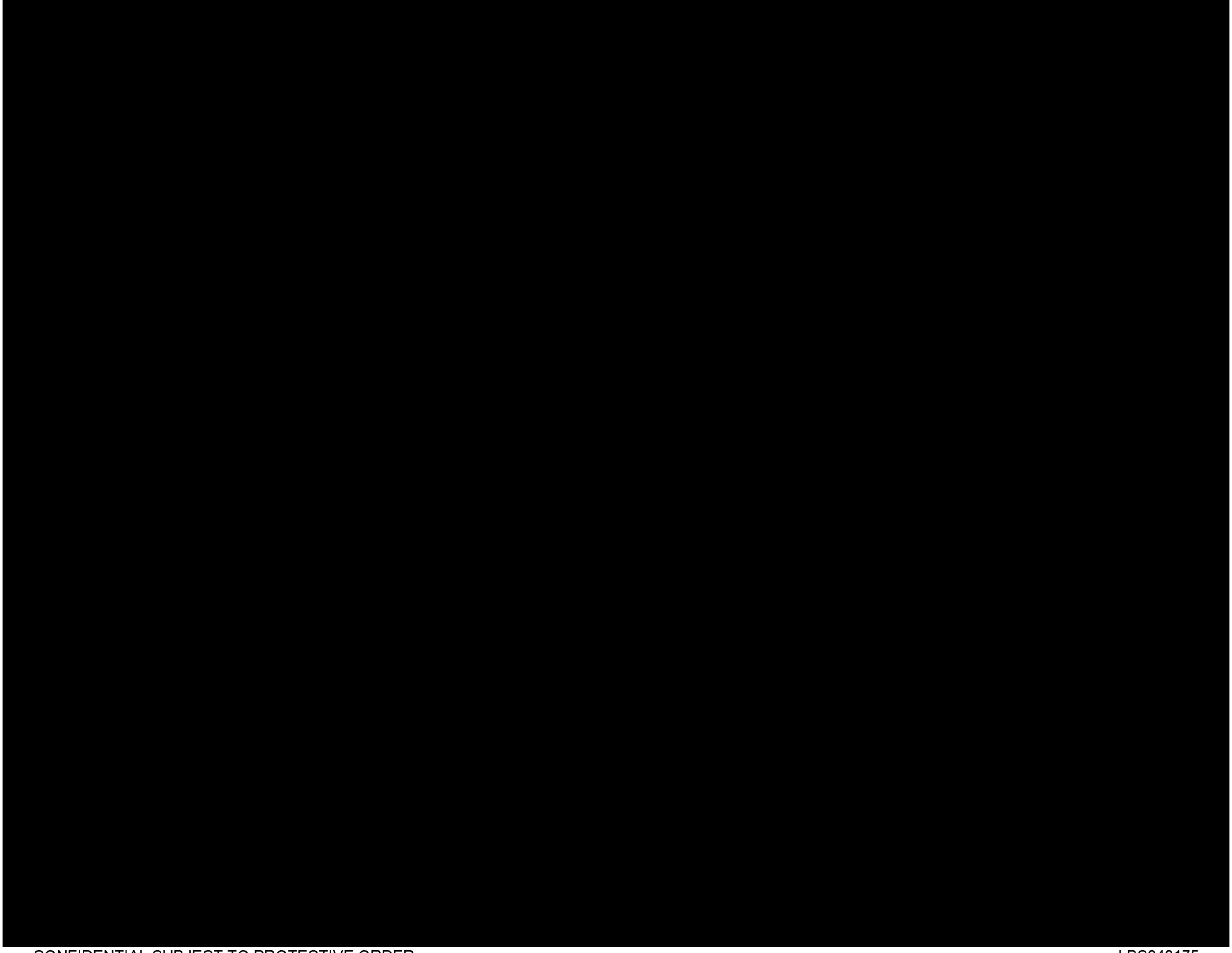


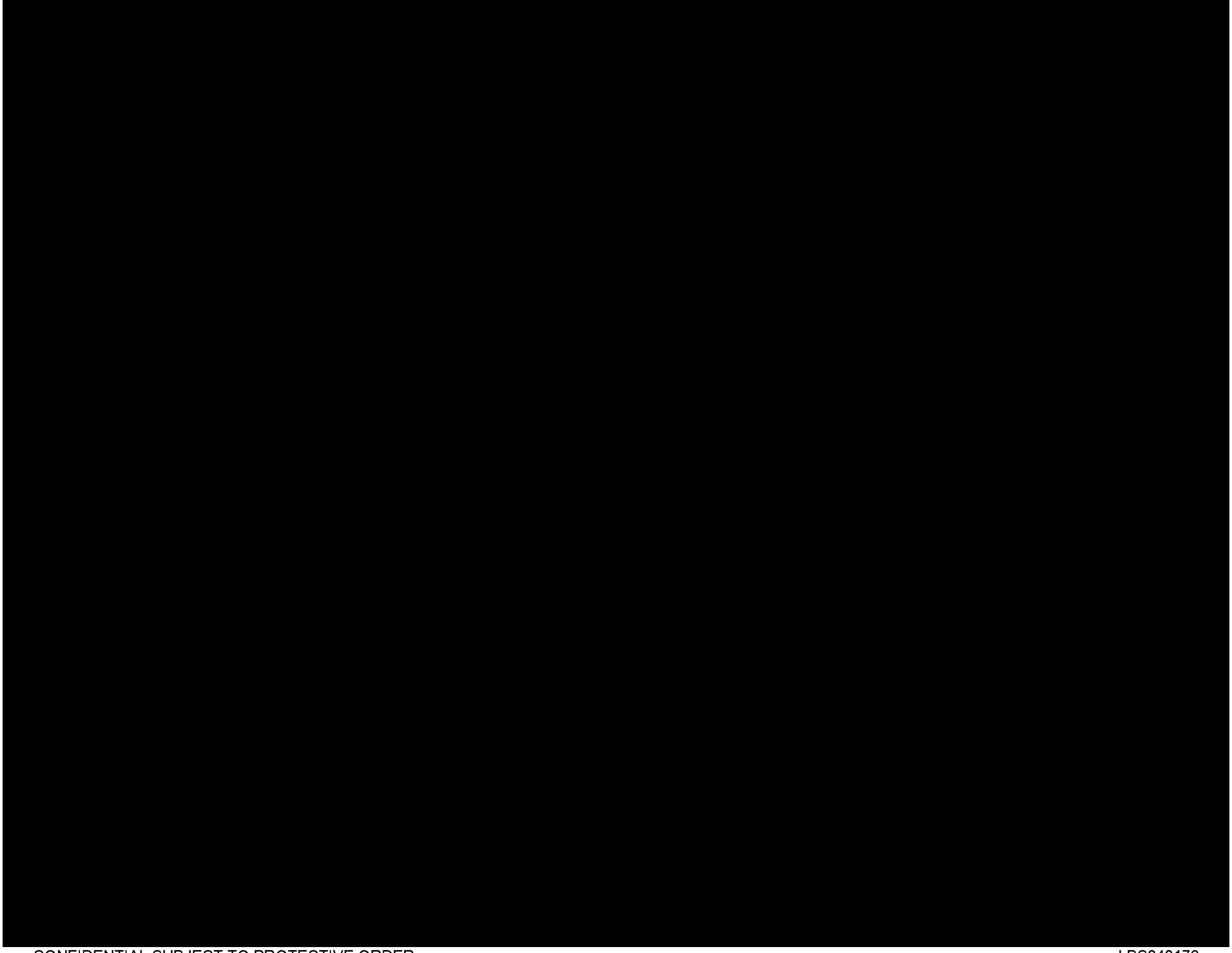


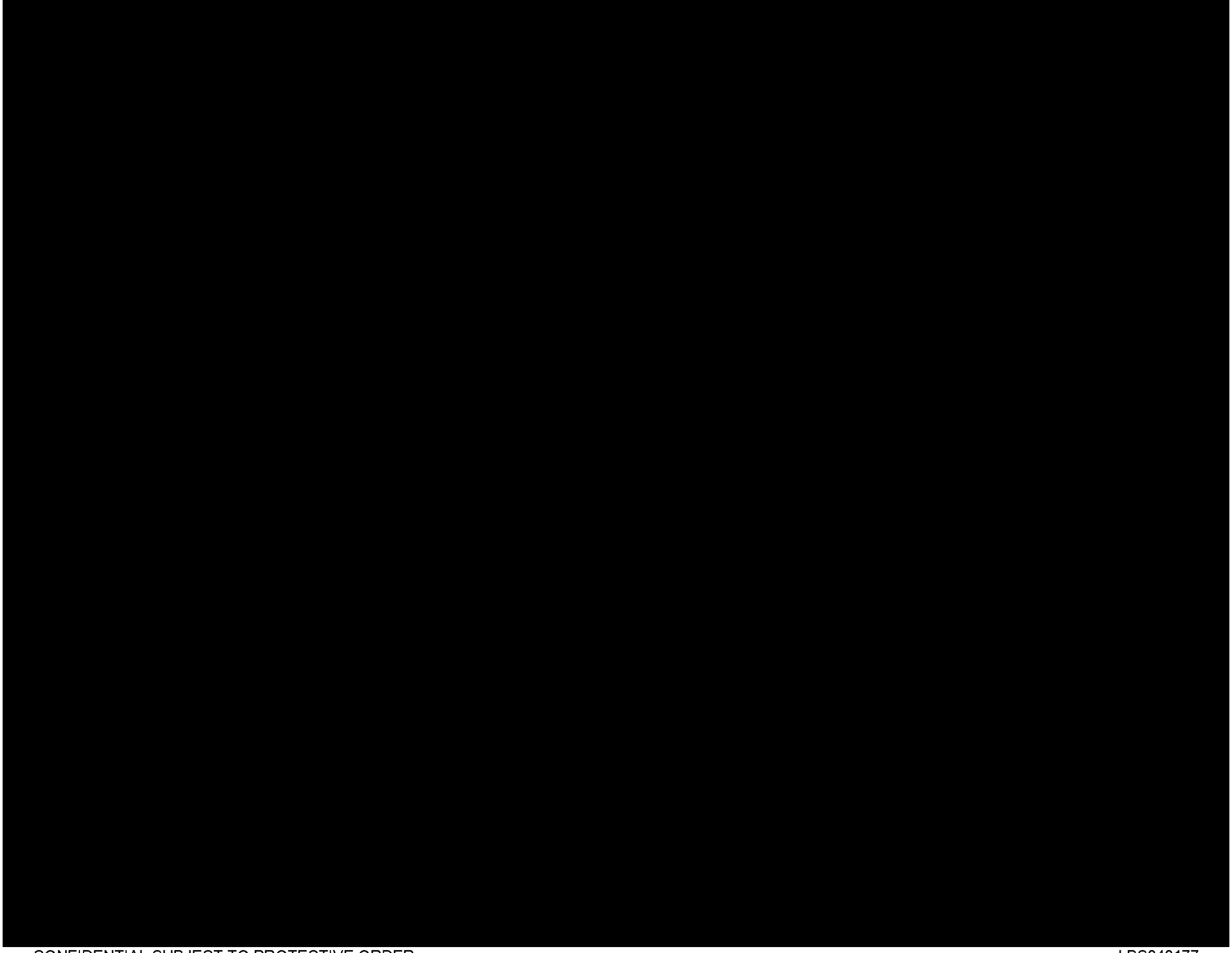


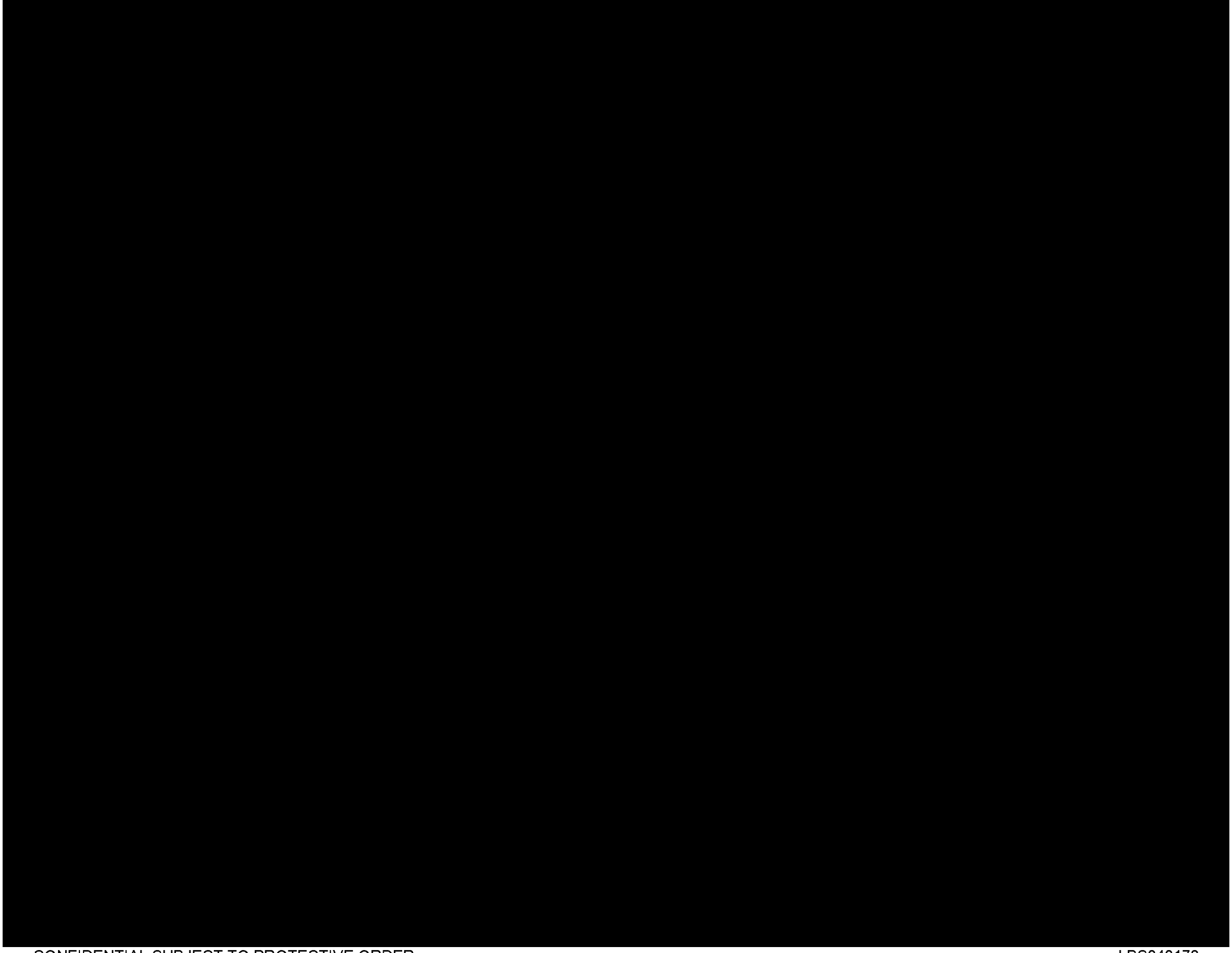


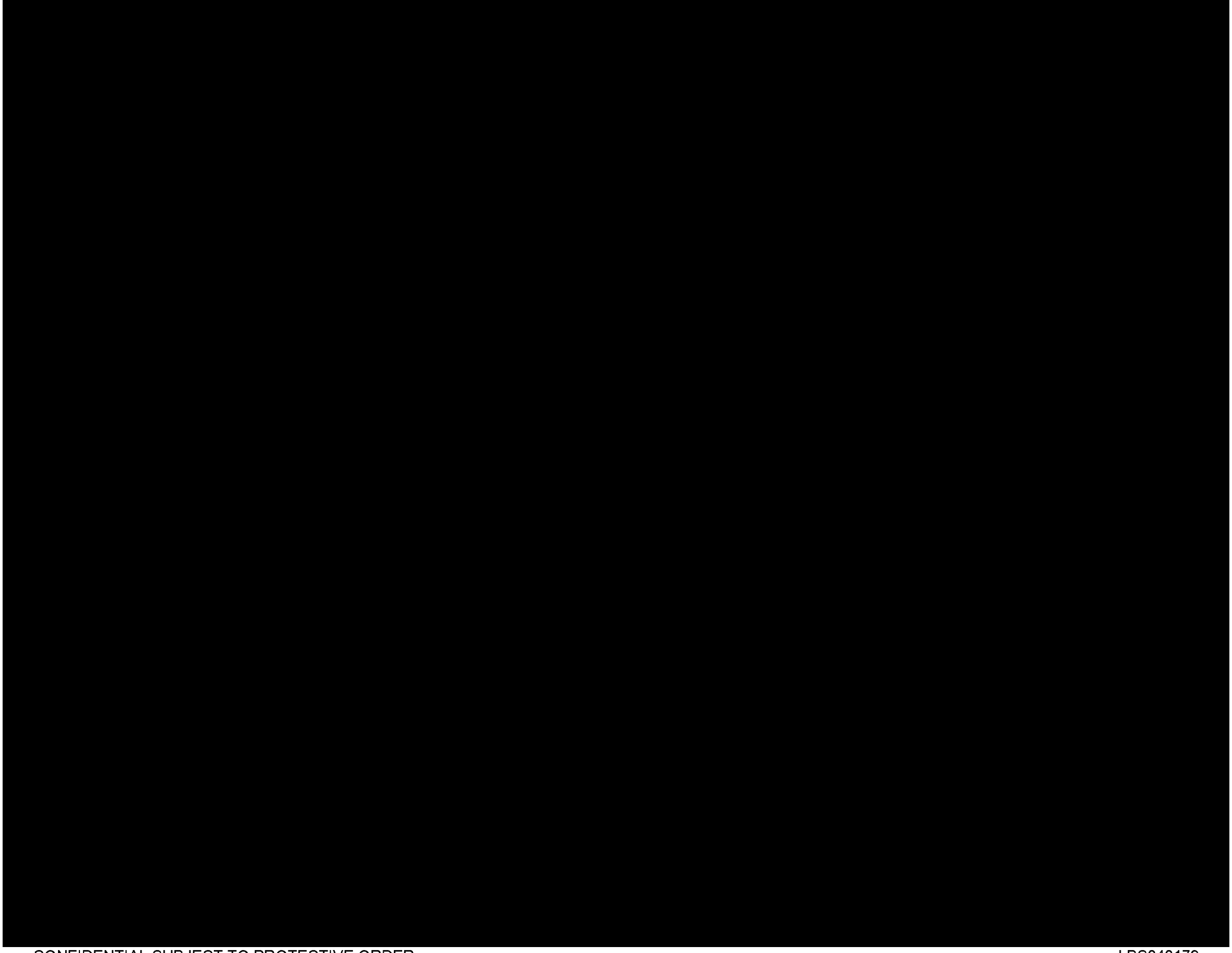












Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 2/26/2012 11:13:45 PM
To: Keller, Christopher J. [ckeller@labaton.com]
CC: Garcia, Danielle [DGarcia@labaton.com]
Subject: Re: [redacted]

We spoke and I agree it is not done until signed. I will keep on top of him on this issue.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
o: 1.212.907.0878
c: 1:516.509.5236

On Feb 26, 2012, at 4:06 PM, "Keller, Christopher J." <ckeller@labaton.com> wrote:

> I spoke with Damon. He said the [redacted]are pretty much a done deal, but nothing is done as you know until sign off. I asked Danielle to send Damon our marketing packet so he has materials. Please follow up with Damon.
>
>
>
> CK

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/26/2007 3:13:34 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: [redacted]

Let's talk tomorrow. Looked at it and like it but for collectability.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:11:47 2007
Subject: RE: [redacted]

Spoke to Patton Boggs today - Man Financial may want to sue Amaranth - they lost $60 million - what are your thoughts?

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 10:06 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

Working on [redacted] funds now. Good follow up.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:02:19 2007
Subject: RE: [redacted]

TAD knew the guy that Damon told us about. Tom wants to go and meet with them. I working on the follow up meeting.

I am going to arrange a dinner with Ken and set sometime to pick Damon's brain and have Kamran there so we can have an executer.

I working on sending an agenda out tonight to the Texans.

How are we doing on [redacted] Funds, I really need to get that out because I want to propose a follow up - I just need to fees, I will deal with the rest.

Tomorrow, lets talk Merck early. Tom suggested that we have McDonald and Natalie work on the allegations in the blue Ribbon - he asked me to clear it with you before I asked so it was not contrary to something that you were doing.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 9:58 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

what in already exists with [redacted]? Good call on getting tad involved.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 21:52:47 2007
Subject: RE: [redacted]

You should be.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 9:15 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Ok I get nervous when I'm not around sometimes

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 20:48:58 2007
Subject: RE: [redacted]

I just spoke with Tom and we are all on the same page.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 8:45 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Somehow I feel like I am coming into the middle of. A conversation but you do know about our current relationship w [redacted], right?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Sent: Thu Jan 25 19:16:09 2007
Subject: RE: [redacted]

Other than the new case meeting I am free - lets do it in the morning.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 7:15 PM
To: Belfi, Eric J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Subject: FW: [redacted]

We should also have a meeting with Jennifer Re: follow-up on the Texas trip. I'm particularly interested in finding out what happened with [redacted] (When Bailey recommended them) and in perhaps setting up a meeting with [redacted] It seems like the most logical place to start, with the highest likelihood of success.

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:47 PM

To: Ching, Natalie; Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

P.s. this is a kansas city based f und. Is this the one you want?

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:45 PM
To: Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

$6.6 billion

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 4:41 PM
To: Ching, Natalie
Cc: Chan, Cindy; Belfi, Eric J.
Subject: Re: [redacted]

How big is the [redacted] national fund?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Ching, Natalie
To: Keller, Christopher J.
Cc: Chan, Cindy
Sent: Wed Jan 24 16:25:59 2007
Subject: RE: [redacted]

Major net sellers according to the 13F. Fifo loss (all sales offset by open) is $55 million

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 3:53 PM
To: Ching, Natalie
Cc: Chan, Cindy
Subject: [redacted]

What's their loss in Merck?

Sent from my BlackBerry Wireless Handheld

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/2/2007 5:24:12 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re:

Good news. Next week - wed and friday open, but if we had to do it thurs or tues, I could swing it.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Mar 01 22:54:49 2007
Subject: Fw:

Damon left me a voicemail that we are all set and Lawrence will set the meetings up. Also Damon assured me that Ken will not work with anyone else. I will follow up. What is your schedule like?

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Belfi, Eric J.
Sent: Thu Mar 01 17:22:46 2007
Subject:

Eric,

Ken just got back from his vacation and I will speak to him about the action plan that was forwarded to Damon. Also, is your firm doing any shareholder cases involving [redacted] I may be able to get you a few hundred names of companies [redacted]

[redacted]

Laurence Tien

Bailey Perrin Bailey LLP
The Lyric Centre
440 Louisiana, Suite 2100
Houston, TX 77002

* Telephone (713) 425-7100
* Direct (713) 425-7264

* Toll-Free (866) 716-8300
* Fax: (713) 425-7101
* E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/4/2007 4:57:56 AM
To: 'ltien@bpblaw.com' [ltien@bpblaw.com]
CC: 'kamran@cmhllp.com' [kamran@cmhllp.com]; Belfi, Eric J. [EBelfi@labaton.com]
Subject: FW:

Laurence: I am glad to hear that things are moving forward. We are heavy into options backdating cases and are lead counsel in over 1/3 of all 10b cases involving options backdating. In fact, we are planning on filing a new case against [redacted], which is based in Houston. If you would like to act as local counsel, please let me know. T[redacted] Chris

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Belfi, Eric J.
Sent: Thu Mar 01 17:22:46 2007
Subject:

Eric,

Ken just got back from his vacation and I will speak to him about the action plan that was forwarded to Damon. [redacted]

[redacted]d

Laurence Tien

Bailey Perrin Bailey LLP
The Lyric Centre
440 Louisiana, Suite 2100
Houston, TX 77002

* Telephone (713) 425-7100
* Direct (713) 425-7264
* Toll-Free (866) 716-8300
* Fax: (713) 425-7101
* E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/6/2007 10:29:24 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Szydlowski, Alan [ASzydlowski@labaton.com]
Subject: RE:

I like the [redacted]angle

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Tuesday, March 06, 2007 4:32 PM
To: Keller, Christopher J.; Szydlowski, Alan
Subject: FW:

What do you think?

