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 SUBMISSION OF
SUPPLEMENTAL DECLARATION OF MICHAEL P. CANTY

Labaton Sucharow LLP ("Labaton") respectfully submits, as Exhibit 1 hereto, the Supplemental Declaration of Michael P. Canty, in further response to Paragraph 1 the Court's October 16, 2018 Order (ECF No. 494) in this matter.

Dated: November 2, 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 November 2, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

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

SUPPLEMENTAL DECLARATION OF MICHAEL P. CANTY

I, MICHAEL CANTY, declare as follows:

1. As noted in my Declaration of October 18, 2018, Docket No. 481-1 ("Initial Declaration"), I am a partner of Labaton Sucharow LLP ("Labaton" or "the Firm"), and I serve as General Counsel of the Firm.

2. On October 16, 2018, this Court ordered that I "submit an affidavit describing how many of Labaton's fee division arrangements Labaton has reviewed, and how many of those arrangements Labaton has revised, in Labaton's efforts 'to ensure that all such arrangements comply with applicable ethics requirements.' Docket No. 485-1 ¶ 4(o)." *See* Docket No. 494 ¶ 1.

3. On October 18, 2018, I filed an affidavit as ordered. See Docket No. 481-1. In paragraph 3 of my Initial Declaration, upon review of Labaton's 150 currently open cases, I found 48 cases that had referral agreements.

4. I have now learned that there was an additional written referral agreement with a different law firm in one of the 48 casesthat has an active referral fee agreement. That additional agreement with the other law firm has not been revised because it is not an operative referral fee agreement in the case. With respect to this additional agreement, the parties have agreed that no referral fee is, or will be, due. Both firms have submitted fee petitions for work that each independently performed on that case (where neither Firm was in a leadership role). Although the fee agreement will not involve the payment of a referral fee, I am reporting this in an abundance of caution because it relates to a referral fee agreement that has now been reviewed by me in an active case.

5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of November, 2018.

/s/Michael P. Canty
Michael P. Canty

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S RESPONSE TO THE
PROPOSED PARTIAL RESOLUTION OF ISSUES

On October 30, 2018, the Special Master, Labaton Sucharow LLP ("Labaton"), and ERISA Counsel each filed memoranda in support of the Special Master's Supplement to His Report and Recommendations and Proposed Partial Resolution of Issues for the Court's Consideration (the "Proposed Partial Resolution") (ECF No. 485).[1] In accordance with the Court's Order dated October 16, 2018 (ECF No. 494), as amended on October 25, 2018 (ECF No. 502), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") now responds to the Proposed Partial Resolution as follows:

First, the Court should not rule on the Proposed Partial Resolution before reaching a final determination on Lieff Cabraser's Response and Objections to the Special Master's Report and Recommendations (ECF No. 367) ("LCHB's Response and Objections"). The Proposed Partial Resolution is conditioned on the reinstatement in full of the fee award that was previously ordered by the Court (i.e., approximately $74.5 million) as well as the original allocation of fees amongst all counsel.[2] The Court has clearly indicated that when it determines what, if any, fees to award to plaintiffs' counsel, it will in all likelihood also direct the allocation of the fee among counsel. *See* Hearing Tr., Oct. 15, 2018, at 9-10, 13. The outcome of Lieff Cabraser's objections to the Special Master's recommendations may well be relevant to the overall fee award, and will most certainly bear directly on the fee share allocation to Lieff Cabraser. At the very least, it would be unfair to Lieff Cabraser for the fee allocation to be predetermined before

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[1] *See* ECF No. 509 (ERISA Counsel's Memorandum in Support of Proposed Partial Resolution of Issues for the Court's Consideration ("ERISA Memo")); ECF No. 510 (Labaton Sucharow's Memorandum in Support of Proposed Partial Resolution of Issues ("Labaton Memo")); ECF No. 511 (Special Master's Memorandum in Support of His Supplement to His Report and Proposed Partial Resolution of Issues for the Court's Consideration ("Special Master Memo")).

[2] *See* Supplemental Response of Labaton Sucharow LLP to the Special Master's Supplement to His Report and Recommendations and Proposed Partial Resolution of Issues for the Court's Consideration (ECF No. 485-1) at 3; Proposed Partial Resolution at 3 (ECF No. 485). Counsel for the Special Master confirmed, during a telephonic meet and confer with Lieff Cabraser on October 19, 2018, that it was the Special Master's position (consistent with Labaton's) that the Proposed Partial Resolution was conditioned on the reinstatement of the original fee award.

resolution of the disputed recommendations of the Special Master as to Lieff Cabraser.

Lieff Cabraser also objects to the implication by the Proposed Partial Resolution that Lieff Cabraser should "disgorge" one-third of the $4.