From: Laurence Tien [mailto:ltien@bpblaw.com]
Sent: Tuesday, March 06, 2007 4:34 PM
To: Kamran Mashayekh; Belfi, Eric J.
Cc: Tim Herron; Damon Chargois
Subject: RE:

[redacted]

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, March 06, 2007 1:47 PM
To: Belfi, Eric J.

Cc: Tim Herron; Damon Chargois; Laurence Tien
Subject: RE:

Eric:

[redacted]

I am happy to discuss at your convenience.

Thank you

K

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, March 06, 2007 1:33 PM
To: Kamran Mashayekh; Keller, Christopher J.
Cc: Damon Chargois; Tim Herron; ltien@bpblaw.com
Subject: RE:

Kamran:

We have been focused on the securities cases, one them that we are currently pursuing is against [redacted] We believe over the next couple of weeks there will probably be more cases evolving from this area.

What type of cases did you have in mind?

Eric

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Sunday, March 04, 2007 9:13 AM
To: Keller, Christopher J.
Cc: Damon Chargois; Tim Herron; Belfi, Eric J.; ltien@bpblaw.com
Subject: RE:

Christopher:

Thanks for keeping us in the loop. Does your firm have any cases in the [redacted] If so, we would like to discuss with you and Eric a potentially lucrative case based on a very recent decision in a case of this genre.

Thank you

K

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Sat 3/3/2007 10:57 PM
To: ltien@bpblaw.com
Cc: Kamran Mashayekh; Belfi, Eric J.
Subject: FW:

Laurence: I am glad to hear that things are moving forward. We are heavy into options backdating cases and are lead counsel in over 1/3 of all 10b cases involving options backdating. In fact, we are planning on filing a new case [redacted] If you would like to act as local counsel, please let me know. [redacted] Chris

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Belfi, Eric J.
Sent: Thu Mar 01 17:22:46 2007
Subject:

Eric,

Ken just got back from his vacation and I will speak to him about the action plan that was forwarded to Damon. Also, is your firm doing any shareholder cases involving backdated employee stock options? I may be able to get you a few hundred names of companies involved in backdating options.

Laurence Tien

Bailey Perrin Bailey LLP
The Lyric Centre
440 Louisiana, Suite 2100
Houston, TX 77002

* Telephone (713) 425-7100
* Direct (713) 425-7264
* Toll-Free (866) 716-8300
* Fax: (713) 425-7101
* E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/6/2007 11:46:00 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Szydlowski, Alan [ASzydlowski@labaton.com]
Subject: RE:

I don't know; is that information publicly available?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Tuesday, March 06, 2007 6:40 PM
To: Keller, Christopher J.; Szydlowski, Alan
Subject: RE:

How do we find a client?

From: Keller, Christopher J.
Sent: Tuesday, March 06, 2007 5:29 PM
To: Belfi, Eric J.; Szydlowski, Alan
Subject: RE:

I like the [redacted] angle

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Tuesday, March 06, 2007 4:32 PM
To: Keller, Christopher J.; Szydlowski, Alan
Subject: FW:
What do you think?

From: Laurence Tien [mailto:ltien@bpblaw.com]
Sent: Tuesday, March 06, 2007 4:34 PM
To: Kamran Mashayekh; Belfi, Eric J.
Cc: Tim Herron; Damon Chargois
Subject: RE:

[redacted]

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, March 06, 2007 1:47 PM
To: Belfi, Eric J.
Cc: Tim Herron; Damon Chargois; Laurence Tien
Subject: RE:

Eric:

[redacted]

I am happy to discuss at your convenience.

Thank you

K

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, March 06, 2007 1:33 PM
To: Kamran Mashayekh; Keller, Christopher J.
Cc: Damon Chargois; Tim Herron; ltien@bpblaw.com
Subject: RE:

Kamran:

We have been focused on the securities cases, one them that we are currently pursuing is against [redacted]). We believe over the next couple of weeks there will probably be more cases evolving from this area.

What type of cases did you have in mind?

Eric

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Sunday, March 04, 2007 9:13 AM
To: Keller, Christopher J.
Cc: Damon Chargois; Tim Herron; Belfi, Eric J.; ltien@bpblaw.com
Subject: RE:

Christopher:

Thanks for keeping us in the loop. [redacted] If so, we would like to discuss with you and Eric a potentially lucrative case based on a very recent decision in a case of this genre.

Thank you

K

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Sat 3/3/2007 10:57 PM
To: ltien@bpblaw.com
Cc: Kamran Mashayekh; Belfi, Eric J.
Subject: FW:

Laurence: I am glad to hear that things are moving forward. We are heavy into options backdating cases and are lead counsel in over 1/3 of all 10b cases involving options backdating. In fact, we are planning on filing a new case against [redacted]. If you would like to act as local counsel, please let me know. [redacted]. Chris

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Belfi, Eric J.
Sent: Thu Mar 01 17:22:46 2007
Subject:

Eric,

Ken just got back from his vacation and I will speak to him about the action plan that was forwarded to Damon. Also, is your firm doing any shareholder cases involving backdated employee stock options? I may be able to get you a few hundred names of companies involved in backdating options.

[redacted]

Laurence Tien

Bailey Perrin Bailey LLP
The Lyric Centre
440 Louisiana, Suite 2100
Houston, TX 77002

* Telephone (713) 425-7100
* Direct (713) 425-7264
* Toll-Free (866) 716-8300
* Fax: (713) 425-7101
* E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>

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Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/8/2007 10:01:48 PM
To: Rado, Andrei [ARado@labaton.com]; Case Development [CaseDevelopment@labaton.com]
CC: Cordoba-Riera, Diana M. [dcordoba-riera@labaton.com]
Subject: Re: HCC

Great. Remember, this is a no web event.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Rado, Andrei
To: Case Development
Cc: Cordoba-Riera, Diana M.
Sent: Thu Mar 08 16:46:56 2007
Subject: FW: HCC

We are on file.

-----Original Message-----
From: Sandy Jorgensen [mailto:sandy@cmhllp.com]
Sent: Thursday, March 08, 2007 4:46 PM
To: Rado, Andrei
Subject: RE: HCC

I have attached a file-marked copy

Sandy Jorgensen
Chargois & Herron
2201 Timberloch Place, Suite 110
The Woodlands, Texas 77380
281 444-0604
281 440-0124 (Facsimile)
sandy@cmhllp.com

> [redacted]

> you may want to look at this. My friend could be a class rep for
> their classifieds.
>
> Laurence Tien
>
> Bailey Perrin Bailey LLP
> The Lyric Centre
> 440 Louisiana, Suite 2100
> Houston, TX 77002
>
>
> * Telephone (713) 425-7100
> * Direct (713) 425-7264
> * Toll-Free (866) 716-8300
> * Fax: (713) 425-7101
> * E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>
>

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> immediately if you or your employer do not consent to internet e-mail
> for messages of this kind. Opinions, conclusions and other
> information in this message that do not relate to the official
> business of my firm shall be understood as neither given nor endorsed
> by it.
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> This electronic message contains information that is (a) LEGALLY
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> named herein. If you are not the Addressee(s), or the person
> responsible for delivering this to the Addressee(s), you are hereby
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> error, please contact us immediately at 212-907-0700 and take the
> steps necessary to delete the message completely from your computer
> system. Thank you.
>
>
>

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 3/30/2007 10:09:02 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: follow up on possibility of meeting with Ken Bailey after April 9th

where are you?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 30, 2007 6:01 PM
To: Keller, Christopher J.
Subject: Re: follow up on possibility of meeting with Ken Bailey after April 9th

That is what I thought you would say - I will keep you in the loop. I like Kamran - he really follows up with things. We will see what he can produce.

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Mar 30 17:56:45 2007
Subject: RE: follow up on possibility of meeting with Ken Bailey after April 9th

If I had to - for a meeting with [redacted], yes.

Christopher J. Keller, Esq.
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Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 30, 2007 5:44 PM
To: Keller, Christopher J.
Subject: Re: follow up on possibility of meeting with Ken Bailey after April 9th

What is the baby situation - would you go over night?

Eric J. Belfi
Partner
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www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Mar 30 17:41:37 2007
Subject: RE: follow up on possibility of meeting with Ken Bailey after April 9th

About what, clients? Sure

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
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e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 30, 2007 5:41 PM
To: Keller, Christopher J.
Subject: Re: follow up on possibility of meeting with Ken Bailey after April 9th

Yes - they said that might want more clients - what do you think?

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
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New York, New York 10017
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Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Mar 30 17:39:15 2007
Subject: RE: follow up on possibility of meeting with Ken Bailey after April 9th

Thanks. Did you hear that Kelly secured a client in the [redacted] case?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, March 30, 2007 5:37 PM
To: Keller, Christopher J.
Subject: Fw: follow up on possibility of meeting with Ken Bailey after April 9th

Here is the update - I will keep you apprised.

Eric J. Belfi
Partner
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Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Belfi, Eric J.
Cc: Tim Herron <tim@hkhlaw.com>; Damon Chargois <damon@cmhllp.com>
Sent: Fri Mar 30 16:18:54 2007
Subject: follow up on possibility of meeting with Ken Bailey after April 9th

Eric:

Hope you are enjoying Europe. I spoke to Laurence Tien today and he stated that Ken Bailey will be back in the office on Monday and he will try to secure a meeting date for us after April 9th. I will follow up on your request with him on Monday or Tuesday of next week. Tim Herron also will be contacting an attorney he knows in Arkansas who is well connected with the unions in that state. I will report back on that as well. As to the [redacted], the ball remains in my European contact's court and hope to have something there soon. As to the [redacted], Tim Herron is meeting with one of his contacts regarding that matter and we will report back if the meeting proves fruitful.

Needless to say, I will be in touch.

Thanks

K

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 6/6/2007 8:40:57 PM
To: Chan, Cindy [CChan@labaton.com]
Subject: FW: Unions

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Wednesday, June 06, 2007 4:10 PM
To: 'damon@cmhllp.com'; Kamran Mashayekh
Cc: Tim Herron
Subject: RE: Unions

Conference Call

Date: June 7, 2007
Time: 9AM Central/10AM EST
Dial in number is 1-888-870-8293
Passcode: 212-907-0878

International Dial in: +1-719-234-7665
Passcode: 212.907.0878

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, June 06, 2007 3:56 PM
To: Belfi, Eric J.; Kamran Mashayekh
Cc: Tim Herron
Subject: Re: Unions

Ok
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Wed, 6 Jun 2007 15:53:59
To:<damon@cmhllp.com>,"Kamran Mashayekh" <kamran@cmhllp.com> Cc:"Tim Herron" <tim@hkhlaw.com>
Subject: RE: Unions

This sounds like a very good development.

Can we talk at 10AM EST tomorrow - (9AM Central)?

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, June 06, 2007 3:42 PM
To: Belfi, Eric J.; Kamran Mashayekh

Cc: Tim Herron
Subject: Re: Unions

His son's name is Camp and I know him. He's a young lawyer who is very personable. He was an associate at Wiiliams Bailey and now works for his dad.

Can I call you in about an hour?
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Wed, 6 Jun 2007 14:51:16
To:<damon@cmhllp.com>,"Kamran Mashayekh" <kamran@cmhllp.com> Cc:"Tim Herron" <tim@hkhlaw.com>
Subject: RE: Unions

It sounds very encouraging. Do you know Ken's son?

Also, if you have time to talk today, it may be worth having a 5 minute call to update you on the securities market.

Eric

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, June 06, 2007 2:44 PM
To: Kamran Mashayekh; Belfi, Eric J.
Cc: Tim Herron
Subject: Re: Unions

Great.
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Kamran Mashayekh" <kamran@cmhllp.com>

Date: Wed, 6 Jun 2007 12:25:30
To:"Belfi, Eric J." <EBelfi@labaton.com> Cc:"Damon Chargois" <damon@cmhllp.com>,"Tim Herron" <tim@hkhlaw.com>
Subject: RE: Unions

Got a response back from bailey's office that bailey's son also wants to get involved in whatever it is that will be up for discussion. The ball is still in their court to get back to us with a date. We will just keep pushing.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, June 06, 2007 12:25 AM
To: kbailey@bpblaw.com
Cc: Kamran Mashayekh
Subject: Unions

Dear Ken:

It has been a couple of months since we met with you in your office and I wanted to follow up with you to see how you were doing with the [redacted]

I have travel commitments over the next two weeks. However, from June 25 forward, I will be available to go and meet with the [redacted] or any funds that you think make sense for us to meet.

If there is any that you need from us, do not hesitate to contact me.

Best regards,

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
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Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 6/11/2007 9:40:22 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: Re: Ken Bailey

We agree. Seriously, how much did you pay him for that??

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Mon Jun 11 17:28:57 2007
Subject: FW: Ken Bailey

The latest from Texas.

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, June 11, 2007 4:48 PM
To: Belfi, Eric J.
Cc: Damon Chargois
Subject: RE: Ken Bailey

I have it on my calendar to follow up on this matter this week. You are good Eric. You really are. Labaton is lucky to have you on their team. Will fire off an email to laurence to see if we can get some movement.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Mon 6/11/2007 3:15 PM
To: Kamran Mashayekh
Subject: Ken Bailey

Checking in to see if you were able to set a meeting with the son?

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/4/2007 6:54:42 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]; Ching, Natalie [NChing@labaton.com]
Subject: RE: Bailey

Very cool. I mentioned to Garrett having a business development summit either here in New York or on location for two days. He was very enthusiastic about it. Let's talk about an invitee list, which would include Garrett, Damon, Lou Angelos, Chris D'Amato, Hunter Biden, perhaps Brent Hatch and even Camp, if you think it's worthwhile.

Christopher J. Keller, Esq.
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e-mail: ckeller@labaton.com
www.Labaton.com

Please note that our office address and firm name have changed.

-----Original Message-----
From: Belfi, Eric J.
Sent: Thursday, October 04, 2007 2:30 PM
To: Tetefsky, Jennifer; Keller, Christopher J.
Subject: Bailey

Met with the son Camp - we should get a meeting with [redacted] - onto the next meeting.

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/11/2007 4:14:43 PM
To: Bernstein, Joel [JBernstein@labaton.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Re: HCC

He is local in HCC. I thought its your case (mid tier and options related).

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Bernstein, Joel
To: Keller, Christopher J.
Cc: Belfi, Eric J.
Sent: Thu Oct 11 11:56:25 2007
Subject: Re: Re: HCC

Who is he

I am not on this case

Joel H. Bernstein
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Tel: (212) 907-0869
Fax: (212) 883-7069
Jbernstein@labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Bernstein, Joel
Cc: Belfi, Eric J.
Sent: Thu Oct 11 11:55:21 2007
Subject: Fw: Re: HCC

Pls keep damon in loop. He's important to our efforts in a number of states.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: Keller, Christopher J.
Cc: Belfi, Eric J.; Elaine Doyal <Elaine@cmhllp.com>
Sent: Thu Oct 11 11:12:37 2007
Subject: RE: Re: HCC

Chris, would you please let Elaine know if you'd like for her to arrange something down here? Also, I would like to attend and see how you fancy nyc lawyers do your thing.

BTW, we just got a $131 million dollar verdict in one of our pharma cases. Unfortunately, I don't expect it to hold up on appeal.

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Thu 10/11/2007 9:56 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: Re: Re: HCC

Defendants have approached us about going to mediation. It looks like this could go early.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: 'damon@cmhllp.com' <damon@cmhllp.com>
Cc: Belfi, Eric J.
Sent: Thu May 10 20:35:47 2007
Subject: RE: Re: HCC

Damon, for the record, I was ready to roll tonight. Next time. Safe journey home.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, May 09, 2007 5:23 PM
To: Keller, Christopher J.
Cc: Tountas, Stephen W.; Schochet, Ira; Rado, Andrei; Belfi, Eric J.
Subject: Re: Re: HCC

Great to catch up with you as well, Chris. Just to be clear, Rosenthal isn't what I would call pretty good. Just not a bad draw. I expect to have a summary for you soon on particulars. The main thing for [redacted]

Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>
Date: Wed, 9 May 2007 16:57:20
To:<damon@cmhllp.com>
Cc:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, "Rado, Andrei" <ARado@labaton.com>, "Belfi, Eric J." <EBelfi@labaton.com>

Subject: FW: Re: HCC

Damon: it was great catching up. I'm going to do my best to make it tomorrow night. I'm copying of this e-mail my partner Ira Schochet and Steve Tountas who'll be doing a lot of the litigation work in this case. As we discussed, since Judge Jon Rosenthal is a pretty good draw, we just need to decide what the practical implication of the attacks motion is. If it's simple coordination, then we may be able to consent to it. If they become one case, then no way.

Christopher J. Keller, Esq.
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Ellman, Alan I.
Sent: Wednesday, May 09, 2007 12:01 PM
To: Keller, Christopher J.; Rado, Andrei
Cc: Weisman, Roy; Chan, Cindy
Subject: Re: HCC

Defendants filed a motion yesterday to consolidate the two HCC derivative suits with the class action. See attached brief in support.

Alan I. Ellman
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100 Park Avenue
New York, New York 10017
Direct Dial: 212-907-0877
Direct Fax: 212-883-7077
aellman@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/12/2007 1:01:47 AM
To: 'damon@cmhllp.com' [damon@cmhllp.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]; 'Elaine@cmhllp.com' [Elaine@cmhllp.com]
Subject: Re: Re: HCC

We will consult with you on all of it. I hear you sharp texans aint so bad too. Wow, that's a big number. Ah, the good ole days where that would have meant a 45 mil payday.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: Keller, Christopher J.
Cc: Belfi, Eric J.; Elaine Doyal <Elaine@cmhllp.com>
Sent: Thu Oct 11 11:12:37 2007
Subject: RE: Re: HCC

Chris, would you please let Elaine know if you'd like for her to arrange something down here? Also, I would like to attend and see how you fancy nyc lawyers do your thing.

BTW, we just got a $131 million dollar verdict in one of our pharma cases. Unfortunately, I don't expect it to hold up on appeal.

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Thu 10/11/2007 9:56 AM
To: Damon Chargois
Cc: Belfi, Eric J.
Subject: Re: Re: HCC

Defendants have approached us about going to mediation. It looks like this could go early.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Keller, Christopher J.
To: 'damon@cmhllp.com' <damon@cmhllp.com>
Cc: Belfi, Eric J.
Sent: Thu May 10 20:35:47 2007
Subject: RE: Re: HCC

Damon, for the record, I was ready to roll tonight. Next time. Safe journey home.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow & Rudoff LLP
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New York, N.Y. 10017
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Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, May 09, 2007 5:23 PM
To: Keller, Christopher J.
Cc: Tountas, Stephen W.; Schochet, Ira; Rado, Andrei; Belfi, Eric J.
Subject: Re: Re: HCC

Great to catch up with you as well, Chris. Just to be clear, Rosenthal isn't what I would call pretty good. Just not a bad draw. I expect to have a summary for you soon on particulars. The main thing for us to research is whether Rosenthal has rendered prior rulings on issues similar to the ones in our case. I will be in touch. Take care.
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>
Date: Wed, 9 May 2007 16:57:20
To:<damon@cmhllp.com>
Cc:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, "Rado, Andrei" <ARado@labaton.com>, "Belfi, Eric J." <EBelfi@labaton.com>
Subject: FW: Re: HCC

Damon: it was great catching up. I'm going to do my best to make it tomorrow night. I'm copying of this e-mail my partner Ira Schochet and Steve Tountas who'll be doing a lot of the litigation work in this case. As we discussed, since Judge Jon Rosenthal is a pretty good draw, we just need to decide what the practical implication of the attacks motion is. If it's simple coordination, then we may be able to consent to it. If they become one case, then no way.

Christopher J. Keller, Esq.
Partner
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100 Park Avenue
New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Ellman, Alan I.
Sent: Wednesday, May 09, 2007 12:01 PM
To: Keller, Christopher J.; Rado, Andrei
Cc: Weisman, Roy; Chan, Cindy
Subject: Re: HCC

Defendants filed a motion yesterday to consolidate the two HCC derivative suits with the class action. See attached brief in support.

Alan I. Ellman
Labaton Sucharow & Rudoff LLP
100 Park Avenue

New York, New York 10017
Direct Dial: 212-907-0877
Direct Fax: 212-883-7077
aellman@labaton.com
www.labaton.com

Message

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

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

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

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

I met with [redacted] and [redacted]. We had a very good meeting.

[redacted]

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

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

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/20/2007 2:04:48 PM
To: Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: Re: Update

Want to change bio to include mercury

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tetefsky, Jennifer
To: Belfi, Eric J.; Sucharow, Lawrence
Cc: Keller, Christopher J.
Sent: Sat Oct 20 09:51:18 2007
Subject: Re: Update

Monday

----- Original Message -----
From: Belfi, Eric J.
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Sat Oct 20 07:49:27 2007
Subject: Re: Update

When does jury selection begin?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Sucharow, Lawrence
To: Belfi, Eric J.
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Sat Oct 20 07:35:13 2007
Subject: RE: Update

Eric, GREAT job. Don't know how you keep the [redacted] straight from the [redacted] Need to discuss th ntive Amer project request. Way too rich a request, but can't judge without seeing a list of what you think he can realistically accomplish (deliver) and what size of those funds really are (and in US equities).
Keep up great work.
I am uexpectedly going out to oserve JDS trial for this coming week; we willneed to arrange to speak by phone to move things along.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, October 19, 2007 7:27 PM
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Subject: Update

Larry:

A quick summary of the trip.

In Oklahoma, we had good meetings with the [redacted] Damon thinks we will get in both.

[redacted]s currently has Litowitz but certainly understands the values of multiple firms (ie conflicts).

[redacted] currently does not have any attorneys and is interested in setting a monitoring system - they should get back to us soon.

In Texas, we met with Steve Kherkher of William & Kherkher - formally of Williams & Bailey and they are going to introduce us to their union clients. They made big money in tobacco and asbestos with the unions.

[redacted]

For lunch, one of Damon's classmates at law school and good buddies - Scott Lemond - set up an appointment the head of the [redacted] - the guy is very bright and the meeting went awesome - I think we will be in there shortly.

[redacted]

Damon's plans are to expand the [redacted]operation, work on the [redacted](he is good friends with the mayor) and start working in [redacted]

Tim is making sure that we complete Arkansas and he is opening the Tennessee front - I hope to go there on the next road trip.

We will be getting some traffic through office during the week of November 5 - Senator Farris, Tim Herron, Damon, and Steve KherKher and possibly Camp Bailey of Bailey (they are the link to the Boilermakers and many other union funds).

[redacted]

We are also working Damon's lawyer friend Gary Pitchlynn [redacted]

Lots of follow up necessary.

Eric

Eric J. Belfi
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New York, N.Y. 10005

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Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/12/2007 12:54:03 PM
To: Rado, Andrei [ARado@labaton.com]
Subject: Fw: Report from the otherside of the pond

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Mon Nov 12 01:33:04 2007
Subject: Report from the otherside of the pond

Chris:

I am traded emails with Damon all weekend and here is where we are.

1. Damon spoke to Jarvis at the function and has set up a lunch this week to talk about it more fully.

2. Damon said that Jarvis is not in the University of Houston as much as he is but he will see if he cares about experts coming from there.

3. Damon has brought in Scott Lemond's father to help who has a relationship with the AG to see if that can help us.

He has the full court press on. We need to deliver a kick ass report.

Eric

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/12/2007 7:38:01 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Report from the otherside of the pond

The report will be kick ass. It's going to have an insider-trading analysis, an accounting analysis, and damage analysis, along with something from investigation that just began. It's going to look good and impress.

Christopher J. Keller, Esq.
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Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Monday, November 12, 2007 1:33 AM
To: Keller, Christopher J.
Subject: Report from the otherside of the pond

Chris:

I am traded emails with Damon all weekend and here is where we are.

1. Damon spoke to Jarvis at the function and has set up a lunch this week to talk about it more fully.

2. Damon said that Jarvis is not in the University of Houston as much as he is but he will see if he cares about experts coming from there.

3. Damon has brought in Scott Lemond's father to help who has a relationship with the AG to see if that can help us.

He has the full court press on. We need to deliver a kick ass report.

Eric

Eric J. Belfi
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 2:29:23 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Damon

[redacted] has shit. Everyone is big in [redacted].

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 16 09:28:24 2007
Subject: Re: Damon

I did not think they were big in [redacted]

Where do we stand on [redacted] - do we have a realistic shot?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Nov 16 09:26:59 2007
Subject: Re: Damon

2 impt points that damon needs to know. First, he should take their temp on [redacted] If they are not interested then push for [redacted] Second, if jarvis wants us to share the case with blbg, that would be fine

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 16 07:29:33 2007
Subject: Damon

Spoke to him last night and he is having lunch with Jarvis Monday and then we will discuss what is the next step - he does not think we should do anything until after the lunch.

Eric J. Belfi
Partner
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140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 2:32:58 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Damon

Short period. Its now a 2yr class. [redacted] in the long period.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 16 09:29:52 2007
Subject: Re: Damon

I thought [redacted]?

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Nov 16 09:29:23 2007
Subject: Re: Damon

[redacted] has shit. Everyone is big in [redacted].

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 16 09:28:24 2007
Subject: Re: Damon

I did not think they were big in [redacted]?

Where do we stand on [redacted] - do we have a realistic shot?

Eric J. Belfi
Partner
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Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Nov 16 09:26:59 2007
Subject: Re: Damon

2 impt points that damon needs to know. First, he should take their temp on [redacted]. If they are not interested then push for [redacted]. Second, if jarvis wants us to share the case with [redacted], that would be fine

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Fri Nov 16 07:29:33 2007
Subject: Damon

Spoke to him last night and he is having lunch with Jarvis Monday and then we will discuss what is the next step - he does not think we should do anything until after the lunch.

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 11:00:40 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; 'damon@cmhllp.com' [damon@cmhllp.com]
CC: Chan, Cindy [CChan@labaton.com]
Subject: RE: [redacted]

ok, we will email it to you for sending to [redacted]. The cover e-mail I was going to send was going to generally express our their belief that the case is extraordinarily strong, highlighting the off-balance-sheet comparison to Enron, and note that our report was substantively supported by the expert reports concerning damages, accounting, and an insider trading analysis all prepared by prominent experts in their field, as well as a substantive investigation headed up by Al Gumney, a CPA and 20 year veteran of the FBI. All this is in the report (including the expert reports), but it doesn't hurt to start out with what really sets our approach and analysis apart from the rest that he has or will see.

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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, November 16, 2007 5:55 PM
To: Keller, Christopher J.; 'damon@cmhllp.com'
Subject: Re: [redacted]

I am back and can send it if you have not sent it yet.

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: 'damon@cmhllp.com' <damon@cmhllp.com>
Cc: Belfi, Eric J.
Sent: Fri Nov 16 17:20:47 2007
Subject: RE: [redacted]

ok. Do you have him email. And should I address him as [redacted] even though we have not met?

Christopher J. Keller, Esq.
Partner
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New York, NY 10005

Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, November 16, 2007 5:08 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

Probably emailing it to me and [redacted] is good.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Fri, 16 Nov 2007 16:51:17
To:<damon@cmhllp.com>
Cc:"Belfi, Eric J." <EBelfi@labaton.com>
Subject: RE: [redacted]

Damon: the report is done. Should we send it directly to [redacted]? By e-mail or federal express? If just to you, how do you want it? We could send it by overnight FedEx so you have it tomorrow morning. We could of course e-mail it or send it for FedEx Monday. Just let me know.

Christopher J. Keller, Esq.
Partner
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Thursday, November 15, 2007 9:07 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

Big thank you.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 20:15:14
To:<damon@cmhllp.com>
Subject: Re: [redacted]

Ok. You will have [redacted] report tomorrow. Its impressive.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Keller, Christopher J.
Sent: Thu Nov 15 15:11:25 2007
Subject: Re: [redacted]

Spoke to Eric and its probably better that no Labaton person is there, since I will be trashing your competitor heavily.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 13:45:49
To:<damon@cmhllp.com>
Subject: RE: [redacted]

Damon, following up on our conversation towards the end of the mediation, do you think a lunch next Monday or Tuesday is Doable?

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com <mailto:damon@cmhllp.com>]
Sent: Wednesday, November 14, 2007 8:52 AM
To: Keller, Christopher J.
Subject: Re: [redacted]

Hey Chris. How's your dad? Also, give me your PIN so that we can communicate w/o going through server.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Tue, 13 Nov 2007 22:13:22
To:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, <damon@cmhllp.com>
Subject: Re: [redacted]

Ill be in around 930 and to hotel at 10.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tountas, Stephen W.
To: Schochet, Ira; Keller, Christopher J.; 'damon@cmhllp.com' <damon@cmhllp.com>
Sent: Tue Nov 13 21:56:02 2007
Subject: [redacted]

FYI -- The mediation is scheduled to start at 9:30 a.m. tomorrow morning in the Flagler ballroom, which is only accessible via the elevator in the main lobby -- take the elevator to floor C2.

Chris -- we are meeting for breakfast in the hotel at 8 am if you would like to join us.

Steve

Privilege and Confidentiality Notice

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 11/16/2007 11:19:40 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: [redacted]

you know that [redacted] is huge in one of these cases

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, November 16, 2007 6:13 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

I mean chasing the clients for [redacted] out there right now.

Eric J. Belfi
Partner
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140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Fri Nov 16 18:11:49 2007
Subject: RE: [redacted]

[redacted]?

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, November 16, 2007 6:09 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

I will cc you so he will see your name - I will also cc damon as I did on the first one.

We are stuck on the tarmac in JFK.

Other the [redacted] is there any news.

On the [redacted] I prepare a whole bunch of emails to go out to people.

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Cc: Chan, Cindy; 'damon@cmhllp.com' <damon@cmhllp.com>
Sent: Fri Nov 16 18:03:15 2007
Subject: RE: [redacted]

Here it is. Godspeed. You may also want to ask for their transactions to analyze, but that may be getting ahead of ourselves.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
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e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, November 16, 2007 5:57 PM
To: Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Can someone send it to me.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.

To: Belfi, Eric J.
Cc: Chan, Cindy
Sent: Fri Nov 16 17:56:32 2007
Subject: Fw: [redacted]

Do you have it?

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Keller, Christopher J.
Sent: Fri Nov 16 17:47:40 2007
Subject: Re: [redacted]

I think Eric has the email and [redacted] is fine.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Fri, 16 Nov 2007 17:20:47
To:<damon@cmhllp.com>
Cc:"Belfi, Eric J." <EBelfi@labaton.com>
Subject: RE:[redacted]

ok. Do you have him email. And should I address him as Jarvis even though we have not met?

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e-mail: ckeller@labaton.com
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Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Friday, November 16, 2007 5:08 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

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Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Fri, 16 Nov 2007 16:51:17
To:<damon@cmhllp.com>
Cc:"Belfi, Eric J." <EBelfi@labaton.com>
Subject: RE: [redacted]

Damon: the report is done. Should we send it directly to [redacted]? By e-mail or federal express? If just to you, how do you want it? We could send it by overnight FedEx so you have it tomorrow morning. We could of course e-mail it or send it for FedEx Monday. Just let me know.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Thursday, November 15, 2007 9:07 PM
To: Keller, Christopher J.
Subject: Re: [redacted]

Big thank you.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 20:15:14
To:<damon@cmhllp.com>
Subject: Re: [redacted]

Ok. You will have [redacted] report tomorrow. Its impressive.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Keller, Christopher J.
Sent: Thu Nov 15 15:11:25 2007
Subject: Re: [redacted]

Spoke to Eric and its probably better that no Labaton person is there, since I will be trashing your competitor heavily.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Thu, 15 Nov 2007 13:45:49
To:<damon@cmhllp.com>
Subject: RE: [redacted]

Damon, following up on our conversation towards the end of the mediation, do you think a lunch next Monday or Tuesday is Doable?

-----Original Message-----

From: damon@cmhllp.com [mailto:damon@cmhllp.com <mailto:damon@cmhllp.com>]
Sent: Wednesday, November 14, 2007 8:52 AM
To: Keller, Christopher J.
Subject: Re: [redacted]

Hey Chris. How's your dad? Also, give me your PIN so that we can communicate w/o going through server.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>

Date: Tue, 13 Nov 2007 22:13:22
To:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, <damon@cmhllp.com>
Subject: Re: [redacted]

Ill be in around 930 and to hotel at 10.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Tountas, Stephen W.
To: Schochet, Ira; Keller, Christopher J.; 'damon@cmhllp.com' <damon@cmhllp.com>
Sent: Tue Nov 13 21:56:02 2007
Subject: [redacted]

FYI -- The mediation is scheduled to start at 9:30 a.m. tomorrow morning in the Flagler ballroom, which is only accessible via the elevator in the main lobby -- take the elevator to floor C2.

Chris -- we are meeting for breakfast in the hotel at 8 am if you would like to join us.

Steve

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 10/13/2008 7:38:10 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Bankston, Jennifer S. [jbankston@labaton.com]
CC: Sucharow, Lawrence [LSucharow@labaton.com]; Dubbs, Thomas [TDubbs@labaton.com]
Subject: RE: Arkansas Teachers RFQ 2008-2

Great news.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Monday, October 13, 2008 1:57 PM
To: Keller, Christopher J.; Bankston, Jennifer S.
Cc: Sucharow, Lawrence; Dubbs, Thomas
Subject: Fw: Arkansas Teachers RFQ 2008-2

Please see communication from ATRS below.

I have reached out to Damon & Tim - it should not be an issue.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Christa Clark <christac@artrs.gov>
To: Belfi, Eric J.
Cc: Tamara Henderson <tamarah@artrs.gov>
Sent: Mon Oct 13 12:20:49 2008
Subject: Arkansas Teachers RFQ 2008-2

I am pleased to inform you that subject to final approval of the Attorney General's office, ATRS has selected Labaton Sucharow as an additional monitoring counsel for our system.

I would like to speak with you regarding the additional firm on your submission Chargois & Herron. This is a little awkward, but since your firms are not legally affiliated, we are unable to process the state contract form with both firms listed.

If your firm is doing the monitoring and providing the financial backing for the cases, I think it is most appropriate that we add your firm independently to the list of approved firms. Your firm may affiliate that firm or utilize them as independent contractors, if you deem is appropriate, on a case by case basis. There would be no requirement that you use them if it was not a necessary and appropriate expense of a case. I don't know how to best handle this point but the state procurement process is not conducive to a joint proposal.

Upon approval of the Attorney General, ATRS will send you a request for a form W-9, Arkansas Professional Services contract form, and State grant/contract disclosure form for your completion.

Please call me if you have a minute to discuss.

Regards,
--
Christa S. Clark
Chief Counsel
Arkansas Teacher Retirement System
1400 W. 3rd St.
Little Rock, AR 72201
(501) 682-1266 Direct
(501) 682-6326 Fax
(501) 590-2869 MOBILE
email: christac@artrs.gov

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 1/29/2007 9:09:08 PM
To: 'damon@cmhllp.com' [damon@cmhllp.com]
CC: 'kamran@tienlawgroup.com' [kamran@tienlawgroup.com]; Keller, Christopher J. [ckeller@labaton.com]
Subject: Action Plan
Attachments: Arkansas.Louisiana.Texas.xls

Dear Damon:

As we discussed, here are the targets that we should start with.

I think we should start with the [redacted] I would like to set up an appointment for one our senior partners and myself to come down and meet with Ken again and possibly with Jarvis Hollingsworth in February. The meeting with Jarvis can be more informal.

I have also attached the public funds for Texas, Arkansas and Louisiana. Please let us know which funds you have contacts in.

Target List:

1. [redacted]:

As of December 2005, they had $6.8 billion under management. This would be a very attractive target to us. Also, as we discussed in the car, did you find out what happened with the [redacted] and [redacted]?

2. Unions listed on the Williams & Bailey website:

[redacted]

3. Texas

[redacted]

4. Arkansas

[redacted]

[redacted]

5. Louisiana (Stars indicated that they have moved for lead plaintiff before):

[redacted]

Give me a call so that we can discuss 917-459-7526 (c).

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Document Withheld

Message

From: damon@cmhllp.com [damon@cmhllp.com]
Sent: 1/30/2007 1:02:26 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: kamran@tienlawgroup.com; Keller, Christopher J. [ckeller@labaton.com]
Subject: Re: Action Plan

Thank you for the timely response, Eric. I will get with Ken and Jarvis and send you an email shortly.
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>
Date: Mon, 29 Jan 2007 16:09:08
To:<damon@cmhllp.com>
Cc:<kamran@tienlawgroup.com>,"Keller, Christopher J." <ckeller@labaton.com>
Subject: Action Plan

Dear Damon:

As we discussed, here are the targets that we should start with.

I think we should start with the [redacted] and [redacted]. I would like to set up an appointment for one our senior partners and myself to come down and meet with [redacted] again and possibly with [redacted] in February. The meeting with [redacted] can be more informal.

I have also attached the public funds for Texas, Arkansas and Louisiana. Please let us know which funds you have contacts in.

Target List:

1. [redacted]s:

As of December 2005, they had $6.8 billion under management. This would be a very attractive target to us. Also, as we discussed in the car, did you find out what happened with the Boilmakers and Lerach?

2. Unions listed on the Williams & Bailey website:

[redacted]

3. Texas

[redacted]

4. Arkansas

5. Louisiana (Stars indicated that they have moved for lead plaintiff before):

Give me a call so that we can discuss 917-459-7526 (c).

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 1/19/2007 12:30:10 AM
To: Keller, Christopher J. [ckeller@labaton.com]
CC: Weiss, Sara [SWeiss@labaton.com]
Subject: FW: Your Proposal to [redacted]

FYI.

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Thursday, January 18, 2007 7:20 PM
To: Belfi, Eric J.; Tim Herron; Damon Chargois; GFriedman@flgllp.com; tkitzman@flgllp.com; Persky, Bernard
Subject: FW: Your Proposal to [redacted]
Eric:

looks like you will be Houston bound. Laurence is my former partner and presently working with Ken Bailey who has the union contacts that you are seeking.

Look forward to seeing you soon.
K

From: Laurence Tien [mailto:ltien@bpblaw.com]
Sent: Thu 1/18/2007 4:20 PM
To: Kamran Mashayekh
Cc: Tim Herron; Damon Chargois
Subject: RE: Your Proposal to [redacted]
I spoke to Ken. He is going to give me a day next week when he can meet with Eric and anyone else. He is interested.

Laurence

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Wednesday, January 17, 2007 1:38 PM
To: Laurence Tien
Cc: Tim Herron; Damon Chargois
Subject: FW: Your Proposal to [redacted]
Let us know LT if you have any news. Also, Tim and Damon will call you tomorrow morning to see if the call will take place since I will be out of town thursday through sat of this week.

Thanks again for you help on this.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wed 1/17/2007 1:32 PM
To: Kamran Mashayekh; tkitzman@flgllp.com; GFriedman@flgllp.com
Subject: Re: Your Proposal to WB

Any news?

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Belfi, Eric J.
Cc: Persky, Bernard; Tim Herron <tim@hkhlaw.com>; tkitzman@flgllp.com <tkitzman@flgllp.com>; GFriedman@flgllp.com <GFriedman@flgllp.com>; Damon Chargois <damon@cmhllp.com>
Sent: Tue Jan 16 11:45:14 2007
Subject: RE: Your Proposal to [redacted]

Thank you. I will be in touch as soon as I get a time commitment. I am also pushing for an in person meeting for you.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tuesday, January 16, 2007 10:06 AM
To: Kamran Mashayekh
Cc: Persky, Bernard; Tim Herron; tkitzman@flgllp.com; GFriedman@flgllp.com; Damon Chargois
Subject: RE: Your Proposal to [redacted]

Kamran:

Today - any time after 1PM today or any time Thursday.

Eric

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Tuesday, January 16, 2007 10:57 AM
To: Belfi, Eric J.
Cc: Persky, Bernard; Tim Herron; tkitzman@flgllp.com; GFriedman@flgllp.com; Damon Chargois
Subject: RE: Your Proposal to[redacted]

Eric:

Laurence informs me that Ken Bailey might be available to talk either today or Thursday. What are your available time slots should we firm up a call for today or Thursday?

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, January 15, 2007 11:57 AM
To: Kamran Mashayekh; Persky, Bernard
Cc: Tim Herron; Damon Chargois; GFriedman@flgllp.com; tkitzman@flgllp.com; Laurence Tien
Subject: RE: Your Proposal to [redacted]

Dear Kamram:

Please find our Securities Class Action Primer.

I have also attached a couple of case studies. Please note that the BMS case was run by Amalgamted Bank (the only fully owned union bank in the United States).

Let me know if there is any other informtion that you need.

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, January 15, 2007 11:54 AM
To: Belfi, Eric J.; Persky, Bernard
Cc: Tim Herron; Damon Chargois; GFriedman@flgllp.com; tkitzman@flgllp.com; Laurence Tien
Subject: RE: Your Proposal to [redacted]

Eric:

My contact, Laurence Tien, at Ken Bailey's firm informs me that he is interested in exploring these cases and requests that you provide a brief summary that outlines this particular genre of cases. Ken Bailey further states that he is willing to tap his union contacts should his due diligence on the merits of the case prove fruitful. Once the summary is received, we will proceed with a call and hopefully an in person meeting in Houston with Ken Bailey and Laurence Tien.

Thank you

K

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, January 15, 2007 10:21 AM
To: Kamran Mashayekh; Persky, Bernard
Cc: GFriedman@flgllp.com; tkitzman@flgllp.com; Tim Herron; Damon Chargois
Subject: RE: Your Proposal to [redacted]

Kamram:

Thank you for following up on this.

I am generally available this week except for Wednesday (I will be in Canada).

Eric

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, January 15, 2007 10:57 AM
To: Belfi, Eric J.; Persky, Bernard
Cc: GFriedman@flgllp.com; tkitzman@flgllp.com; Tim Herron; Damon Chargois
Subject: Your Proposal to [redacted]

Good Morning Eric:

Further to your email of Friday regarding the above, I spoke to Ken Bailey's firm who represents a multitude of unions in a variety of cases. They are interested in exploring further the contents of your email and suggested that we set up a phone conference for you to further educate them on the merits of any case we wish to bring. I should have some time slots for us to choose from relative to a phone conference with his firm for tomorrow and I will forward those to you by the end of the day.

As you so aptly suggested, onward we move despite our failed attempts at securing the SRAM client.

Thank you

K

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</HTML

Message

From: Kamran Mashayekh [kamran@cmhllp.com]
Sent: 3/5/2007 7:26:33 PM
To: Keller, Christopher J. [ckeller@labaton.com]
CC: Damon Chargois [damon@cmhllp.com]; Tim Herron [tim@hkhlaw.com]
Subject: RE:

Thank you Chris for considering our firm for this matter and should it lead to something substantive and concrete, we look forward to working with you and Eric.

Thanks

k

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Monday, March 05, 2007 11:12 AM
To: Kamran Mashayekh
Cc: Damon Chargois; Tim Herron; Rado, Andrei; Chan, Cindy
Subject: Re:

Its yours. I didn't know you had interest it local counsel positions. We may be filing another one in TX, in addition to [redacted], and I will let you lknow as we get closer to filing. Just so you, since there will be a lead plaintiff contest under the PSLRA, there is no gaurantee we (or you) will be actively litigating the case. Chris

---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kamran Mashayekh <kamran@cmhllp.com>
To: Keller, Christopher J.
Cc: Damon Chargois <damon@cmhllp.com>; Tim Herron <tim@hkhlaw.com>
Sent: Mon Mar 05 11:57:24 2007
Subject: RE:

Christopher:

We sent you an email and left a message with your assistant this morning that our firm (Chargois, mashayekh and herron) is interested in being local on the case and wishes to explore what that would entail in this case.

If we still have a shot for being considered, please let us know how best to proceed.

Thank you

k

From: Keller, Christopher J. [mailto:ckeller@labaton.com]
Sent: Monday, March 05, 2007 10:55 AM
To: ltien@bpblaw.com
Cc: Kamran Mashayekh; Belfi, Eric J.
Subject: Re:

Thanks. I think we will be ok finding an alternate firm I wanted to give you guys first shot at it.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Laurence Tien <ltien@bpblaw.com>
To: Keller, Christopher J.
Cc: kamran@cmhllp.com <kamran@cmhllp.com>; Belfi, Eric J.
Sent: Mon Mar 05 11:16:03 2007
Subject: RE:

Chris,

My firm probably would not be interested in being local counsel for the [redacted] case but thank you for thinking of us. If Kamran's firm is not interested, then I can probably find some good attorneys for you.

Laurence

> -----Original Message-----
> From: Keller, Christopher J. [mailto:ckeller@labaton.com]
> Sent: Saturday, March 03, 2007 10:58 PM
> To: Laurence Tien
> Cc: kamran@cmhllp.com; Belfi, Eric J.
> Subject: FW:
>
>
> Laurence: I am glad to hear that things are moving forward.
> We are heavy into options backdating cases and are lead
> counsel in over 1/3 of all 10b cases involving options
> backdating. In fact, we are planning on filing a new case
> against [redacted] which is based in Houston. If
> you would like to act as local counsel, please let me know.
> The Google case sounds interesting also. Chris
>

> ----- Original Message -----
> From: Laurence Tien <ltien@bpblaw.com>
> To: Belfi, Eric J.
> Sent: Thu Mar 01 17:22:46 2007
> Subject:
>
> Eric,
>
> Ken just got back from his vacation and I will speak to him
> about the action plan that was forwarded to Damon. Also, is
> your firm doing any shareholder cases involving backdated
> employee stock options? I may be able to get you a few
> hundred names of companies involved in backdating options.
>

>
> Laurence Tien
>
> Bailey Perrin Bailey LLP
> The Lyric Centre
> 440 Louisiana, Suite 2100
> Houston, TX 77002
>
>
> * Telephone (713) 425-7100
> * Direct (713) 425-7264
> * Toll-Free (866) 716-8300
> * Fax: (713) 425-7101
> * E-mail: ltien@bpblaw.com <mailto:ltien@bpblaw.com>
>
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> necessary to delete the message completely from your computer
> system. Thank you.
>
>
>

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 10/30/2007 2:57:34 AM
To: Keller, Christopher J. [ckeller@labaton.com]
Subject: Fw: Wellcare Health Plans/Aetna, Inc.

FYI - as you thought.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Tim Herron <tim@cmhllp.com>
To: Belfi, Eric J.; Damon Chargois <damon@cmhllp.com>
Sent: Mon Oct 29 22:48:51 2007
Subject: RE: Wellcare Health Plans/Aetna, Inc.

i spoke to the Senator today and he said that Paul Doane enjoyed the meeting and he was confident that they would create a business opportunity for the firm. As a public employee and with the new relationship he has with a number of people in arkansas he is going to be extremely careful in all public statements to avoid any difficulty. Be patient. The senator is cautious and doesnt want any impropriety to by imputed and wants this thing to proceed below the radar. He talked about the trip to ny and is looking forward to it. I would not worry. I didnt fine Doanes e mail the slightest bit discouraging. These are careful guys.

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Mon 10/29/2007 8:00 AM
To: Damon Chargois; Tim Herron
Subject: RE: Wellcare Health Plans/Aetna, Inc.

The email was a little inconsistent with the conversation he had with Chris which Paul seems to admit so any information that the Senator can find out would be great.

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Monday, October 29, 2007 9:58 AM
To: Belfi, Eric J.; tim@cmhllp.com
Subject: Re: Wellcare Health Plans/Aetna, Inc.

Tim, I wonder what the senator can find out.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Mon, 29 Oct 2007 07:28:30
To:<tim@cmhllp.com>
Cc:<damon@cmhllp.com>
Subject: Fw: Wellcare Health Plans/Aetna, Inc.

To keep you in the loop.

Eric J. Belfi
Partner
Labaton Sucharow LLP

140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Paul Doane <pauld@atrs.state.ar.us>
To: Belfi, Eric J.
Cc: Jane . <janet@atrs.state.ar.us>; Christa Clark <christac@atrs.state.ar.us>
Sent: Sun Oct 28 23:47:47 2007
Subject: Re: Wellcare Health Plans/Aetna, Inc.

Eric, I did appreciate the chance to visit with your firm in New York last week. However, I don't want to convey any false expectations. I do plan on discussing with the Investment or Policies Committee at its November 14th meeting the possibility of developing a stated policy regarding our fiduciary role in pursuing appropriate legal action to recover trust assets where justified and to consider the merits in having more than one firm engaged to monitor potential actions/ But all this is an involved process and will involve further review and probably a formal RFP process which will likely be several months down the line. Also, our contract renewal with [redacted] is up next Spring so it may make sense to wrap all of these steps into one process rather than multiple. I am very interested in your firm and will remain in touch as we progress but the Board has an awful lot on its plate with several other items in the immediate hopper. I have been pushing them quite hard on a series of fronts. Just didn't want you to misinterpret my comments to Chris that something (decision) was imminent. Regards, pd

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 8/10/2007 3:46:49 AM
To: damon@cmhllp.com; tim@cmhllp.com
CC: Keller, Christopher J. [ckeller@labaton.com]
Subject: Arkansas Targets

Damon & Tim:

Here is a list of the targets in Arkansas:

1	Arkansas Teachers Retirement	Little Rock	AR	$7,700.0
2	[redacted]			
3				
4				
5				
6				
7				
8				
9				
10				
11				

Eric J. Belfi
Partner
Labaton Sucharow & Rudoff LLP
100 Park Avenue
New York, New York 10017
Phone: (212) 907-0878
Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 12/14/2007 1:17:48 PM
To: Keller, Christopher J. [ckeller@labaton.com]
Subject: Fw: New funds

FYI.

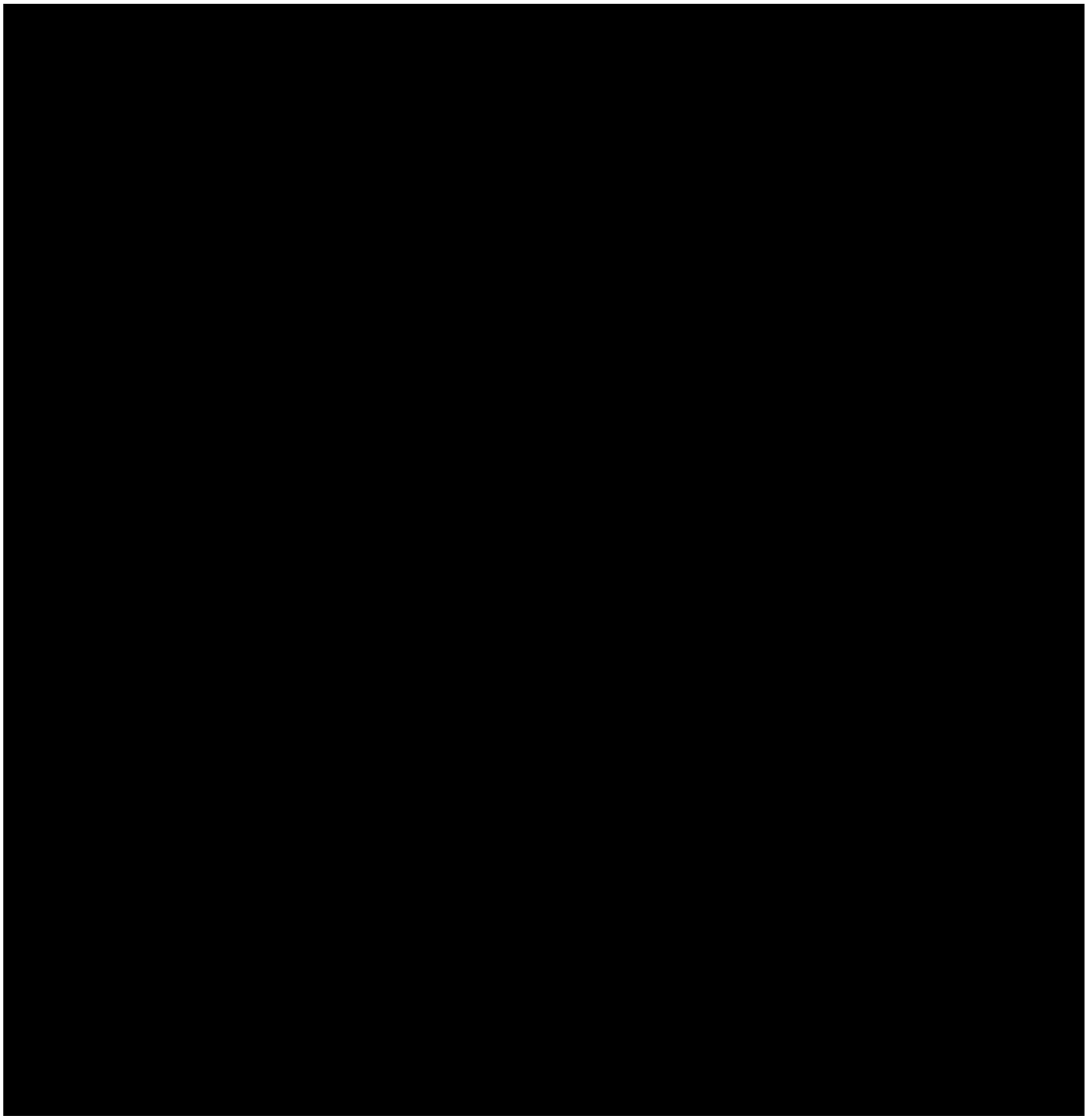
Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Tim Herron <Tim@hkhlaw.com>
To: Belfi, Eric J.
Cc: Damon Chargois <damon@cmhllp.com>
Sent: Fri Dec 14 08:02:27 2007
Subject: New funds

The senator just called me. He has the [redacted] in arkansas. He wants copies several, of the information you gave him in ny. Hje gave his only copy to [redacted] Can you e mail fax or overnight it to me. He plans to get you guys the top five plans in arkansas. He said he will use me a point person be cause it is easier for him.
He said [redacted] will be totally on board shortly. He and I are planning a trip to [redacted] after the first of the year to work on that state for you guys.
Sent via BlackBerry from Tim Herron

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 7/11/2008 12:15:46 AM
To: Tetefsky, Jennifer [JTetefsky@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]
Subject: This week



On Monday (I have made some additions based on follow up), Damon and I met with Kwanza [redacted] Councilman who is a trustee on [redacted] He was very interested with our portfolio monitoring package and he was particularly interested in the audit because the pension fund has had some management issues and they would love to do something positive with the fund. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Eric J. Belfi
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140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 11/12/2008 3:54:26 AM
To: Ching, Natalie [NChing@labaton.com]
CC: Bankston, Jennifer S. [jbankston@labaton.com]; Keller, Christopher J. [ckeller@labaton.com]; Edgar, Michael R. [MEdgar@labaton.com]
Subject: Georgia

Flag: Follow up

Meetings today, November 11, 2008

1. Kwanza [redacted] Tim Herron
   Follow up

[redacted]

Strong Contacts - already monitoing

[redacted]

Relationships but never monitored

[redacted]

[redacted]

State Public Funds [redacted]

[redacted]

[redacted]

[redacted]

Find more information about the State-Collective County fund and muncipal funds.

Eric J. Belfi
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ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 1/26/2007 3:11:47 AM
To: Keller, Christopher J. [ckeller@labaton.com]
Subject: RE: [redacted]

Spoke to Patton Boggs today - [redacted] may want to sue [redacted] - they lost $60 million - what are your thoughts?

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 10:06 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

Working on [redacted] funds now. Good follow up.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Jan 25 22:02:19 2007
Subject: RE: [redacted]

TAD knew the guy that Damon told us about. Tom wants to go and meet with them. I working on the follow up meeting.

I am going to arrange a dinner with Ken and set sometime to pick Damon's brain and have Kamran there so we can have an executer.

I working on sending an agenda out tonight to the Texans.

How are we doing on [redacted]Funds, I really need to get that out because I want to propose a follow up - I just need to fees, I will deal with the rest.

Tomorrow, lets talk [redacted]early. Tom suggested that we have McDonald and Natalie work on the allegations in the blue Ribbon - he asked me to clear it with you before I asked so it was not contrary to something that you were doing.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 9:58 PM
To: Belfi, Eric J.
Subject: Re: [redacted]

what in already exists with [redacted]? Good call on getting tad involved.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 21:52:47 2007
Subject: RE: [redacted]

You should be.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 9:15 PM

To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Ok I get nervous when I'm not around sometimes

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Tetefsky, Jennifer; Keller, Christopher J.
Cc: Chan, Cindy
Sent: Thu Jan 25 20:48:58 2007
Subject: RE: [redacted]

I just spoke with Tom and we are all on the same page.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Thursday, January 25, 2007 8:45 PM
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Chan, Cindy
Subject: Re: [redacted]

Somehow I feel like I am coming into the middle of. A conversation but you do know about our current relationship w [redacted], right?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Sent: Thu Jan 25 19:16:09 2007
Subject: RE: [redacted]

Other than the new case meeting I am free - lets do it in the morning.

-----Original Message-----
From: Keller, Christopher J.
Sent: Thursday, January 25, 2007 7:15 PM
To: Belfi, Eric J.
Cc: Tetefsky, Jennifer; Chan, Cindy
Subject: FW: [redacted]

We should also have a meeting with Jennifer Re: follow-up on the Texas trip. I'm particularly interested in finding out what happened with the [redacted] (When Bailey recommended them) and in perhaps setting up a meeting with [redacted]. It seems like the most logical place to start, with the highest likelihood of success.

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:47 PM
To: Ching, Natalie; Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

P.s. this is a kansas city based f und. Is this the one you want?

-----Original Message-----
From: Ching, Natalie
Sent: Wednesday, January 24, 2007 4:45 PM
To: Keller, Christopher J.
Cc: Chan, Cindy; Belfi, Eric J.
Subject: RE: [redacted]

$6.6 billion

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 4:41 PM
To: Ching, Natalie
Cc: Chan, Cindy; Belfi, Eric J.
Subject: Re: [redacted]

How big is the [redacted] fund?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Ching, Natalie
To: Keller, Christopher J.
Cc: Chan, Cindy
Sent: Wed Jan 24 16:25:59 2007
Subject: RE: [redacted]

Major net sellers according to the 13F. Fifo loss (all sales offset by open) is $55 million

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 24, 2007 3:53 PM
To: Ching, Natalie
Cc: Chan, Cindy
Subject: [redacted]

What's their loss in [redacted]?

Sent from my BlackBerry Wireless Handheld

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/18/2007 5:35:13 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Your Proposal to [redacted]

deal sounds fine

Christopher J. Keller, Esq.
Partner
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e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Thursday, January 18, 2007 12:16 PM
To: Keller, Christopher J.
Subject: FW: Your Proposal to [redacted]

Please let me know if you have comments right away.

From: Damon Chargois [mailto:damon@cmhllp.com]
Sent: Thursday, January 18, 2007 11:17 AM
To: Kamran Mashayekh; Belfi, Eric J.
Cc: Persky, Bernard; Tim Herron
Subject: RE: Your Proposal to [redacted]

Eric, very nice speaking with you this morning. I am hopeful that our firms will have success in the securities fraud cases. Also, I now have another justification for getting up to New York sometime soon.

[redacted]

[redacted]

Please respond in the affirmative and I will follow up with a letter agreement reflecting same. I expect to contact you within an hour or two on the conference call.

I look forward to meeting you in person and working with you. Take care.

Damon J. Chargois

From: Kamran Mashayekh
Sent: Tuesday, January 16, 2007 9:57 AM
To: Belfi, Eric J.
Cc: BPersky@labaton.com; Tim Herron; tkitzman@flgllp.com; GFriedman@flgllp.com; Damon Chargois
Subject: RE: Your Proposal t[redacted]

Eric:

Laurence informs me that Ken Bailey might be available to talk either today or Thursday. What are your available time slots should we firm up a call for today or Thursday?

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, January 15, 2007 11:57 AM
To: Kamran Mashayekh; Persky, Bernard

Cc: Tim Herron; Damon Chargois; GFriedman@flgllp.com; tkitzman@flgllp.com; Laurence Tien
Subject: RE: Your Proposal to [redacted]

Dear Kamram:

Please find our Securities Class Action Primer.

I have also attached a couple of case studies. Please note that the BMS case was run by Amalgamted Bank (the only fully owned union bank in the United States).

Let me know if there is any other informtion that you need.

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Fax: (212) 883-7078
ebelfi@labaton.com
www.labaton.com

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, January 15, 2007 11:54 AM
To: Belfi, Eric J.; Persky, Bernard
Cc: Tim Herron; Damon Chargois; GFriedman@flgllp.com; tkitzman@flgllp.com; Laurence Tien
Subject: RE: Your Proposal to WB

Eric:

My contact, Laurence Tien, at Ken Bailey's firm informs me that he is interested in exploring these cases and requests that you provide a brief summary that outlines this particular genre of cases. Ken Bailey further states that he is willing to tap his union contacts should his due diligence on the merits of the case prove fruitful. Once the summary is received, we will proceed with a call and hopefully an in person meeting in Houston with Ken Bailey and Laurence Tien.

Thank you

K

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Monday, January 15, 2007 10:21 AM
To: Kamran Mashayekh; Persky, Bernard
Cc: GFriedman@flgllp.com; tkitzman@flgllp.com; Tim Herron; Damon Chargois
Subject: RE: Your Proposal to WB

Kamram:

Thank you for following up on this.

I am generally available this week except for Wednesday (I will be in Canada).

Eric

From: Kamran Mashayekh [mailto:kamran@cmhllp.com]
Sent: Monday, January 15, 2007 10:57 AM
To: Belfi, Eric J.; Persky, Bernard
Cc: GFriedman@flgllp.com; tkitzman@flgllp.com; Tim Herron; Damon Chargois
Subject: Your Proposal to WB

Good Morning Eric:

Further to your email of Friday regarding the above, I spoke to Ken Bailey's firm who represents a multitude of unions in a variety of cases. They are interested in exploring further the contents of your email and suggested that we set up a phone conference for you to further educate them on the merits of any case we wish to bring. I should have some time slots for us to choose from relative to a phone conference with his firm for tomorrow and I will forward those to you by the end of the day.

As you so aptly suggested, onward we move despite our failed attempts at securing the [redacted]

Thank you

K

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 5/11/2007 12:35:47 AM
To: 'damon@cmhllp.com' [damon@cmhllp.com]
CC: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Re: [redacted]

Damon, for the record, I was ready to roll tonight. Next time. Safe journey home.

Christopher J. Keller, Esq.
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New York, N.Y. 10017
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Wednesday, May 09, 2007 5:23 PM
To: Keller, Christopher J.
Cc: Tountas, Stephen W.; Schochet, Ira; Rado, Andrei; Belfi, Eric J.
Subject: Re: Re: [redacted]

Great to catch up with you as well, Chris. Just to be clear, Rosenthal isn't what I would call pretty good. Just not a bad draw. I expect to have a summary for you soon on particulars. The main thing for us to research is whether Rosenthal has rendered prior rulings on issues similar to the ones in our case. I will be in touch. Take care.
Sent via BlackBerry from Cingular Wireless

-----Original Message-----
From: "Keller, Christopher J." <ckeller@labaton.com>
Date: Wed, 9 May 2007 16:57:20
To:<damon@cmhllp.com>
Cc:"Tountas, Stephen W." <STountas@labaton.com>, "Schochet, Ira" <ISchochet@labaton.com>, "Rado, Andrei" <ARado@labaton.com>, "Belfi, Eric J." <EBelfi@labaton.com>
Subject: FW: Re: [redacted]

Damon: it was great catching up. I'm going to do my best to make it tomorrow night. I'm copying of this e-mail my partner Ira Schochet and Steve Tountas who'll be doing a lot of the litigation work in this case. As we discussed, since Judge Jon Rosenthal is a pretty good draw, we just need to decide what the practical implication of the attacks motion is. If it's simple coordination, then we may be able to consent to it. If they become one case, then no way.

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e-mail: ckeller@labaton.com
www.Labaton.com

From: Ellman, Alan I.
Sent: Wednesday, May 09, 2007 12:01 PM
To: Keller, Christopher J.; Rado, Andrei
Cc: Weisman, Roy; Chan, Cindy
Subject: Re: [redacted]

Defendants filed a motion yesterday to consolidate the two [redacted] derivative suits with the class action. See attached brief in support.

Alan I. Ellman
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100 Park Avenue
New York, New York 10017
Direct Dial: 212-907-0877
Direct Fax: 212-883-7077
aellman@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 9/6/2007 4:38:50 PM
To: Chan, Cindy [CChan@labaton.com]
Subject: FW: Thanks.

Please put this on my calendar as tentative, it's a American Indian finance conference

-----Original Message-----
From: Belfi, Eric J.
Sent: Thursday, September 06, 2007 8:11 AM
To: Keller, Christopher J.
Subject: Re: Thanks.

The conference is the 15th and 16th of October.
Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Cc: Chan, Cindy
Sent: Thu Sep 06 08:01:17 2007
Subject: Re: Thanks.

Ah - need to get them

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Thu Sep 06 07:44:44 2007
Subject: Re: Thanks.

The names of the Indian tribes?
Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Keller, Christopher J.
To: Belfi, Eric J.
Sent: Thu Sep 06 07:43:33 2007
Subject: Fw: Thanks.

I was responding to this one

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Wed Sep 05 23:12:51 2007
Subject: FW: Thanks.

FYI.

Did you ever get the names from Garrett?

From: Gary S. Pitchlynn [mailto:gpitchlynn@ici-ok.com]
Sent: Wednesday, September 05, 2007 4:53 PM
To: Belfi, Eric J.
Subject: Thanks.

Eric,

I was pleasantly surprised to have received a wonderful basket of fruit and cheese today from you. That was kind and very thoughtful of you.

I am working on arrangements to meet you (is Damon coming?) in Connecticut at the conference, so let me know what I need to do in the way of registering, or does the registration of the booth cover the few of us that might attend and man the booth?

I have a call into my friend to see if he can attend as well. I think that would be very helpful in that part of the country, so I will continue to work on that.

I also have some other ideas of people that could be of assistance and will work on those as well.

Gary

Gary S. Pitchlynn
Indian Country Investments, LLC
P.O. Box 427
Norman, Oklahoma 73070
Phone: (405) 360-9631
Fax: (405) 447-4219

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/10/2008 12:41:17 AM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: RE: Tennessee

Besides [redacted], I'm not aware of anything. And you would be the one to know if we have anything in Texas, so I guess the answer is, that's it.

Christopher J. Keller, Esq.
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Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Wednesday, January 09, 2008 7:31 PM
To: Tetefsky, Jennifer; Keller, Christopher J.
Subject: RE: Tennessee

I think anything we have from their will help.

Also I spoke with Oklahoma contact and he is arranging meetings at the beginning of the week of the 27th.

I meet with D'Amato on Wednesday to discuss Delaware and Alaska.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Wednesday, January 09, 2008 7:26 PM
To: Belfi, Eric J.; Keller, Christopher J.
Subject: Re: Tennessee

Would it be helpful at all if we dropped names of local law firms we have used as local counsel in matters?

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Wed Jan 09 19:22:24 2008
Subject: FW: Tennessee

I know we represent the [redacted] - I can say that we are meeting with [redacted] on the 30th of January - anything else.

From: Tim Herron [mailto:tim@cmhllp.com]
Sent: Wednesday, January 09, 2008 3:23 PM
To: Belfi, Eric J.
Subject: RE: Tennessee

I just received a call from David Clark, of the [redacted] he was buttonholed by the senator and has the brochure you sent to me. He told me that they have other representation. He is going to talk to his board about meeting with us. He was interested in other people represented in

Arkansas and Texas. I didn't know if you have any funds in Texas and I told him we were working on Arkansas. A representative list would be helpful if you don't mind. Hopefully, we will get a meeting. I sent you a copy of my initial e mail to him. Tim

---

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Sunday, December 30, 2007 8:10 AM
To: Tim Herron
Subject: Tennessee

Tim:

I hope you had a good trip across the pond.

I wanted to let you know that I have a family reunion in Memphis, Tennessee next weekend and I will be arriving in Memphis midday Friday, January 4th and I could meet with someone Friday afternoon if there is someone to meet.

As far as future scheduling, I am keeping the week of January 28th open for marketing in the US and can go back to any of these places. I will be available prior to that if something comes up.

Happy New Year.

Eric J. Belfi
Partner
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140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/10/2008 12:59:27 AM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: Re: Tennessee

Yes we are in semtech with them and we are on their list

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Wed Jan 09 19:52:27 2008
Subject: RE: Tennessee

What about Mississippi - have we every represented them? What about any other states around their - Tennessee, Alabama, Florida, Georgia (I guess we can mention Marta), Kentucky? Besides New Mexico, what other funds have we represented in that geographic area?

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 09, 2008 7:41 PM
To: Belfi, Eric J.; Tetefsky, Jennifer
Subject: RE: Tennessee

Besides [redacted], I'm not aware of anything. And you would be the one to know if we have anything in Texas, so I guess the answer is, that's it.

Christopher J. Keller, Esq.
Partner
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-----Original Message-----

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Sent: Wednesday, January 09, 2008 7:26 PM
To: Belfi, Eric J.; Keller, Christopher J.
Subject: Re: Tennessee

Would it be helpful at all if we dropped names of local law firms we have used as local counsel in matters?

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Wed Jan 09 19:22:24 2008
Subject: FW: Tennessee

I know we represent the [redacted] - I can say that we are meeting with [redacted] on the 30th of January - anything else.

From: Tim Herron [mailto:tim@cmhllp.com]
Sent: Wednesday, January 09, 2008 3:23 PM
To: Belfi, Eric J.
Subject: RE: Tennessee

I just received a call from [redacted] of the [redacted]; he was buttonholed by the senator and has the brochure you sent to me. He told me that they have other representation. He is going to talk to his board about meeting with us. He was interested in other people represented in Arkansas and Texas. I didn't know if you have any funds in Texas and I told him we were working on Arkansas. A representative list would be helpful if you don't mind. Hopefully, we will get a meeting. I sent you a copy of my initial e mail to him. Tim

---

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Sunday, December 30, 2007 8:10 AM
To: Tim Herron
Subject: Tennessee

Tim:

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I wanted to let you know that I have a family reunion in Memphis, Tennessee next weekend and I will be arriving in Memphis midday Friday, January 4th and I could meet with someone Friday afternoon if there is someone to meet.

As far as future scheduling, I am keeping the week of January 28th open for marketing in the US and can go back to any of these places. I will be available prior to that if something comes up.

Happy New Year.

Eric J. Belfi
Partner
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Phone: +1.212.907.0878

Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 1/10/2008 2:29:33 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: Re: Tennessee

That's great to hear. Forgot to discuss with las.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Sent: Wed Jan 09 20:02:28 2008
Subject: RE: Tennessee

Did you talk to Larry about going to Arizona on February 2 & 3. I will be Chicago on Friday the 1st so I will be halfway there.

We are having an amazing week here - we have really made some nice progress.

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 09, 2008 7:59 PM
To: Belfi, Eric J.; Tetefsky, Jennifer
Subject: Re: Tennessee

Yes we are in [redacted] with them and we are on their list

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Wed Jan 09 19:52:27 2008
Subject: RE: Tennessee

What about Mississippi - have we every represented them? What about any other states around their - Tennessee, Alabama, Florida, Georgia (I guess we can mention Marta), Kentucky? Besides [redacted] what other funds have we represented in that geographic area?

-----Original Message-----
From: Keller, Christopher J.
Sent: Wednesday, January 09, 2008 7:41 PM
To: Belfi, Eric J.; Tetefsky, Jennifer
Subject: RE: Tennessee

Besides [redacted], I'm not aware of anything. And you would be the one to know if we have anything in Texas, so I guess the answer is, that's it.

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

-----Original Message-----
From: Belfi, Eric J.
Sent: Wednesday, January 09, 2008 7:31 PM
To: Tetefsky, Jennifer; Keller, Christopher J.
Subject: RE: Tennessee

I think anything we have from their will help.

Also I spoke with Oklahoma contact and he is arranging meetings at the beginning of the week of the 27th.

I meet with D'Amato on Wednesday to discuss Delaware and Alaska.

-----Original Message-----
From: Tetefsky, Jennifer
Sent: Wednesday, January 09, 2008 7:26 PM
To: Belfi, Eric J.; Keller, Christopher J.
Subject: Re: Tennessee

Would it be helpful at all if we dropped names of local law firms we have used as local counsel in matters?

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Wed Jan 09 19:22:24 2008
Subject: FW: Tennessee

I know we represent the [redacted] - I can say that we are meeting with [redacted] on the 30th of January - anything else.

From: Tim Herron [mailto:tim@cmhllp.com]
Sent: Wednesday, January 09, 2008 3:23 PM
To: Belfi, Eric J.
Subject: RE: Tennessee

I just received a call from [redacted], of the [redacted]; he was buttonholed by the senator and has the brochure you sent to me. He told me that they have other representation. He is going to talk to his board about meeting with us. He was interested in other people represented in Arkansas and Texas. I didn't know if you have any funds in Texas and I told him we were working on Arkansas. A representative list would be helpful if you don't mind. Hopefully, we will get a meeting. I sent you a copy of my initial e mail to him. Tim

---

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Sunday, December 30, 2007 8:10 AM
To: Tim Herron
Subject: Tennessee

Tim:

I hope you had a good trip across the pond.

I wanted to let you know that I have a family reunion in Memphis, Tennessee next weekend and I will be arriving in Memphis midday Friday, January 4th and I could meet with someone Friday afternoon if there is someone to meet.

As far as future scheduling, I am keeping the week of January 28th open for marketing in the US and can go back to any of these places. I will be available prior to that if something comes up.

Happy New Year.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, New York 10005
Phone: +1.212.907.0878
Fax: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 6/25/2008 11:14:47 AM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
CC: Bernstein, Joel [JBernstein@labaton.com]
Subject: Re: Georgia

Sounds great. Let's lock it up.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Cc: Bernstein, Joel
Sent: Wed Jun 25 03:20:36 2008
Subject: Fw: Georgia

FYI.

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Damon Chargois <damon@cmhllp.com>
To: Belfi, Eric J.
Sent: Tue Jun 24 16:07:07 2008
Subject: RE: Georgia

very well. we can get [redacted] you and i need to talk about the good councilman. im on conference call now and for the next hour, though.

-----Original Message-----
From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Tue 6/24/2008 2:27 PM
To: Damon Chargois
Subject: Re: Georgia

How did it go?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: damon@cmhllp.com <damon@cmhllp.com>
To: Belfi, Eric J.
Sent: Mon Jun 23 16:09:56 2008
Subject: Re: Georgia

Its dinner. I will let you know.
Sent via BlackBerry by AT&T

-----Original Message-----
From: "Belfi, Eric J." <EBelfi@labaton.com>

Date: Mon, 23 Jun 2008 15:35:46
To:<damon@cmhllp.com>
Subject: Georgia

How did you do today?

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
Sent: 7/8/2008 12:15:18 PM
To: Belfi, Eric J. [EBelfi@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: Re: Georgia

Thanks for the update. Did the good councilman suggest a firm to work with?

Can you give me a [redacted]update?

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Mon Jul 07 23:36:55 2008
Subject: Georgia

I was able to meet a number of people and make some headway into who can help us with some of the local funds in the Georgia area.

Damon and I met with Kwanza[redacted] who is a trustee on the A[redacted] Pension Board. He was very interested with our portfolio monitoring package and he was particularly interested in the audit because the pension fund has had some management issues and they would love to do something positive with the fund. [redacted]

[redacted]

[redacted]

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Belfi, Eric J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=BELFIE]
Sent: 12/8/2007 1:26:26 AM
To: Keller, Christopher J. [ckeller@labaton.com]; Bernstein, Joel [JBernstein@labaton.com]; Dubbs, Thomas [TDubbs@labaton.com]; Hart, Barbara [BHart@labaton.com]; Plasse, Jonathan [JPlasse@labaton.com]; Sucharow, Lawrence [LSucharow@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: RE: mega fraud case reports

Chris:

[redacted] nothing new from Damon - I have sent the updated report to Jarvis and Damon has conveyed the partnership offer - trying to get a meeting with them later next week.

[redacted]

[redacted]

[redacted]

[redacted]

Eric

From: Keller, Christopher J.
Sent: Thursday, December 06, 2007 7:34 PM
To: Belfi, Eric J.; Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer
Subject: RE: mega fraud case reports
Please apprise me of any updates on your outreach in these cases.

Christopher J. Keller, Esq.
Partner
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140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

From: Belfi, Eric J.
Sent: Wednesday, November 28, 2007 10:25 PM
To: Keller, Christopher J.; Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer
Subject: RE: mega fraud case reports
Chris:

Here is a quick review of where my outreach is - I will fill you in the latest details tomorrow:

[redacted]

[redacted]

[redacted]

[redacted]

Eric

From: Keller, Christopher J.
Sent: Wednesday, November 28, 2007 12:31 PM
To: Keller, Christopher J.; Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer; Belfi, Eric J.
Subject: RE: mega fraud case reports

Please advise me of the status of outreach. [redacted]

Christopher J. Keller, Esq.
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New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

From: Keller, Christopher J.
Sent: Thursday, November 15, 2007 12:54 PM
To: Keller, Christopher J.; Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer; Belfi, Eric J.
Subject: RE: mega fraud case reports
Please let me know the status of our outreach on these cases. The lead plaintiff moving dates are all packed in between Christmas and just after New Year's, so getting retained early is critical in these matters.

From: Keller, Christopher J.
Sent: Wednesday, November 07, 2007 7:38 PM
To: Keller, Christopher J.; Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer; Belfi, Eric J.
Subject: mega fraud case reports

[redacted]

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

From: Keller, Christopher J.
Sent: Tuesday, November 06, 2007 2:37 PM
To: Bernstein, Joel; Dubbs, Thomas; Hart, Barbara; Plasse, Jonathan; Sucharow, Lawrence; Tetefsky, Jennifer; Belfi, Eric J.
Cc: Rado, Andrei
Subject: FW: [redacted]ynch Report

[redacted]

Christopher J. Keller, Esq.
Partner
Labaton Sucharow LLP

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New York, NY 10005
Phone: (212) 907-0853
Fax: (212) 883-7053
e-mail: ckeller@labaton.com
www.Labaton.com

Please note our new office address.

From: Chan, Cindy
Sent: Friday, November 02, 2007 12:51 PM
To: Belfi, Eric J.; Keller, Christopher J.
Subject: Merrill Lynch Report

Please see attached.

Message

From: Sucharow, Lawrence [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SUCHARL]
Sent: 8/17/2007 1:33:17 PM
To: Keller, Christopher J. [ckeller@labaton.com]; Belfi, Eric J. [EBelfi@labaton.com]
CC: Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: RE: Faris

No. Everyone understands that [redacted] is waiting on Jay and Richard and their communications with Ralph. I will email Jay.

-----Original Message-----
From: Keller, Christopher J.
Sent: Friday, August 17, 2007 7:01 AM
To: Sucharow, Lawrence; Belfi, Eric J.
Cc: Tetefsky, Jennifer
Subject: Re: Faris

Any word on [redacted]

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Sucharow, Lawrence
To: Belfi, Eric J.; Keller, Christopher J.
Cc: Tetefsky, Jennifer
Sent: Fri Aug 17 01:44:18 2007
Subject: Re: Faris

Verry nice.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.; Sucharow, Lawrence
Cc: Tetefsky, Jennifer
Sent: Thu Aug 16 22:34:26 2007
Subject: Faris

FYI.
-----Original Message-----
From: damon@cmhllp.com [mailto:damon@cmhllp.com]
Sent: Thursday, August 16, 2007 9:26 AM
To: Belfi, Eric J.; tim@cmhllp.com
Subject: Re: Little Rock

You guys did well. Tim and I both feel very optimistic about Labaton firm's doing a lot of good things in Arkansas. This is thanks to you and Chris representing the firm very well. Take care, bro.
Sent via BlackBerry by AT&T

Message

From: Sucharow, Lawrence [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SUCHARL]
Sent: 10/20/2007 11:35:13 AM
To: Belfi, Eric J. [EBelfi@labaton.com]
CC: Keller, Christopher J. [ckeller@labaton.com]; Tetefsky, Jennifer [JTetefsky@labaton.com]
Subject: RE: Update

Eric, GREAT job. Don't know how you keep the [redacted] straight from the [redacted]. Need to discuss th [redacted]. Way too rich a request, but can't judge without seeing a list of what you think he can realistically accomplish (deliver) and what size of those funds really are (and in US equities).
Keep up great work.
I am uexpectedly going out to oserve JDS trial for this coming week; we willneed to arrange to speak by phone to move things along.

-----Original Message-----
From: Belfi, Eric J.
Sent: Friday, October 19, 2007 7:27 PM
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Subject: Update

Larry:

A quick summary of the trip.

In Oklahoma, we had good meetings with the [redacted]. Damon thinks we will get in both.

[redacted] currently has Litowitz but certainly understands the values of multiple firms (ie conflicts).

[redacted] currently does not have any attorneys and is interested in setting a monitoring system - they should get back to us soon.

In Texas, we met with Steve Kherkher of William & Kherkher - formally of Williams & Bailey and they are going to introduce us to their union clients. They made big money in tobacco and asbestos with the unions.

Here is a list from their website:

Paper, Allied-Industrial, Chemical & Energy Workers Union (PACE) Local 4-6000 United Steelworkers (USW) 13-227 USW 13-2001 Int'l Brotherhood of Electrical Workers (IBEW) 66 IBEW 716 Int'l Union of Operating Engineers (IUOE) 450 IUOE 564 IUOE 351 In'tl Association of Machinists & Aerospace Workers (IAM & AW) 37 Millwrights 2232 Ironworkers 84 Plumbers 68 Sheetmetal Workers 54 Pipefitters 211

We will start this project hopefully in about 2 to 3 weeks.

They will also help us with some of the public pension funds in Texas.

For lunch, one of Damon's classmates at law school and good buddies - Scott Lemond - set up an appointment the head of the [redacted] - the guy is very bright and the meeting went awesome - I think we will be in there shortly.

Scott is going to get us in to the [redacted] next time we are town.

Damon's plans are to expand the Oklahoma operation, work on the Dallas' Funds (he is good friends with the mayor) and start working in Alabama at the municipal level - they are very tied in Alabama.

Tim is making sure that we complete Arkansas and he is opening the Tennessee front - I hope to go there on the next road trip.

We will be getting some traffic through office during the week of November 5 - Senator Farris, Tim Herron, Damon, and Steve KherKher and possibly Camp Bailey of Bailey (they are the link to the [redacted] and many other union funds).

[redacted]

We are also working Damon's lawyer friend Gary Pitchlynn - also an Indian - and he thinks he can deliever the Mississippi [redacted] to start and has a number of other contacts.

Lots of follow up necessary.

Eric

Eric J. Belfi
Partner
Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

Message

From: Sucharow, Lawrence [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SUCHARL]
Sent: 10/20/2007 12:06:58 PM
To: Belfi, Eric J. [EBelfi@labaton.com]
Subject: RE: Update

Official observer and kibbitzer. Not sure I can use those new copying machines.

-----Original Message-----
From: Belfi, Eric J.
Sent: Saturday, October 20, 2007 8:00 AM
To: Sucharow, Lawrence
Subject: Re: Update

That is exciting - I would love to be there. What is your job - are you the copy guy?

Eric J. Belfi
Partner
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140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Sucharow, Lawrence
To: Belfi, Eric J.
Sent: Sat Oct 20 07:58:58 2007
Subject: RE: Update

Tues; but on fast track. They expect jury in the a.m. and openings in the p.m.

-----Original Message-----
From: Belfi, Eric J.
Sent: Saturday, October 20, 2007 7:49 AM
To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Subject: Re: Update

When does jury selection begin?

Eric J. Belfi
Partner
Labaton Sucharow LLP
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

----- Original Message -----
From: Sucharow, Lawrence
To: Belfi, Eric J.
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Sent: Sat Oct 20 07:35:13 2007
Subject: RE: Update

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To: Sucharow, Lawrence
Cc: Keller, Christopher J.; Tetefsky, Jennifer
Subject: Update

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[redacted]

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Lots of follow up necessary.

Eric

Eric J. Belfi
Partner
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New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
www.labaton.com

From: Garrett Bradley
Sent: Thursday, February 3, 2011 10:56 AM
To: Joyce Murphy
Subject: FW: Florida (March 31 - April 2)
Attachments: 4th Annual Business Development Summit Agenda.pdf

Put these dates in my calendar to hold and look at flights

From: Belfi, Eric J. [mailto:EBelfi@labaton.com]
Sent: Wednesday, February 02, 2011 7:19 PM
To: Garrett Bradley; 'Damon Chargois'; 'Art Coia'; Mark S. Goldman; 'Brian D. Penny'; 'Jason Risch'; Jeremy Pisca; 'Joseph Danis'; 'Michael E. Lamb'; 'Yarbro, Jeffrey P.'; 'Allen Vaught'; Keller, Christopher J.; 'Martin Whitmer'; 'Chris D'Amato'
Subject: Florida (March 31 - April 2)

Please join us for the Fourth Annual Business Development Summit at the Shore Club in South Beach - http://www.shoreclub.com/en-us/#/home/

Please email Cindy Chan (cchan@labaton.com) if you can join us.

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4TH ANNUAL BUSINESS DEVELOPMENT SUMMIT

Agenda

March 31, 2011-April 2, 2011

Location: Shore Club
1901 Collins Avenue
Miami Beach, FL 33139

THURSDAY, MARCH 31

1:00 p.m. – 3:00 p.m.	Arrival and check into hotel.
3:00 p.m. – 7:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning the financial mortgage crisis and potential case opportunities.
7:00 p.m. – 9:00 p.m.	Dinner

FRIDAY, APRIL 1

9:00 a.m. – 12:00 p.m.	Client development discussions led by Chris Keller and Eric Belfi. Breakout sessions
12:00 p.m. – 1:00 p.m.	Lunch
1:00 p.m. – 6:00 p.m.	Golf
6:00 p.m. – 9:00 p.m.	Dinner

SATURDAY, APRIL 2

9:00 a.m. – 9:30 a.m.	Breakfast

9:30 a.m. – 12:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning Antitrust case opportunities and client development.
12:00 p.m. – 1:00 p.m.	Check out and travel home.

From: Chan, Cindy <CChan@labaton.com>
Sent: Tuesday, February 3, 2009 11:36 AM
To: Garrett Bradley
Cc: Keller, Christopher J.
Subject: 2nd Annual Business Development Summit - Agenda (updated)
Attachments: 2nd Annual Business Development Summit - Agenda.doc

Hi Garrett,

Attached please find the updated agenda for the 2nd Annual Business Development Summit. Please see below for a list of attendees. Thank you.

Confirmed attendees:
Bill Jordan
Art Coia
Michael Lamb
Jim Wyly
Mark Goldman
Brian Penny
Damon Chargois
Eric Belfi
Chris Keller

Tentative attendees:
Chris D'Amato
Jason Crowell
Mike Murphy

Please consider the environment before printing this email.

2ND ANNUAL BUSINESS DEVELOPMENT SUMMIT

Agenda

February 8-10, 2009

Location: Loews Miami Beach Hotel
1601 Collins Avenue,
Miami Beach, Florida 33139

SUNDAY, FEBRUARY 8

1:00 p.m. – 3:00 p.m.	Arrival and check into hotel.
3:00 p.m. – 7:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning the financial mortgage crisis and potential case opportunities.
7:00 p.m. – 9:00 p.m.	Dinner at Prime 112 112 Ocean Dr, Miami Beach, FL 33139

MONDAY, FEBRUARY 9

9:00 a.m. – 12:00 p.m.	Client development discussions led by Chris Keller and Eric Belfi. Breakout sessions
12:00 p.m. – 1:00 p.m.	Lunch
1:00 p.m. – 6:00 p.m.	Golf
6:00 p.m. – 9:00 p.m.	Dinner

TUESDAY, FEBRUARY 10

9:00 a.m. – 9:30 a.m.	Breakfast

9:30 a.m. – 12:00 p.m.	Presentation by Chris Keller and Eric Belfi concerning Antitrust case opportunities and client development.
12:00 p.m. – 1:00 p.m.	Check out and travel home.

From: Damon Chargois <damon@cmhllp.com>
Sent: Saturday, April 14, 2012 11:11 AM
To: Garrett Bradley
Subject: Re: BP Letter

Agreed. Aftetnoon is best for me

Sent from my iPhone

On Apr 14, 2012, at 7:05 AM, Garrett Bradley <GBradley@tenlaw.com> wrote:

> Nice I think we should do a call on Monday the latest
>
> Garrett

On Apr 14, 2012, at 8:00 AM, "Damon Chargois" <damon@cmhllp.com> wrote:

> I do. One client estimates his economic losses at half million. Another potential client owns luxury condos on the Alabama coast and is calculating his economic losses this weekend.
>
> Sent from my iPhone

On Apr 14, 2012, at 5:56 AM, Garrett Bradley <GBradley@tenlaw.com> wrote:

> I looked it over. Think you have some people who will qualify?
>
> Garrett
>
> On Apr 13, 2012, at 6:34 PM, "Damon Chargois" <damon@cmhllp.com> wrote:
>
> > Thank you
> >
> > Sent from my iPhone
> >
> > On Apr 13, 2012, at 5:29 PM, Garrett Bradley <GBradley@tenlaw.com> wrote:
> >
> > > I have not looked at this yet
> > > Garrett
> > >
> > > Begin forwarded message:
> > >
> > > **From:** "Baden, John" <jbaden@motleyrice.com>
> > > **To:** "Garrett Bradley"

<GBradley@tenlaw.com>
Subject: BP Letter

John A. Baden, IV |
Attorney at Law |
Motley Rice LLC
28 Bridgeside Blvd. |
Mt. Pleasant, SC
29464
o. 843.216.9124 | f.
843.216.9450
jbaden@motleyrice.com<mailto:jbaden@motleyrice.com>

Confidential &
Privileged

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<BP Checklist.pdf>

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From: Damon Chargois <damon@cmhllp.com>
Sent: Thursday, January 20, 2011 10:22 AM
To: Keller, Christopher J.
Cc: Belfi, Eric J.; Garrett Bradley; Art Coia
Subject: Re: Florida

Works for me, too.

Sent from my iPhone

On Jan 19, 2011, at 3:03 PM, "Keller, Christopher J." <ckeller@labaton.com> wrote:

> That works for me
>
> Christopher J. Keller, Esq.
> Partner || Labaton Sucharow LLP
> 140 Broadway
> New York, NY 10005
> Phone: (212) 907-0853
> Fax: (212) 883-7053
> e-mail: ckeller@labaton.com
> www.Labaton.com
>
> ---
>
> **From:** Belfi, Eric J.
> **Sent:** Wednesday, January 19, 2011 3:10 PM
> **To:** Garrett Bradley; 'Art Coia'; 'Damon Chargois'
> **Cc:** Keller, Christopher J.
> **Subject:** Florida
>
> We are looking to secure dates for the 4th annual conference.
>
> I had discussed with several of you, Sunday, April 3 - Tuesday, April 5 but Art has suggest that we should do, Thursday, March 31 - Saturday, April 2 and we should do it at the Shore Club. Let me know what works for people.
>
> Eric J. Belfi
> Partner | | Labaton Sucharow LLP
> 140 Broadway
> New York, N.Y. 10005
> Telephone: +1.212.907.0878
> Facsimile: +1.212.883.7078

ebelfi@labaton.com
www.labaton.com

From: Belfi, Eric J. <EBelfi@labaton.com>
Sent: Thursday, March 25, 2010 12:15 PM
To: Mark S. Goldman; Martin Whitmer; damon@cmhllp.com; Art Coia; Garrett Bradley; Wkingsbury@mmwr.com
Cc: Keller, Christopher J.; Liebesman, Sidney S.
Subject: 3rd Annual Business Development Conference
Attachments: Scan 100840009.jpg

Thank you all for participating in the 3rd Annual Business Development Conference.

I found this article and thought you might find it interesting.

Eric J. Belfi
Partner | | Labaton Sucharow LLP
140 Broadway
New York, N.Y. 10005
Telephone: +1.212.907.0878
Facsimile: +1.212.883.7078
ebelfi@labaton.com
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From: Art Coia <aec@hgk.com>
Sent: Friday, March 26, 2010 1:51 PM
To: Belfi, Eric J.; Mark S. Goldman; Martin Whitmer; damon@cmhllp.com; Garrett Bradley; Wkingsbury@mmwr.com
Cc: Keller, Christopher J.; Liebesman, Sidney S.
Subject: Re: 3rd Annual Business Development Conference

Great seeing you guys in FL. Hope we can stay in touch and accomplish some good things this year.

Peace.

-ac

On 3/25/10 12:15 PM, "Belfi, Eric J." <EBelfi@labaton.com> wrote:

Thank you all for participating in the 3rd Annual Business Development Conference.

I found this article and thought you might find it interesting.

Eric J. Belfi
Partner || Labaton Sucharow LLP
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ebelfi@labaton.com
www.labaton.com <http://www.labaton.com/>

From: Garrett Bradley
Sent: Friday, February 8, 2013 11:10 AM
To: 'Damon Chargois'
Subject: FW: BP Oil Spill
Attachments: Econ Order & Reasons Granting Final Approval.pdf; ATT00001.htm; BP Econ Settlement_Agreement.pdf; ATT00002.htm; BEL Client Questionnaire.docx; Gulf Coast Area _ 2012.04.24[1].pptx; 10 Practical Things You Should Know About the BP Oil Spill Settlement Ag....pdf

Damon,

Hope all is well. Here are some attachments and a blurb I have been using let me know if you have any connections.

Great talking with you recently regarding our work representing companies in the Deepwater Horizon (BP) oil spill settlement. My firm, Thornton & Naumes, has worked with the firm Motley/Rice (www.motleyrice.com) for over 30 years in many different litigation areas. We are currently looking to represent companies that have some type of physical presence in the Gulf coast area depicted on the attached map. These companies may be able to submit a claim to the BP oil spill settlement fund that Motley/Rice helped establish. Also attached are certain documents relating to the criteria. We would like to have a call to explain the process to anyone at any company you believe might be interested. We would offer a no cost review of the necessary paperwork from the company (just profit and loss statements from 2007-2011 and tax returns) and analyze the data in accord with the settlement criteria and tell the company, confidentially, what we believe we could get for them should they allow us to file the claim. This is not protracted litigation, but rather a 90 day estimated process to see if the company is approved. If they decide to move forward we would negotiate a fee that would come out of the recovery. Therefore there are no upfront costs or expenses and we take the risk should there be no recovery. If for some reason a claim is not approved we would not seek any fees or expenses from the company. The companies CANNOT be from the financial, gambling, banking or government sectors.

Please let me know if there is anyone I should speak with. Thank you.

Garrett Bradley

Thornton & Naumes

www.tenlaw.com

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, 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

REPORT PURSUANT TO PARAGRAPH 5(C) OF THE COURT'S AUGUST 10, 2018 ORDER (DOCKET NO. 445)

Pursuant to paragraph 5(c) of the Court's August 10, 2018 Order, Docket No. 445, Labaton Sucharow LLP ("Labaton"), the Thornton Law Firm, Lieff, Cabraser, Heimann &

Bernstein LLP, McTigue Law LLP, Keller Rohrback L.L.P., Zuckerman Spaeder, LLP (the "Law Firms"), State Street Bank and Trust Company ("State Street"), and the Special Master report that they have satisfied their obligations under the Protocol, Docket No. 259, and the Court's July 9, 2018 Order, Docket No. 385.

The Law Firms, State Street and the Special Master further advise the Court that they agree that the following items, initially filed under seal, may now be unsealed:[1]

1. Memorandum of Law in Support of State Street's Motion to Redact Confidential and Proprietary Information in the Special Master's Report, Executive Summary and Exhibits, Docket No. 251 (filed June 5, 2018)

2. Memorandum in Support of Labaton's Motion to Redact and Retain Under Seal, Docket No. 254-1 (filed June 5, 2018)

3. Declaration of Jonathan Gardner in Support, Docket No. 254-2 (filed June 5, 2018)

4. Labaton's Motion to Strike Supplemental Report of Stephen Gillers and Related Portions of the Master's Report and Recommendations, Docket No. 271 (filed June 8, 2018)

5. Memorandum in Support of Labaton's Motion to Strike Supplemental Report of Stephen Gillers and Related Portions of the Master's Report and Recommendations, Docket No. 272 (filed June 8, 2018)

6. Declaration of Stuart Glass in Support, Docket No. 273 (filed June 8, 2018)

7. Motion and Supporting Memorandum of Law in Support of State Street's Motion to Seal and Motion to Include Only the Cited Pages and Lines of Deposition Transcripts, Docket No. 291-2 (filed June 10, 2018)

8. Affidavit of Daniel W. Halson, Docket No. 291-3 (filed June 11, 2018) **[The remaining documents filed under seal at Docket No. 291 should not be unsealed.]**

9. State Street's Reply, Docket No. 312-1 (filed June 20, 2018)

10. Labaton's Proposed Reply to the Special Master's Response to Motion to Strike, Docket No. 323 (filed June 21, 2018)

[1]

11. Keller Rohrback's Notice of Exceptions to ECF 359 and ECF 361, Docket No. 386 (filed July 10, 2018)

12. Zuckerman Spaeder LLP's Notice of Exception to ECF 359, ECF 361, and ECF 367, Docket No. 390 (filed July 12, 2018)

The Special Master and Labaton agreed that a small amount of personal information should be redacted from two of the documents that the Special Master added to the record on August 3, 2018 and that the Special Master is filing publicly today. Counsel for the Special Master informed counsel for Labaton this afternoon, however, that the Special Master also wishes to unseal the cover memorandum to "The Special Master's First Submission of Documents to Supplement the Record (Under Seal)," Docket No. 415 (filed August 3, 2018). While Labaton has no objection to the documents being in the public record, Labaton objects to the un-sealing of the cover memorandum, which Labaton perceives as essentially a Supplement to the Special Master's Report & Recommendations, on both procedural and substantive grounds. Labaton's preparation of a motion to strike the cover memorandum was interrupted by the negotiation of a resolution between Labaton and the Special Master. In light of the Special Master's position that the cover memorandum should be unsealed, Labaton will proceed with the preparation and filing of the motion to strike, and therefore objects to un-sealing the cover memorandum until the Court has decided that forthcoming motion to strike.

Dated: August 16, 2018

Respectfully submitted,

By: */s/ Brian T. Kelly*

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Joshua C. Sharp (BBO No. 681439)
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By: */s/ J. Brian McTigue*

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Counsel for the Henriquez ERISA Plaintiffs

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

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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By: */s/ William H. Paine*

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daniel.halston@wilmerhale.com

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

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 16, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LABATON SUCHAROW LLP'S MOTION FOR EXTENSION OF TIME TO FILE MOTION TO STRIKE

Labaton Sucharow LLP ("Labaton") respectfully moves the Court, to the extent necessary, for an extension of time until Tuesday, August 21, 2018, to file a motion to strike the

cover memorandum to "The Special Master's First Submission of Documents to Supplement the Record" (filed under seal August 3, 2018) (the "Cover Memorandum"). In support of this motion, Labaton states as follows:

1. On August 10, 2018, the Court ordered that by August 16, 2018, the Master and the lawyers for the class shall (among other things): "(b) File for the public record . . . any documents the Master added to the Record on August 6, 2018 pursuant to paragraph 3 of the July 9, 2018 Order, and explain the reasons for any proposed redactions. In the alternative, they shall file a motion and affidavit seeking to establish good cause for an extension of time to do so." Order, August 10, 2018 (the "August 10 Order," ECF 445) at ¶ 5(b).

2. Following entry of the August 10 Order, counsel for Labaton conferred with counsel for the Special Master regarding the 625 pages of documents that the Master added to the record.[1] Labaton proposed redactions only with respect to a small amount of personal information contained in two documents, to which the Special Master agreed. *See* Declaration of Justin J. Wolosz ("Wolosz Decl."), filed herewith, ¶ 2.

3. Separately, counsel for Labaton undertook the preparation of a submission that would address Paragraph 5(c) of the Court's August 10 Order, and that would include a list of previously sealed documents that the parties now agree can be unsealed. *Id.*, ¶ 3. On Tuesday, August 14, 2018, counsel for Labaton sent other counsel a list of Labaton's prior filings that remain sealed, but that Labaton believes can now be unsealed. The email invited other counsel to advise of any additional documents that they wished to include on the list. *Id.*, ¶ 4.

4. On Thursday, August 16, 2018 (the date the submission was due), at approximately 1:20 PM, counsel for the Special Master contacted counsel for Labaton and

[1] Labaton had understood that the Cover Memorandum and documents were filed conventionally on August 3, 2018; the Court refers to the filing date as August 6, 2018.

advised that the Special Master wished to add the Cover Memorandum to the list of documents that can now be unsealed. *Id.*, ¶ 5.

5. Labaton objects to the un-sealing of the Cover Memorandum. Labaton was previously in the process of preparing a motion to strike that document, but that preparation was interrupted by the negotiation of a possible resolution between Labaton and the Special Master. *Id.*, ¶ 6. In light of the Special Master's position – relayed just hours ago – that he now wants the Cover Memorandum unsealed, Labaton intends to complete and file its motion to strike. *Id.*

6. Having learned just hours ago that the Special Master is seeking the release of this document, Labaton is unable to complete and file its motion to strike today. *Id.*, ¶7. Paragraph 5(b) of the Court's August 10 Order states that August 16, 2016 is the deadline to seek proposed redactions (or move for an extension of time to do so) with respect to "any documents the Master added to the Record on August 6, 2018." Although this paragraph does not appear to apply to the Cover Memorandum (or a motion to strike), in an abundance of caution, Labaton is filing this motion seeking additional time. Labaton believes that an brief extension until August 21, 2018 would allow sufficient time to prepare and file its motion to strike.

WHEREFORE, to the extent deemed necessary, Labaton respectfully requests that the Court (1) allow Labaton until next Tuesday, August 21, 2018, to file its motion to strike the Cover Memorandum; and (2) maintain under seal the Cover Memorandum at least until the Court is able to rule on the referenced motion to strike.

August 16, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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Justin J. Wolosz (BBO No. 643543)
Stuart M. Glass (BBO No. 641466)
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sglass@choate.com

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. Zuckerman Spaeder LLP, Keller Rohrback LLP, and McTigue Law LLP take no position on the request. State Street and the Special Master 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 August 16, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, *et al.*, 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, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF JUSTIN J. WOLOSZ IN SUPPORT OF
MOTION FOR EXTENSION OF TIME

Justin J. Wolosz declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a partner at the law firm Choate Hall & Stewart LLP, which is counsel for Labaton Sucharow LLP ("Labaton") in this matter. I make this declaration in support of Labaton Sucharow LLP's Motion for Extension of Time to File Motion to Strike.

2. Following entry of this Court's August 10, 2018 Order (ECF 445), my colleague Phoebe Fischer-Groban, at my direction, conferred with counsel for the Special Master regarding the 625 pages of documents that the Master added to the record on August 3, 2018. Labaton proposed redactions only with respect to a small amount of personal information contained in two documents, to which the Special Master agreed.

3. Separately, I and others at my firm began preparing a submission that would address Paragraph 5(c) of the Court's August 10 Order, and that would include a list of previously sealed documents that the parties now agree can be unsealed.

4. On Tuesday, August 14, 2018, Ms. Fischer-Groban sent other counsel a list of Labaton's prior filings that remain sealed, but that Labaton believes can now be unsealed. The email invited other counsel to advise of any other documents that they wished to include on the list.

5. On Thursday, August 16, 2018, at approximately 1:20 PM, counsel for the Special Master advised that the Special Master wished to add the cover memorandum to "The Special Master's First Submission of Documents to Supplement the Record" (filed under seal August 3, 2018) (the "Cover Memorandum") to the list of documents that can now be unsealed.

6. Labaton objects to the un-sealing of the Cover Memorandum. Labaton was previously in the process of preparing a motion to strike the Cover Memorandum, but that preparation was interrupted by the negotiation of a possible resolution between Labaton and the

Special Master. In light of the Special Master's position that he now wants the Cover Memorandum unsealed, Labaton intends to complete and file its motion to strike.

7. Labaton was unable in the hours since learning the Special Master's position to complete and file the motion to strike today. Accordingly, Labaton is requesting a brief extension until Tuesday August 21, 2018 to complete and file the motion to strike.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2018.

/s/ Justin J. Wolosz
JUSTIN J. WOLOSZ

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 16, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LABATON SUCHAROW LLP'S MOTION TO STRIKE THE COVER MEMORANDUM TO THE MASTER'S FIRST SUBMISSION OF DOCUMENTS TO SUPPLEMENT THE RECORD

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7.1, for the reasons set forth in the accompanying memorandum, which is incorporated herein by reference, Labaton

Sucharow LLP ("Labaton") respectfully moves to strike the cover memorandum to the Master's First Submission of Documents to Supplement the Record, filed under seal on August 3, 2018 (the "Cover Memorandum"). *See* Mot. to Seal, ECF 415.

WHEREFORE, Labaton respectfully requests that the Court strike the Cover Memorandum.

Dated: August 21, 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)
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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.

The Thornton Law Firm does not object to the relief requested in this motion. Lieff Cabraser Heimann & Bernstein LLP and State Street Bank and Trust Company take no position on the relief requested in this motion. McTigue Law LLP, Keller Rohrback L.L.P., and Zuckerman Spaeder oppose the relief requested in this motion.

The Special Master responded as follows: "While the Special Master does not wish to withdraw the Cover Memorandum, we do believe it is in the interest of the Special Master's supplementation of his Report and Recommendations to keep this pleading under seal until such time as all issues surrounding the Report and Recommendations are resolved or the Court directs otherwise."

/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 August 21, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF LABATON SUCHAROW LLP'S MOTION TO STRIKE THE COVER MEMORANDUM TO THE MASTER'S FIRST SUBMISSION OF DOCUMENTS TO SUPPLEMENT THE RECORD

Labaton Sucharow LLP ("Labaton") respectfully submits this memorandum in support of its motion to strike the cover memorandum filed by the Master with his First Submission of Documents to Supplement the Record ("Cover Memorandum"), filed under seal on August 3, 2018 (Motion to Seal at ECF 415). Labaton does not seek to strike the documents themselves, nor did Labaton object to the documents being released to the public record.

BACKGROUND

The Court's March 8, 2017 Order appointing the Master provides that the Master's "complete record of the evidence concerning his recommended findings of fact and any conclusions of law . . . shall be filed with the Master's Report and Recommendation." March 8, 2017 Order ¶ 11, ECF 173. On May 15, 2018, Customer Class Counsel,[1] filed a Motion for Clarification or Modification asking the Court to clarify that the Master should not file in Court the entire, extensive record compiled in discovery during his investigation, but, rather, that he should limit the documents filed in these proceedings to: (1) the exhibits to the Master's Report and Recommendations (the "Report"), (2) additional documents the Master may wish to add, (3) additional documents the parties wish to add, and (4) any other additional documents the Court wishes to add. Customer Class Counsels' Mot. for Clarification or Modification, ECF 222. In no way did the motion suggest that the Master would, in conjunction with expansion of the judicial record, be permitted to expand or modify his Report.

On May 31, 2018, the Court granted Customer Class Counsels' motion. The Court ordered that the Master should "preserve all documents and information developed in his investigation," but that he was to file only:

> (a) the exhibits to the Master's Report and Recommendation; (b) *any additional documents and information the Master wishes to add*; (c) any additional documents or information previously provided to the Master

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

> that any party wishes to add; and (d) any other documents that the court requests (the "Record"). The parties shall confer and, by June 6, 2018, propose a schedule and procedure for preparing and filing the record.

May 31, 2018 Order ¶ 12, ECF 237 ("May 31 Order") (emphasis added). The Court's May 31 Order did not authorize the Master to file an additional substantive memorandum supplementing his findings of fact and conclusions of law, which were already set forth in his lengthy Report, as to which all Objections have already been filed.

As they had been ordered to do, on June 6, 2018 the parties jointly filed All Parties' Response to May 31, 2018 Order (ECF No. 237) Regarding Additional Documents from the Record, ECF 259. This filing set forth a proposed protocol ("Protocol") for submitting additional documents and information from the record that had not been included as exhibits to the Master's Report. The Protocol does not suggest that the Master should be granted the authority to expand or modify his Report by belatedly filing supplemental findings of facts, conclusions of law, or argument.[2]

On July 6, 2018, the Master wrote to the Court and asked whether the Court wished the Master to "respond to the objections of Customer Class Counsel including the enlargement of the filed record and/or to specify relevant portions of the existing filed record." July 6 Letter to Hon. Mark L. Wolf, ECF 383. The Court issued its response on July 9, 2018, ordering the Master to file "any additional documents or information developed in his investigation." July 9, 2018 Order ¶ 3, ECF 385. The Court reserved judgment on whether the Master would be called upon to respond to the parties' objections. *Id.* at ¶ 4.

On August 3, 2018, the Master filed (under seal) 675 additional pages of documents produced in the proceedings before him. Without the Court's permission and with no notice to

[2] The Court adopted the Protocol in part in its August 10, 2018 Order, although it altered the procedure for the filing of documents identified by the Master. August 10, 2018 Order ¶¶ 4, 5(b), ECF 445.

the parties, the Master included a written memorandum, confusingly entitled, "Special Master's First Submission of Documents to Supplement the Record." *See* Mot. to Seal, ECF 415. This ten-page substantive memorandum, which Labaton refers to herein as the "Cover Memorandum," is not a document produced in discovery or a transcript of a deposition generated during the proceedings before the Master. Rather, the Cover Memorandum details additional factual matters and includes additional legal analysis attempting to buttress the Master's disputed findings of fact and conclusions of law in the Master's Report, including, for example, with regard to the dispute among experts concerning Prof. Gillers' analysis of the interplay between Rules 1.5(e) and 7.2(b) of the Massachusetts Rules of Professional Conduct.[3] The Master filed the Cover Memorandum after the parties had already filed their objections to the Master's Report, so this modified or expanded information was not addressed in their objections. *See* May 16, 2018 Memorandum and Order at 6 ¶ 4, ECF 223; June 28, 2018 Memorandum and Order at 34 ¶ 12, ECF 356.

After the Master filed the unauthorized Cover Memorandum, Labaton commenced preparation of this motion to strike. Wolosz Decl. ¶ 6, ECF 457. Labaton's preparation of this motion was interrupted when the parties and the Master began to negotiate regarding a possible resolution of this matter, as reported to the Court at the August 9, 2018 hearing. *Id.* On August 16, 2018, however, the Master, through his counsel, informed Labaton that he saw no reason not to un-seal the Cover Memorandum. *Id.* Labaton therefore now moves to strike the document, which should not have been filed in the first instance. The presence of the Cover Memorandum,

[3] Labaton will not be more specific here, as this memorandum is being filed publicly, and the Cover Memorandum remains under seal.

without response, will only serve to confuse the public record in a manner that is neither necessary nor appropriate.[4]

ARGUMENT

I. The Cover Memorandum Should Be Stricken Because its Filing Was Not Authorized by Rule 53 or by any Order of the Court.

Federal Rule of Civil Procedure 53(h)(1) provides that a master "shall prepare a report upon the matters submitted to him by the order of reference, and, if required by the order of reference to make findings of fact and conclusions of law, he shall set them forth in the report." Sequentially, Rule 53(h)(2) then allows the parties to serve written objections to the Report, which is precisely what happened here. Rule 53 anticipated no further amendment to the Report absent a resubmission, which had not occurred at the time that the Master filed his First Submission of Documents to Supplement the Record. Nor was there an order from the Court that authorized such an expanded Report. The process contemplated in the Court's March 8, 2017 Order, ECF 173, was complete. The Court's Orders of May 31, 2018 and July 9, 2018 addressed the filing of additional documents and information from the record but not a modified or expanded Report. *See* May 31 Order ¶ 12; July 9, 2018 Order ¶ 3, ECF 385. Neither these orders, nor any others from the Court, authorized the Master to use the submission of documents as a justification for submitting a modified or expanded Report containing new proposed findings of fact and conclusions of law.

Because the Master did not have authority to file the Cover Memorandum, and no mechanism was in place for Labaton to object to the recommended findings or conclusions contained therein, it can only serve to confuse the record and should therefore be stricken.[5]

[4] As noted above, Labaton's objection relates only to the Cover Memorandum. With the exception of limited personal information from two documents (to which the Master consented), Labaton has raised no objection to the filing of the 675 pages of additional documents themselves. *See* Special Master's Response to Court's August 10, 2018 Order at 4, ECF 454.

II. The Cover Memorandum Should Be Stricken to Avoid Confusion in Circumstances in which Labaton is Unable to Respond.

As noted above, the Master filed the Cover Memorandum after the deadline had passed for Labaton to file objections. The inability to file a direct and fulsome reply poses the substantial risk of prejudice to Labaton.

As previously noted, much of the Cover Memorandum expands upon the Master's opinion that the Chargois fee arrangement violated Mass. R. Prof. C. 1.5(e) such that Rule 7.2(b) would purportedly govern. This novel argument crafted by the Master's ethics expert, Professor Stephen Gillers, was and is hotly contested. *See* Report at 248-72; Labaton's Objections at 25-43, ECF 434. The Master was not authorized to attempt to "get the last word", and should not be permitted to use his authorized supplementation of documents and information from the record to engage in such an unauthorized effort.

To the extent that the Master wishes to address the Rule 1.5(e)/7.2(b) issue, and other issues, in a modified or expanded manner, he may do so in the context of the Court's recent resubmission of the Report to him. Labaton will presumably then have the opportunity to respond in an orderly fashion, following the sequencing specified in Rule 53. If such sequencing is not followed, and the Cover Memorandum is left unanswered in the public record, confusion will inevitably arise as the resubmission process proceeds and yet another version of the arguments is presented.

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[5] After the Cover Memorandum was filed, the Court ordered that this matter will be resubmitted to the Master to allow him an opportunity to respond to the parties' objections. August 10, 2018 Order at 2, ECF 445. But that order was not in place when the Master filed the Cover Memorandum, and in any event, the authorized response is expected to be a different document that has not yet been prepared. That is the document to which Labaton presumably can, and should respond.

CONCLUSION

For these reasons, the Court should strike the Master's Cover Memorandum, and restore order through the resubmission of a revised Report if the Master chooses to submit one. Any such submission will provide the opportunity for Labaton to respond as anticipated by the Federal Rules of Civil Procedure.

Dated: August 21, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 21, 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.	)	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 28, 2018

The court has considered the response to the August 10, 2018 Order (Docket No. 445) of the law firms representing the class in this case (the "Lawyers"), the Master, State Street Bank and Trust Company ("State Street"), the response to that Order of Competitive Enterprise Institute ("CEI"), as well as Labaton Sucharow LLP's ("Labaton") Motion to Strike the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record. The issues they present are resolved as follows.

A. Unsealing

The Lawyers, State Street, and the Master agree that certain documents relating to the Master's Report and Recommendation (the "Report"), objections to it, and exhibits made under seal should be unsealed with the exception of limited personal information in two documents. See Docket No. 455. In addition, without objection, the Thornton Law Firm ("Thornton") made limited redactions based on the work product doctrine to the versions of two exhibits it filed for the public record. See Docket No. 446 (referring to its Motion to Impound objection to the R&R, Docket No. 360). Lieff Cabraser Heimann & Bernstein, LLP ("Lieff") has moved to redact information in Exhibit A to its objections. See Docket No. 373. The foregoing are all documents which the court will consider in deciding issues in this case. There is, therefore, a presumption that the public has a right to see and copy them. See F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987);

Docket No. 356 at 4-6. However, it is appropriate to redact from them the limited personal information, confidential business information, and work product that they include. See United States v. Kravetz, 706 F.3d 47, 62 (1st Cir. 2013); Siedle v. Putnam Investments, Inc., 147 F.3d 7, 11 (1st Cir. 1998). Accordingly, the motions to seal the unredacted versions of the foregoing documents (Docket Nos. 455, 360, 373) are being allowed.

B. Labaton's Motion to Strike

Labaton has moved to strike the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record See Docket No. 458. The Cover Memorandum (Docket No. 423) was filed under seal on July 6, 2018, with 213 additional exhibits, totaling about 625 pages. Those exhibits are now part of the public record in this case. The Cover Memorandum includes excerpts of those exhibits, the Master's explanation of their relevance to the origins of the relationship between Labaton and Arkansas Teacher Retirement System, and to the Master's conclusion that Labaton's undisclosed payment of $4,100,000 to Damon Chargois, Esq. was not an ethically permissible "referral fee," but rather an impermissible "finder's fee." See Special Master's Report and Recommendation (Docket No. 224) at 251-54 (the "Report").

Labaton argues that the Master should not be allowed to supplement the Report in this manner. See Docket No. 459 at 5. Rather, it contends that the Master should be required to provide

the information in the Cover Memorandum in the response to the objections to the Report that he was, on August 10, 2018, authorized to submit. Id. at 7.

As Labaton argues, in authorizing the Master to file additional exhibits, the court did not order or invite him to identify particularly important excerpts or to explain their implications. However, the Cover Memorandum was filed on July 6, 2018. The court read it in preparation for the August 9, 2018 hearing and considered it, among many other things, in deciding (ultimately with the Lawyers' agreement) to resubmit the Report to the Master to respond to the objections to it. See Docket No. 445 ¶2. As indicated earlier, there is, therefore, a presumptive right of public access to the Cover Memorandum. See Standard Fin. Mgmt. Corp., 830 F.2d at 408; Docket No. 356 at 4-6. The factual information in the Cover Memorandum is in the referenced exhibits that are already part of the public record in this case. Moreover, the usual public interest in access to judicial records is enhanced by the fact that, as explained in the August 1, 2018 Memorandum and Order (Docket No. 412), the court has been informed that a committee of the Arkansas legislature is "extremely concerned about references [in the Report] to 'political favors' in Arkansas that brought about the relationship between ATRS, Labaton Sucharow

and the Chargois/Herron law firm," Docket Nos. 412, 412-1, and has asked to speak to the Master about this matter.[1]

In view of the foregoing, the court finds it most appropriate to deny Labaton's Motion to Strike the Cover Memorandum. It is, however, authorizing Labaton to file a reply to it now.

C. Scheduling

In response to the August 10, 2018 Order, the Lawyers, except for Thornton, agree that the Master and the Lawyers should be given an opportunity to discuss whether they can agree to a joint proposed resolution of their disputes before the Master responds to the objections to his Report. They propose to report on their discussions by September 6, 2018, and state that they may request additional time to continue them.

The court has a responsibility "to protect against unreasonable expense or delay" in these proceedings. Fed. R. Civ. P. 53(a)(3). Therefore, it is allowing this request. However, to reduce the risk that time and money may be wasted in negotiating terms that may prove unacceptable to the court, it makes the following observations.

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[1] The court has ordered that the Master not discuss or disclose documents or information developed in his investigation without authorization by the court, and has required that requests for such information be directed to the court. See Docket No. 412.

The Master was appointed to investigate issues in this case, and to provide his recommendations regarding the facts and applicable law. If discussion of the Lawyers' objections persuades the Master that any of his original findings and conclusions should be modified, the court will consider the proposed modifications. However, the court continues to expect to receive the Master's candid views on the facts and the law, as well as reasonable suggestions that would, if adopted, reduce the length and expense of proceedings in this matter.

The court is now a fiduciary for the class. See W.B. Rubenstein, 4 Newberg on Class Actions §13:40 (5th ed. 2018 Update); In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 192-94 (D. Mass. 2005); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002). In addition, it has a duty to protect and promote the integrity of the administration of justice.

Questions about the accuracy and honesty of representations that some of the Lawyers made, under oath, in initially persuading the court to award the Lawyers about $75,000,000 in attorneys' fees prompted the court to appoint the Master. See Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co., 232 F. Supp. 3d 189, 193 (D. Mass. 2017). The Master found that misstatements were made to the court and, at least with regard to Thornton, some of the misstatements were made knowingly. See Report (Docket No. 224) at 225-29, 364-67. The Master recommended that certain sanctions be

imposed. See id. at 362-74. Thornton, among others, disputes the Master's findings and objects to his recommended sanctions. See Docket No. 361.

Whether sanctionable conduct occurred is relevant both to the amount of attorneys' fees to be awarded and to the integrity of the judicial process. As the Ninth Circuit has written, "under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation," and whether any misconduct was willful is relevant to the magnitude of any sanction that should be imposed. Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012). In addition, sanctions, including a fine, might be justified and appropriate to punish and deter misconduct that could injure the administration of justice. See, e.g., Fleming & Assocs. v. Newby & Tittle, 529 F.3d 631, 638 (5th Cir. 2008); Martinez v. City of Chicago, 823 F.3d 1050, 1054 (7th Cir. 2016). Therefore, the court may feel compelled to resolve certain disputed issues that are relevant to possible sanctions even though doing so may involve additional time and expense.

The Lawyers and the Master should consider the foregoing observations as they discuss a possible joint proposed resolution of some or all of the disputed issues in this matter. They should not, however, regard them as the court's final view on any issue.

D. The Role of CEI

On August 10, 2018, the court authorized CEI to request leave to file additional amicus briefs, which to date the court has found helpful. See Docket No. 445 ¶3. The court took under advisement CEI's request to serve as Guardian Ad Litem for the class. See id. CEI has subsequently submitted additional information and argument concerning its requests. See Docket No. 451. As the Lawyers and the Master are discussing a possible proposal to resolve or narrow their disputes, the nature and scope of future litigation in this matter is uncertain. Therefore, the court will continue to take CEI's request to serve as Guardian Ad Litem under advisement.

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

1. The documents listed in the Report Pursuant to Paragraph 5(c) of the Court's August 10, 2018 Order (Docket No. 455), which are numbered 1 through 12, are UNSEALED.

2. Lieff's Motion to Impound One Exhibit (Docket No. 373) is ALLOWED.

3. Thornton's Motion to Impound (Docket No. 360) as modified by Thornton's Notice of Filing Objections (Docket No. 446) is ALLOWED.

4. Labaton's Motion for Extension of Time to File Motion to Strike (Docket No. 456) is ALLOWED. Labaton's Motion to Strike Cover Memorandum (Docket No. 458) is DENIED. Labaton may, by September 7, 2018, file a response to the Cover Memorandum.

5. The Master and the Lawyers shall confer and, by September 6, 2018, report, jointly if possible but separately if necessary, on whether they have agreed to a proposal to resolve some or all of the issues in dispute in this matter, or request additional time to do so. After reviewing this submission, the court will, if necessary, establish a schedule for the Master to respond to the objections to the Report and for the Lawyers to submit replies.

6. CEI's Motion for Leave to Participate as Guardian Ad Litem for the Class (Docket No. 126) shall remain under advisement.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. August 28, 2018

The court has received, but not yet reviewed, the bills for the fees and expenses of the Master and the organizations and individuals he has retained for June and July 2018. They total more than the remaining amount of the $3,800,000 previously provided from class funds to the Clerk of the United States District Court for the District of Massachusetts to pay such bills.[1] Therefore, the court is considering amending its prior orders to require that Labaton Sucharow, LLP ("Labaton") pay from

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[1] On August 10, 2018, the court ordered that "[t]he Master and the individuals and organizations he employs shall continue to be compensated in the manner provided in the March 7, 2017 Order (Docket No. 173) ¶¶13, 14, as amended on May 25, 2017, see Docket No. 206)." Docket No. 445, ¶2. As the court explained in note 1 of that Order:

> On June 22, 2018, the court issued an order granting Labaton Sucharow LLP's Motion for Relief from Order Awarding Fees, Expenses, and Service Awards (Docket No. 178). See Docket No. 331. That Order vacated the Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket No. 111). See Fed. R. Civ. P. 60(b), 1946 Advisory Committee Note ("Rule 60(b) [which provides for "Relief from a Judgment or Order"] does not assume to define the substantive law as to the grounds for vacating judgments . . . .") (emphasis added). The court has not vacated the Order and Final Judgment approving the $300,000,000 settlement of this case (Docket No. 110). However, as the court has vacated the award of $75,000,000 for attorneys [fees], expenses, and service awards, it deems those funds to now constitute class funds.

fees it previously received an additional $750,000 to the Clerk to provide a fund for payment of past and possible future fees and expenses. See Fed. R. Civ. P. 53(b)(4); Mar. 8, 2017 Mem. & Order (Docket No. 173) ¶16

Therefore, it is hereby ORDERED that:

1. Any objection to the issuance of such an order, and the reasons for it, shall be filed by September 7, 2018.

2. If one or more objections are filed, the Master shall respond by September 17, 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 Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant	No. 11-cv-10230 MLW

MOTION TO WITHDRAW APPEARANCE OF STUART M. GLASS

Pursuant to Local Rule 83.5.2(c), the undersigned counsel respectfully moves the Court to withdraw his appearance as counsel for Labaton Sucharow in the above-captioned action because his departure from Choate, Hall & Stewart, LLP will take effect shortly. Labaton Sucharow will continue to be represented by Joan A. Lukey and Justin J. Wolosz of Choate, Hall & Stewart, LLP.

All counsel have consented to this Motion.

Respectfully submitted,

/s/ Stuart M. Glass

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Attorney for Labaton Sucharow LLP

Dated: September 5, 2018

LOCAL RULE 7.1(a)(2) CERTIFICATION

I hereby certify that all counsel have consented to the relief sought by this motion.

/s/ *Stuart M. Glass*
Stuart M. Glass

CERTIFICATION OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 5, 2018.

/s/ *Stuart M. Glass*
Stuart M. Glass

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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,

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.
_____/

JOINT RESPONSE TO COURT'S AUGUST 28, 2018 ORDER

On August 16, 2018, in response to the Court's August 10, 2018 Order [Dkt. # 445], the Special Master proposed a timeline for proceeding in the post-Report stages of the investigation. Specifically, the Master recommended that the parties continue discussing a joint resolution of outstanding issues, for the Court's consideration, through September 6, 2018, at which time the Master would advise the Court whether (i) additional time is necessary to reach a global resolution; or (ii) given the circumstances, it is unlikely that the parties will reach a global proposal, making it appropriate to begin preparing responses to the Law Firms' various objections. On August 28, 2018, the Court ordered the Master and the Lawyers to confer and by September 6, 2018, report, jointly if possible, on the status of those discussions, including any requests for additional time, to reach a proposal to resolve some or all of the issues in dispute in the matter. Dkt. # 460. The Special Master has conferred with counsel and provides the following update to the Court[1]:

Given the Court's guidance, the Special Master and the Lawyers have engaged in good faith discussions to reach a global proposal to resolve the issues remaining in the Master's investigation. Those discussions are ongoing. In an effort to expedite discussions, the Master has invited all the Lawyers to attend a global, in-person meeting on September 11, 2018, in Boston, to continue discussions and pursue a final resolution, if possible. Both Customer Class Counsel (Labaton, Lieff Cabraser, and Thornton Law Firm) and ERISA counsel (Keller Rohrback, McTigue Law, and Zuckerman Spaeder) have accepted the invitation to attend the meeting with the Special Master and his counsel.

[1] The Special Master conferred with all counsel concerning the substance of this pleading. Labaton and Keller Rohrback have joined in the Joint Proposal. Thornton Law Firm responds separately stating its position on the status of the investigation. At the time of filing, the Master had not yet received approval from other counsel.

Given the complexity of the legal and factual issues up for discussion, the Special Master, along with certain of the Lawyers[2], respectfully request that the Court provide the parties an additional twelve (12) days (one week from the upcoming September 11, 2018 meeting), or until September 18, 2018, to finalize an agreed-to proposal for resolution, should it be possible to do so, and present it to the Court for consideration. If the parties are unable to reach a proposal by September 18, 2018, the Special Master will proceed, at the Court's direction, in responding to the Law Firms' objections in accordance with a schedule set by the Court at a future time.

Moreover, the Special Master notes that any further filing of substantive pleadings may prove counterproductive to resolution discussions -- during which the parties have been collaborating and working together to resolve outstanding issues. Because efforts have been made toward reaching a proposed resolution with certain of the Law Firms, any submission or response to any pending motion at this stage would greatly distract the parties from the shared goal of resolution and likely impede the resolution process. The Special Master[3], therefore, respectfully request that the Court stay the filing of any substantive pleadings and motion papers until the period for reaching a proposed resolution has run on September 18, 2018.

[2] *See* note 1, *supra.*

[3] Labaton and Keller Rohrback join in this request.

Dated: September 6, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

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

I hereby certify that this foregoing document was filed electronically on September 6, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF"). Paper copies were sent to any person identified in the NEF as a non-registered participant.

/s/ *William F. Sinnott*
William F. Sinnott

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM LLP'S
RESPONSE TO AUGUST 28, 2018 COURT ORDER

Pursuant to the Court's August 28, 2018 Order, the Thornton Law Firm advises the Court that there is no agreed upon proposed resolution of this matter but that it does not object to additional time for the law firms and the Special Master to discuss the issues further at the Special Master's meeting on September 11.

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: September 6, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on September 6, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Joshua C. Sharp

Joshua C. Sharp

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. September 7, 2018

In their Joint Response to the Court's August 28, 2018 Order (Docket No. 460) the Master and the Lawyers request an extension to September 18, 2018 to attempt to agree on a proposed resolution

of some or all of the disputed issues in this case. They also request a stay of the deadlines for substantive submissions until they submit their September 18, 2018 report on their discussions. It appears that the only outstanding deadlines for submissions are: (1) the September 7, 2018 deadline for Labaton Sucharow, LLP ("Labaton") to file any response to the Master's "Cover Memorandum," see Docket No. 460; (b) the September 7, 2018 deadline for Labaton to object to being ordered to pay an additional $750,000 to the Clerk to provide a fund for payment of the expenses of the Master; and (c) the September 17, 2018 deadline for the Master to respond to any objections concerning the proposed additional payment, see Docket No. 461.

The court finds the foregoing requests reasonable and they are hereby ALLOWED. Any party requesting a stay from complying with any other Order(s) or deadlines shall file a motion identifying with specificity the relief being sought.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S REQUEST FOR CLARIFICATION AND OBJECTION TO THE PROPOSED ISSUANCE OF AN ORDER CONCERNING ADDITIONAL PAYMENT TO THE SPECIAL MASTER

In its Order dated August 28, 2018 (ECF No. 461), the Court proposed the issuance of an Order "***amending its prior orders*** to require that Labaton Sucharow, LLP ('Labaton') ***pay from fees it previously received*** an additional $750,000 to the Clerk to provide a fund for payment of past and possible future fees and expenses" of the Special Master. (Emphases added). The Court requested that the parties file any objections to such a proposed order by September 7, 2018, a deadline that was then extended to September 18, 2017 (ECF No. 465). Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") now responds to the Court's August 28 Order as follows:

As an initial matter, Lieff Cabraser requests clarification as to whether the Court presently is considering directing Labaton to fund the entire $750,000 payment ***itself***, out of the "fees it previously received" in this matter, without further contribution from Lieff Cabraser. Lieff Cabraser understands this to be the Court's intention based on the plain text of the Order—first, because the Order (unlike prior orders) states that the proposed additional funds are to be paid from fees that Labaton had "previously received," and second, because the Court states that it is considering "amending its prior orders" concerning payment to the Special Master, each of which (unlike the current order under consideration) specifically provided that payment was to be made out of the fees and expenses "previously distributed to" all three of the main customer class law firms.[1]

In any event, to the extent the Court intended Lieff Cabraser to share in the obligation to pay an additional $750,000 for the benefit of the Special Master, Lieff Cabraser objects to the proposed additional payment as excessive in itself, and to the Special Master's fees and expenses

[1] The Court's prior orders concerning payment of the Special Master's fees and expenses each specifically referred to ¶ 13 of the Court's March 8, 2017 Order (ECF No. 173), which, unlike the amendment now proposed by the August 28 Order, provided that "payment shall be made . . . ***from the award of attorneys' fees and expenses distributed to Labaton Sucharow, LLP, the Thornton Law Firm LLP, and Lieff, Cabrasser [sic], Heimann & Bernstein LLP***.") (emphasis added). *See* Orders dated October 24, 2017 (at 3) and April 23, 2018 (at 4) (ECF Nos. 208 and 217). The August 28 Order, unlike the Court's prior orders concerning payments to the Special Master, does not cite ¶ 13 of the Court's March 8, 2017 Order.

as excessive in their totality, and asserts that any additional payments to the Special Master should be deferred until a full and final accounting can be done, which the Court has indicated may come only at the conclusion of the de novo review of the Special Master's Report. Hearing Tr., August 9, 2018, at 53. Further, at this time Lieff Cabraser has no knowledge what (if anything) any proposed resolution between Labaton and the Special Master provides for by way of the additional $750,000 expenses contemplated by the August 28 Order. Accordingly, at a minimum, any order regarding additional payments should be deferred until the terms of any such proposed resolution are disclosed to the Court and to Lieff Cabraser.

Dated: September 18, 2018 Respectfully submitted,

By: */s/ Richard M. Heimann*

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Counsel for Lieff Cabraser Heimann & Bernstein, LLP

CERTIFICATE OF SERVICE

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

September 18, 2018 */s/ Richard M. Heimann*
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM LLP'S
RESPONSE TO PROPOSED ORDER
REGARDING ADDITIONAL FUNDS FOR SPECIAL MASTER

Pursuant to the Court's August 28, 2018 Order (ECF 461), the Thornton Law Firm ("TLF") hereby responds to the Court regarding the proposal to amend the Court's prior orders to require Labaton Sucharow LLP ("Labaton") to pay an additional $750,000 to the Clerk for past and future fees and expenses of the Special Master. Since it appears from the plain text of the Court's Order that the proposed amendment applies only to Labaton, TLF takes no position on the proposed amendment.

To the extent the proposed amendment applies to all Customer Class counsel, TLF acknowledges that the Special Master must be paid for his work so long as the Court ensures that

his costs and fees are reasonable. TLF objects to any further sua sponte filings by the Special Master which increase the costs of this matter unnecessarily. Accordingly, to the extent all Customer Class counsel is required to pay the additional $750,000, the Court should ensure that the Special Master works within a reasonable budget and that the Special Master refrains from filing or drafting documents that the Court does not request.

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: September 18, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on September 18, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Joshua C. Sharp

Joshua C. Sharp

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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 RESPONSE TO COURT'S SEPTEMBER 7, 2018 ORDER

On September 7, 2018, the Court allowed the Special Master's and the Law Firms' request for additional time, or until September 18, 2018, to report to the Court on the status of the parties' discussions for a proposed resolution of some or all of the disputed issues in the case. Dkt. # 465. The Court further stayed the deadlines for all substantive submissions until that date.

After more than six weeks of meaningful discussions, the Special Master reports that he has reached a tentative agreement with Labaton and ERISA counsel for the Court's consideration resolving all of the disputed issues as to those firms. The Special Master, therefore, requests that any substantive submissions to the Court involving Labaton or ERISA counsel, currently outstanding, be further held in abeyance until a date set by the Court to take place after the parties have memorialized their agreement for a proposed resolution and submitted it to the Court for its consideration, no more than fourteen (14) days from today, or October 2, 2018.[1]

With respect to the remaining firms, the Special Master was unable to reach an agreement consistent with how the Special Master views his responsibilities to the Court under the Court's March 8, 2017 Order and his Report and Recommendations. The Master will file appropriate responses to Lieff Cabraser's and Thornton's objections according to the time table set by the Court.

[1] On August 28, 2018, the Court informed the parties it was considering amending its prior orders to require Labaton to pay an additional $750,000 to the Clerk for payment of past and possible future fees and expenses for the Special Master's investigation. Dkt. # 461. The Court ordered any objection to such an order be filed by September 7, 2018. *Id*. On September 7, 2018, the Court allowed the Special Master's request to stay all outstanding deadlines for substantive submissions to the Court until a future date. Dkt. # 465. Because certain of the Law Firms—in addition to Labaton—may object to the Court's issuing an order for additional payment by Labaton, the Special Master respectfully requests that the deadline for filing any objection to the Court issuing the order described in its September 7, 2018 notice to the parties be stayed *as to all firms* until a date set by the Court, and at no time before the Court receives the memorialized terms of the proposed resolution among Labaton, ERISA counsel, and the Special Master. The Special Master will thereafter respond to any objections filed according to this time table.

Dated: September 18, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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CERTIFICATE OF SERVICE

I hereby certify that this foregoing document was filed electronically on September 18, 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

BARRETT & SINGAL

September 20, 2018

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

Re: *Special Master's Request to Respond to Thornton Law Firm's and Lieff Cabraser's Objection to Court's Proposed Order*

Dear Judge Wolf:

As the Court directed in its August 10, 2018 Order, the Special Master requests permission from the Court to briefly respond to recent filings made by Lieff Cabraser and Thornton Law Firm responding to, and objecting to, the Court's proposal to amend its prior orders to require Labaton Sucharow to pay an additional $750,000 to the Clerk from fees previously received. Dkt. #445, p. 2; Dkt. # 461.

Respectfully submitted,

William F. Sinnott
Counsel to the Special Master

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CERTIFICATE OF SERVICE

I hereby certify that this foregoing document was filed electronically on September 20, 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. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 11-10230-MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN,WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 11-12049-MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 12-11698-MLW

ORDER

WOLF, D.J. September 21, 2018

The court has reviewed the September 18, 2018 responses of the Master (Docket No. 468) and the Lawyers (Docket Nos. 466 and 467) to the August 28, 2018 Order (Docket No. 461) and to the September 7, 2018 Order (Docket No. 465), as well as the Master's September 20, 2018 letter (Docket No. 469).

Lieff Cabraser Heimann & Bernstein ("Lieff") and Thornton Law Firm ("Thornton") note that in the August 28, 2018 Order the court gave notice that it is "considering amending its prior orders to require that Labaton Sucharow, LLP ('Labaton') pay from fees it previously received an additional $750,000 to the Clerk to provide a fund for payment of past and possible future fees and expenses" of the Master. Docket No. 461 at 2-3. They point out that the court's prior Orders concerning the Master's fees and expenses each referred to paragraph 13 of the March 8, 2017 Order (Docket No. 173), which provided that "payment shall be made . . . from the award of attorneys fees and expenses distributed to [Labaton], [Thornton], and [Lieff]." See Docket Nos. 208 at 3 and 217 at 4.

The court now clarifies that it did not intend that the different language in the August 28, 2018 Order be interpreted differently from the pertinent provisions of its earlier Orders. The court has understood that Labaton was making the required payments on behalf of Lieff, Thornton, and Labaton, and that the three firms would allocate the cost among themselves. See, e.g., Mar. 7, 2017 Tr. at 51. The court understands that Lieff and

Thornton now object to sharing with Labaton responsibility for the proposed additional $750,000 payment. The court is giving them an opportunity to amplify the reasons for their objections after the terms of the Master's proposal concerning a possible agreed resolution of issues relating to Labaton is disclosed.

Thornton also requests that the Master be ordered to "refrain[] from filing or drafting documents that the Court does not request." Docket No. 467 at 2. However, the August 10, 2018 Order authorizes the Master to "address any issues related to [his Report and Recommendation] if requested by the court or authorized by the court in response to a request by the Master." Docket No. 445 (emphasis added). To the extent that Thornton is requesting a revision of this Order, the request is not meritorious.

The Master requests authorization to respond to the Lieff and Thornton objections to possibly sharing responsibility for the proposed payment of an additional $750,000 to fund the work of the Master. See Docket No. 469. The Master is being authorized to do so.

The Master requests until October 2, 2018 file his proposed resolution of disputes relating to Labaton and to counsel for the ERISA class. See Docket No. 468. That request is being allowed.

The Master also requests that any substantive motions involving Labaton and the ERISA class be deferred until after October 2, 2018. Id. at 2. The court understands that the only

such submissions are the three identified in the September 7, 2018 Order as to which an indefinite stay was granted. See Docket No. 465. No party has, as then ordered, id., moved for a stay from complying with any other Order(s) or deadlines. Id. Again, any party seeking further relief is ordered to file forthwith a motion identifying with specificity the relief being sought.

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

1. By October 2, 2018:

(a) The Master, Labaton, and counsel for the ERISA class shall file, for the public record, their agreement for a proposed resolution concerning matters relating to Labaton and/or to counsel for the ERISA class. If they believe there is a valid basis to seal limited information included in the submission(s), they shall file a motion to seal, see L.R. 7.2, and a redacted version of the submission(s) for the public record.

(b) The Master may respond to the objection of Lieff and Thornton to possibly sharing responsibility with Labaton for the proposed additional $750,000 payment to fund the Master's work.

2. Lieff and Thornton shall, by October 9, 2018, submit any additional information or argument in support of their objections to possibly sharing responsibility for the proposed payment.

3. A hearing to address pending issues and to schedule future events shall be held on October 15, 2018, at 2:00 p.m.

Lawrence Sucharow, Esq., of Labaton and George Hopkins, Executive Director of Arkansas Teachers Retirement System, shall attend.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. September 25, 2018

On August 6, 2018 the Master filed, under seal, his First Submission of Documents to Supplement the Record (the "Cover Memorandum") and 213 exhibits in addition to those referenced in his Report and Recommendation. See Docket No. 423. On August 16, 2018, Labaton Sucharow LLP ("Labaton") informed the Court that it did not object to unsealing those exhibits, with minor redactions. See Docket No. 455. However, Labaton did object to the filing of the Cover Memorandum, and stated that it would "proceed with the preparation and filing of [a] motion to strike [the Cover Memorandum], and therefore objects to unsealing the Cover Memorandum until the Court has decided the forthcoming motion to strike." Id. at 3. The Master filed the slightly redacted 213 exhibits on August 16, 2018. See Docket No. 454. On August 21, 2018, Labaton filed its Motion to Strike the Cover Memorandum. See Docket No. 458.

In an August 28, 2018 Memorandum and Order, the court denied Labaton's Motion to Strike the Cover Memorandum. See Docket No. 460. In doing so, the court noted that:

> The Cover Memorandum (Docket No. 423) was filed under seal on [August] 6, 2018, with 213 additional exhibits, totaling about 625 pages. Those exhibits are now part of the public record in this case. The Cover Memorandum includes excerpts of those exhibits, the Master's explanation of their relevance to the origins of the relationship between Labaton and Arkansas Teacher Retirement System, and to the Master's conclusion that Labaton's undisclosed payment of $4,100,000 to Damon Chargois, Esq. was not an ethically permissible "referral fee," but rather an impermissible "finder's

> fee." See Special Master's Report and Recommendation (Docket No. 224) at 251-54 (the "Report").

Id. at 3. In denying the motion to strike the court explained:

> [T]here is [] a presumptive right of public access to the Cover Memorandum. See [F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987)]; Docket No. 356 at 4-6. The factual information in the Cover Memorandum is in the referenced exhibits that are already part of the public record in this case. Moreover, the usual public interest in access to judicial records is enhanced by the fact that, as explained in the August 1, 2018 Memorandum and Order (Docket No. 412), the court has been informed that a committee of the Arkansas legislature is "extremely concerned about references [in the Report] to 'political favors' in Arkansas that brought about the relationship between ATRS, Labaton Sucharow and the Chargois/Herron law firm," Docket Nos. 412, 412-1, and has asked to speak to the Master about this matter.
>
> In view of the foregoing, the court finds it most appropriate to deny Labaton's Motion to Strike the Cover Memorandum. It is, however, authorizing Labaton to file a reply to it now.

Id. at 4-5 (footnote omitted).

Although the court intended that the Cover Memorandum be part of the public record, its order denying the motion to strike did not expressly direct that it be unsealed. See id. at ¶4. The court now realizes that the Cover Memorandum has erroneously remained sealed.

In view of the foregoing, it is hereby ORDERED that the attached Cover Memorandum, Docket No. 423 (under seal), is UNSEALED and made part of the public record.

UNITED STATES DISTRICT JUDGE

EXHIBIT A

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 FIRST SUBMISSION OF DOCUMENTS TO SUPPLEMENT THE RECORD

Pursuant to paragraph 12(b) of the Court's May 31, 2018 Order (Dkt. #237), the Special Master hereby files, under seal to permit appropriate redactions after conferral among the parties, an initial set of additional documents and transcript excerpts to further support and supplement the exhibits to the Special Master's Report and Recommendation and assist the Court's *de novo* review. *See* Fed. R. Civ. P. 53(f). This submission represents the first of two submissions that, collectively, present such additional documents and information that, while not cited in his Report or exhibits, are critical to the Court's understanding of the record upon which the Special Master's findings of facts are based, as well as certain legal issues raised by the parties post-filing.

The Special Master's first supplemental submission contains documents critical to understanding the origins of the relationship between Labaton Sucharow and Damon Chargois, and how the relationship – mischaracterized by Labaton as a "referral" relationship – operated prior to the State Street case. Collectively, these documents provided background for the Special Master's Report, informed his judgment that the $4.1M fee paid to Chargois was not a referral fee – and, in any event, was unknown to the client at the time of origin – and informed his analysis of the serious ethical violations and transgressions that arose from this arrangement and payment. The Special Master concluded that Labaton's conduct constituted a violation of Mass. R. Prof. C. Rule 7.2(b) (Report and Recommendations, pp. 263-273; 334-337) – intended to prevent lawyers from acting as touts in soliciting business from clients – and specifically found that Labaton's noncompliance with Mass. R. Prof. C. Rule 1.5(e), in failing to sufficiently inform its client of the payment obligation, directly implicated Rule 7.2(b). In so finding, the Special Master carefully observed that the nature of the Chargois relationship fit squarely within Rule 7.2(b)'s proscriptions because Chargois, at Labaton's request, routinely sought and secured

clients for Labaton. The information provided to the Special Master reinforced his finding that the Chargois Arrangement could not even arguably constitute a traditional referral relationship – one in which a client in need of specific legal services is connected to an appropriately qualified attorney – under which the Massachusetts Rules of Professional Conduct permit bare referral fees.[1]

In his efforts to secure various clients for Labaton, Chargois relied on personal, business, and political connections – both his own, and those of his associates. While the Report describes the efforts made by the Chargois & Herron firm, on behalf of Labaton, to introduce Labaton to potential institutional investor clients in Arkansas, the Report did not discuss various other details pertinent to the central finding that the payment to Chargois was not a referral fee. *See* Report and Recommendations, pp. 89-92.[2]

The documents submitted in this first submission (categorized and explained further below) further support the Special Master's informed conclusions about the "unique and troubling nature" (Report and Recommendations, p. 262) of the Chargois Arrangement, a pre-existing obligation to pay Chargois that resulted in a payment from class funds in the State Street case, including that: (1) the Arrangement predated Labaton's 2008 communications with ATRS on which Labaton relied in arguing that it sufficiently notified its client (ATRS) of the obligation to pay Chargois (Rule 1.5(e)); (2) ATRS did not seek a referral recommendation from Chargois –

[1] Although the Special Master found violations of Mass. R. Prof. C. Rule 7.2(b), he refrained from recommending professional discipline for prudential reasons (Report and Recommendation, pp. 337-338).

[2] The Report details that Arkansas State Senator Steve Faris, who was a personal friend of Damon Chargois' law partner Tim Herron, recommended in 2007 that Chargois & Herron attempt to contact then Executive Director of ATRS, Paul Doane. *Id.* At Senator Faris' suggestion, Chargois successfully facilitated a meeting between Mr. Doane and Labaton, during which Labaton presented its capabilities in serving institutional investors and monitoring portfolios. *Id.* This introduction precipitated Labaton's portfolio monitoring relationship with ATRS. Labaton's eventual representation of ATRS in the State Street matter implicated its financial obligation under the Chargois Arrangement discussed throughout the Special Master's Report.

rather, Chargois was functioning in a business development capacity, proactively pursuing Labaton's relationship with ATRS as an economic opportunity for his own firm; and (3) Labaton's similar arrangement with Chargois that he would actively pursue other potential clients shows Labaton's intent of entering into financial arrangements similar to the one that resulted in the $4.1M payment.

I. Labaton's Efforts to Influence the Arkansas Procurement Process In Order to Secure Its Relationship with ATRS Further Illustrate That the Chargois Payment Was Not a "Referral Fee"

In his investigation, the Special Master examined and considered substantial evidence that Senator Faris and other local officials, to whom Labaton was introduced by Chargois & Herron, played a significant role behind the scenes in securing ATRS as a fund monitoring client for Labaton. These efforts were made outside the ordinary RFP process and show that the payments made to Chargois for his role in opening the door to ATRS' retention of Labaton were not referral fees. Of course, successful representation of ATRS later triggered Labaton's financial obligation underlying the $4.1M fee paid to Damon Chargois in the State Street case, the agreement to which was in place from the very beginning of Chargois' efforts to facilitate the Labaton/ATRS relationship. *See* Section II-III, *infra*.

The following correspondence underscores the efforts of Labaton and its proxies to gain advantage, outside of the state procurement process, in order to secure ATRS as a client:

LBS017432-34: August 2007 correspondence between Belfi and Chargois. Chargois: "Senator Farris [sic] is on for meeting in our Little Rock office at 11:00am on Wednesday... The senator is prepped to have a private meeting with us so that there are no distractions. He is prepared to hear you out and take the necessary steps after you do your thing. There will most likely have to be a subsequent meeting with Senator Farris [sic] and the Governor or Attorney General after you have impressed the senator with your firm's credentials."

LBS017437-38: August 2007 correspondence between Chargois, Belfi and Herron. Chargois: "You guys did well. Tim and I both feel very optimistic about Labaton firm's doing a lot of good things in Arkansas. This is thanks to you and Chris representing the firm very well..."

LBS017442-43: September 2007 correspondence between Chargois and Belfi. Chargois: "The good senator is finalizing with Paul Doan [sic] on Friday. Everybody wants something sometimes. Specifically, the Labaton firm will represent the pension fund. Please be discreet and act surprised when it happens."

LBS031471-72: October 2007 correspondence from Belfi to Tetefsky, Keller, and Sucharow regarding update on trips to different states. Belfi: "Damon is really moving all of the fronts... On Arkansas, the Senator is going to come visit us at the end of the month or early November – Tim and possibly Damon will come up as well up."

LBS017444-46: October 2007 correspondence between Belfi, Sucharow, Tetefsky. Providing a summary of a business trip, Belfi describes meetings and efforts to secure fund clients in Arkansas, Oklahoma, Texas, Alabama, Tennessee, and Mississippi.
Sucharow: "Eric, GREAT job. Don't know how you keep the [redacted] straight from the [redacted]. Need to discuss [redacted] project request. Way too rich a request, but can't judge without seeing a list of what you think he can realistically accomplish (deliver) and what size those funds really are (and in US equities)...Keep up great work..."

LBS040523-A: October 2007 correspondence from Paul Doane to Eric Belfi, copying ATRS contacts.
Doane: "Eric, I did appreciate the chance to visit with your firm in New York last week. However, I don't want to convey any false expectations. I do plan on discussing with the investment or policies committee at its November 14th meeting the possibility of developing a stated policy regarding our fiduciary role in pursuing appropriate legal action to recover trust assets where justified and to consider the merits in having more than one firm engaged to monitor potential actions/ But all this is an involved process and will involve further review and probably a formal RFP process which will likely be several months down the line. Also, our contract renewal with [redacted] is up next Spring so it may make sense to wrap all of these steps into one process rather than multiple. I am very interested in your firm and will remain in touch as we progress but the Board has an awful lot on its plate with several other items in the immediate hopper. I have been pushing them quite hard on a series of fronts. Just didn't want you to misinterpret my comments to Chris that something (decision) was imminent. Regards, pd."
[Belfi forwarded message to Chargois, Herron];
Chargois: "Tim, I wonder what the senator can find out.";
Belfi: "The email was a little inconsistent with the conversation he had with Chris which Paul seems to admit so any information the Senator can find out would be great.";
Herron: "i spoke to the senator today and he said that Paul Doane enjoyed the meeting and he was confident that they would create a business opportunity for the firm. As a public employee and with the new relationship he has with a number of people in arkansas he is going to be extremely careful in any public statements to avoid any difficulty. Be patient. The senator is cautious and doesn't want any impropriety to [be] imputed and wants this thing to proceed below the radar. He talked about the trip to ny and is looking forward to it. I would not worry. I didn't find Doane's email the slightest bit discouraging. These are careful guys."

LBS017448-48: November 2007 correspondence from Belfi to C. D'Amota and S. King regarding Caribbean meeting. Belfi: "We are working on dates for our meeting down south (we are working on the

location)... Also, Damon Chargois (the Texas lawyer) is in town next Thursday evening (Nebraska's night) and we will be going out with him and a State Senator from Arkansas that we work very closely with if you are able to join us..."

LBS017450: December 2007 correspondence from Herron to Belfi and Chargois regarding "New funds." Herron: "The senator just called me. He has the [redacted] pension funds lined up in arkansas...He plans to get you guys the top five plans in Arkansas. He said he will use me a point person because it is easier for him. He said doane will be totally on board shortly. He and I are planning a trip to north carolina after the first of the year to work on that state for you guys"

LBS017451-52: April 2008 email correspondence between Belfi and Herron regarding Arkansas Teachers RFP. Herron: "The senator called me last week and said it was coming up and our friend has mentioned it to him several times. It is a done deal he says"

LBS017453-54: April 2008 follow-up correspondence between Belfi and Herron regarding Arkansas Teachers RFP. Herron: "Called senator he will call me back. He assured me that this was a sure thing but would check on the dates for the RFP"[3]

II. Nature of the Chargois Arrangement

Email correspondence between Damon Chargois, Eric Belfi, and Chris Keller in 2009 reveals an attempt to formalize, in writing, the terms of the Chargois Arrangement, further illustrating that the Arrangement was not a "referral" relationship but rather a negotiated agreement applying to attorney fees awarded to Labaton in *any* litigation brought on behalf of clients obtained by Labaton through introductions by Chargois and Herron. Unlike a traditional referral, Chargois negotiated for fees paid after he contacted clients about possible representation by Labaton, not the other way around:

LBS017479-81: February 2009 email correspondence between Chargois, Belfi and Keller. Chargois: "...I don't know how formal you guys want to be with this, but you have probably noticed that I am pretty

[3] These emails, of course, implicate other issues, beyond the "referral fee" question, that have arisen in the post-filing phase of this matter, including: (1) the Court's inquiries regarding the origins of the Labaton/ATRS relationship and the resulting motion to recuse the Court for bias, the Mandamus Petition, and the accuracy of the associated representations made to the Court, and the Court of Appeals, regarding the state of the record relating to the origins of that relationship; (2) the current oversight hearings being conducted by the Arkansas State Legislature on this subject; (3) the need for a continued role by the Special Master to defend attacks upon the Report and Recommendations; (4) the accuracy and reliability of Professor Gillers' opinions regarding violations of Mass. R. Prof. C. Rule 1.5(e) and 7.2(b); and (5) that Larry Sucharow was involved in, and had knowledge of, the Chargois Arrangement from the very beginning.

informal and rely more on our mutual trust and respect for each other to carry the day. That said, I think it's important for us to lay out our understanding of our agreement with respect to the gathering of pension fund business. We have agreed that Chargois & Herron, LLP, shall receive 20% of the gross attorney fees recovered by Labaton Sucharow on any litigation or claims process brought on behalf of the Arkansas Teachers' Retirement Pension Fund. We have also agreed to the same payment terms shall apply to any other pension fund or retirement fund representation that Labaton Sucharow obtains via contacts through Chargois & Herron, LLP. This includes introductions to funds in Atlanta, Richmond and Georgia via Frank Stout, in addition to Chargois & Herron, LLP (CMH), and CMH's contacts. Eric, much earlier you and I had agreed that CMH would receive 10% of gross attorney fees received by Labaton for any pension fund business that came by way of contacts through Bailey, Bailey & Perrin...";
Chargois "Guys, do I need to draft letter agreement? I don't mind bc I want to get this off of my todo list. Eric, to address Chris's concern about judges slashing fees, we can add a provision that says CMH's interest falls to 10% if the judge awards a gross attorney fee below 15%. Let me know, boys.";
Keller: "Damon, sorry for the delay. I'm buried. We are fine with the terms you propose. One point of clarification, the 20% fee you earn should be on what Labaton earns (which is total fee awarded less local, or if there is a split with another firm). If you have time feel free to draft, but not necessary since I will get to it next week. Looking forward to some tropical business development."

LBS017486-88: April 2009 correspondence, with draft agreement attachment, from Chargois to Belfi and Keller.

LBS031192-95: April 2009 correspondence from Keller to Chargois and Belfi with Labaton's proposed changes to Chargois draft agreement.

LBS030663-64: September 2009 correspondence from Belfi to Chargois and Herron regarding monitoring agreements. Chargois: "Thank you, Eric. We are also confirming our agreement that any attorney fee award realized by your firm as a result of representing either of these funds, or any related funds where Labaton's representation came about as a result of Chargois, Mashayekh & Herron's efforts and/or contact (or our agents, assigns, friends, etc.) will be treated the same as our agreement on the Arkansas Teacher Retirement Fund, namely that gross attorney fees will be divided 80/20 (80% to Labaton, Sucharow and 20% to Chargois, Mashayekh & Herron)."

III. Chargois' Efforts to Connect Labaton With Other Clients

The comprehensive record is replete with references to efforts made by Chargois, his firm, or his associates to secure other institutional investors as clients for Labaton, in a number of states. Though the Chargois efforts were not always successful in securing clients, these documents show a pattern and provide factual background that further illuminated the Labaton-Chargois relationship and informed the Special Master's view of potential ethical violations:

LBS017414-16: March 2007 correspondence between Belfi, Chargois, Herron, Mashayekh regarding potential price fixing case. Mashayekh: "I will be getting with [Mark] Aubochon to see where he is relative to his efforts in securing a client for us.";
Chargois: "I am bird-dogging"

LBS031458-59: March 2007 correspondence between Belfi and Keller. Belfi: "I had a nice talk with Damon today. He will be meeting with Ken this week and will make sure we get a meeting soon. He will also bring us to Arkansas shortly."

LBS040295-98: March 2007 correspondence between Mashayekh, Herron, and Chargois regarding possible meetings. Mashayekh: "...Tim Herron also will be contacting an attorney he knows in Arkansas who is well connected with the unions in that state. I will report back on that as well... As to the [redacted], Tim Herron is meeting with one of his contacts regarding that matter and we will report back if the meeting proves fruitful...";
Belfi (to Keller): "I like Kamran – he really follows up with things. We will see what he can produce."

LBS031465: July 2007 correspondence between Mashayekh and Belfi. Belfi: "How are we doing with unions, Arkansas, and Native Americans?"
Mashayekh: "damon has been running with the ball on all that and [Wednesday] would be a good time to discuss the status of his efforts on that end"

LBS040343: October 2007 correspondence between Belfi, Keller, and Tetefsky. Belfi: "I met with [redacted]. We had a very good meeting. [Redacted]. "All in all a good meeting and we will go back to them in a week or so to touch base. In the meantime I am going to talk to Damon's contact about what is going on behind the scenes. Also, they went to the Bernstein conference last week and they were impressed so we need to do one soon."
Keller: "Agree on the conference – doane should be invited to speak"

LBS040368: November 2007 correspondence from Belfi to Keller. Belfi: "I am traded emails with Damon all weekend and here is where we are.... 1. Damon spoke to Jarvis at the function and has set up a lunch this week to talk about it more fully. 2. Damon said that Jarvis is not in the University of Houston as much as he is but he will see if he cares about experts coming from there. 3. Damon has brought in Scott Lemond's father to help who has a relationship with the AG to see if that can help us.... [Chargois] has the full court press on. We need to deliver a kick ass report."

LBS040380-81: November 2007 correspondence between Keller and Belfi regarding Chargois. Belfi: "Spoke to him last night and he is having lunch with Jarvis Monday and then we will discuss what is the next step – he does not think we should do anything until after the lunch.";
Keller: "2 impt points that damon needs to know. First, he should take their temp on [redacted]. If they are not interested then push for [redacted]. Second, if Jarvis wants us to share the case with blbg, that would be fine"

LBS017449: December 2007 correspondence between Belfi and Keller regarding Texas. Belfi: "Spoke to Damon and he going to Jarvis about the lt governor"

LBS040570: January 2008 correspondence between Herron and Belfi regarding Tennessee. Herron: "I just received a call from David Clark of the [redacted]...he was buttonholed by the senator and has the brochure you sent to me. He told me that they have other representation. He is going to talk to his board about meeting with us. He was interested in other people represented in Arkansas and Texas. I didn't know if you have any funds in Texas I told him we were working on Arkansas. A representative list would be helpful. if you don't mind. Hopefully we will get a meeting. I sent you a copy of my initial email to him."

LBS040581-82: June 2008 correspondence between Belfi and Chargois regarding Georgia.
Belfi: "How did it go?";
Chargois: "very well. We can get [redacted] you and i need to talk about the good councilman..."

LBS040583-84: July 2008 correspondence between Belfi, Keller and Tetefsky regarding Georgia. Belfi: "I was able to meet a number of people and make some headway into who can help us with some of the local funds in the Georgia area. Damon and I met with Kwanza [redacted] who is a trustee on the [redacted] Pension Board. He was very interested with our portfolio monitoring package and he was particularly interested in the audit because the pension fund has some management issues and they would love to do something positive with the fund. [redacted]."

LBS039537: March 2009 correspondence from K. Hall to Belfi, Frank Stout, Chargois, Serendipity Media Group and Natalie Ching. Hall: "The board is meeting now. I just spoke to [redacted] representative and the board Chair. [Redacted] will have to issue an rfp. Will make motion to move forward @ end of meeting."

LBS039539- 40: March 2009 correspondence from A. Griffin to Belfi, Chargois. Griffin: "Im in [redacted] later this week and will be meeting with the Deputy Mayor and also reaching out to one of the city funds board members through a mutual acquittance. That board member, [redacted] is also the [redacted] and is active with the [redacted]. Due to the relative success of the [redacted] funds lately, hes starting to gain some notoriety within that community and should be able to help with getting in front of other fund directors. Finally, Im in negotiations with a national government affairs firm with pre-existing contacts with many jurisdictions to do work in their shop. If youd like to explore formalizing a relationship and have me put together a more organized program to get you in front of these funds/managers, please let me know"

All of this correspondence is, at the least, relevant and admissible evidence under Fed. R. Evid. 404(b) as showing Labaton's motive, intent, plan and knowledge in initiating and pursuing the Chargois Arrangement. (The Special Master would be happy to provide more extensive briefing on this aspect, if the Court wishes). The Special Master's first submission includes numerous other documents that further illuminate the true nature of the Chargois-Labaton-ATRS

relationship and demonstrate that Chargois solicited ATRS and other clients on Labaton's behalf. Theses references, when viewed alongside sworn testimony and the Report and Recommendations and its exhibits, directly support the Special Master's finding that the $4.1M payment was not a referral fee, but instead violated Rule 7.2(b)'s proscriptions against procuring clients for financial gain (as well as implicating the other issues outlined in footnote 3, *supra*).

Dated: August 3, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically on August 3, 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. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S
MOTION FOR CONTINUANCE OF HEARING

Pursuant to District of Massachusetts Local Rule 40.3, Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser") respectfully moves for a continuance of the hearing that the Court recently scheduled to take place in this matter on October 15, 2018. *See* ECF No. 470. As grounds for this motion, Lieff Cabraser states as follows:

1. On October 15-16, 2018, counsel for Lieff Cabraser, Richard M. Heimann, Esq., is already scheduled to participate as the Lead Counsel for plaintiffs in a mediation in San Francisco. More than 80 counsel, representing more than 30 parties and/or insurers, will be participating in the mediation, making rescheduling at this late date impossible. Mr. Heimann's attendance at this mediation, as Lead Counsel for plaintiffs, is required.

2. Mr. Heimann is Lieff Cabraser's General Counsel and has been the chief counsel representing Lieff Cabraser throughout these proceedings since the Special Master was appointed. Mr. Heimann's attendance at the upcoming hearing is necessary for Lieff Cabraser to be fully represented in these proceedings.

3. This is the first request by Lieff Cabraser for any type of continuance during these proceedings.

WHEREFORE, for the reasons set forth herein, Lieff Cabraser respectfully submits that good cause exists for a continuance of the hearing currently scheduled for October 15, 2018, and respectfully requests that the hearing be rescheduled to October 18 or later. As described in the Local Rule 7.1(a)(2) certification below, there is not a consensus amongst all counsel as to what alternative date(s) would work for a rescheduled hearing, with some expressing true scheduling conflicts and others simply refusing to agree to a change of date. If the Court declines to reschedule the hearing, Lieff Cabraser requests that Mr. Heimann be permitted to participate in the hearing by telephone and the firm's managing partner, Steven E. Fineman, will attend in person.

Dated: September 25, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013

By: */s/ Daniel P. Chiplock*
Daniel P. Chiplock (*pro hac vice*)
Lieff Cabraser Heimann & Bernstein, LLP

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

On Monday, September 24, 2018, less than one full business day after the Court scheduled the October 15 hearing, I contacted counsel for the other parties and the Special Master in this case in order to confer regarding the substance of this motion. Counsel for the Special Master do not oppose this motion, but wish for the Special Master to be permitted to attend the upcoming hearing. The earliest dates the Special Master is available after October 15 are October 29 and November 1. Counsel for Thornton Law Firm LLP also do not oppose this motion, and are also available on October 29 and November 1 (in addition to the week of October 22). Keller Rohrback LLP and State Street take no position on this motion and will accommodate any hearing date set by the Court.

Labaton Sucharow LLP opposes the motion due to other commitments in the weeks immediately following October 15 that may make it difficult to attend a rescheduled hearing prior to November 2. Zuckerman Spaeder LLP states that they ordinarily would extend the courtesy of not objecting, but attorney Carl Kravitz potentially may be required to serve on a federal jury in D.C. between October 19 and November 2 (although it is unknown whether Mr. Kravitz actually will be required to do so). McTigue Law LLP opposes the motion, stating that they had already purchased travel tickets for the October 15 hearing before Lieff Cabraser sought to confer. No other counsel expressed a view prior to the filing of this motion.

/s/ Daniel P. Chiplock
Daniel P. Chiplock

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2018, I caused a true and correct copy of the above document to be served via ECF on counsel for all parties and counsel for the Special Master.

/s/ Daniel P. Chiplock
Daniel P. Chiplock

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
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LABATON SUCHAROW LLP'S OBJECTION TO LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S MOTION FOR CONTINUANCE OF HEARING [ECF No. 473]

Labaton Sucharow LLP ("Labaton") respectfully objects to Lieff, Cabraser, Heimann & Bernstein, LLP's ("Lieff's") Motion for Continuance of Hearing [ECF No. 473]. Labaton is sympathetic to Lieff's scheduling concerns. Unfortunately, based on its own scheduling

obligations, and the significant efforts it has already undertaken to be available on the date the Court has set for the hearing, Labaton is constrained to object to Lieff's request. In further support of this objection, Labaton states the following:

1. Lawrence Sucharow, whom the Court ordered to attend the October 15 hearing (*see* ECF No. 470), has made arrangements to attend the hearing on the scheduled date of October 15. Mr. Sucharow has significant pre-existing conflicts in the weeks that follow, including during the weeks of October 22 and for three weeks on and after November 8. It would be difficult for him to reschedule in the timeframe that Lieff has suggested.

2. Lead counsel for Labaton in this action, Ms. Lukey, who has served as liaison counsel in these post-judgment proceedings, is also lead counsel in a case that (months ago) had been scheduled for a final arbitration hearing on October 15-16. In deference to this Court's Order setting a hearing for October 15 (*see* ECF No. 470), with significant difficulty, Ms. Lukey arranged for the arbitration hearing to be postponed so that she could attend the scheduled hearing before this Court. The arbitrator accommodated the request, and a new date is expected to be set within the several weeks following the week of October 15. It would be highly problematic for undersigned counsel (and her client in arbitration) if this Court were to select a different hearing date now, in which case the postponement will have been unnecessary, and the new date that the Court selects could conflict with the postponed arbitration date.

3. For these reasons, October 15 is an available date for Labaton, Mr. Sucharow and (with effort already undertaken) its counsel, and unfortunately, October 18 and other dates in the near future pose serious conflicts. Accordingly, while Labaton would prefer to be in a position to accommodate Mr. Heimann's schedule, Labaton is constrained to object to Lieff's request for

a continuance. Labaton assents to Lieff's alternate request that Mr. Heimann participate by telephone, with the firm's managing partner, Steven E. Fineman, attending in person.

WHEREFORE, Labaton respectfully requests that the Court deny Lieff's motion to continue the October 15 hearing.

Dated: September 25, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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Counsel for Labaton Sucharow LLP

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on September 25, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

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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.	No. 11-cv-10230 MLW
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THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S
MOTION FOR CONTINUANCE OF HEARING

As the court is not available on October 29 or November 1, 2018, this motion is hereby DENIED. Mr. Heimann may participate by telephone if Mr. Heimann attends the hearing. Wolf, D.J. Sept. 26, 2018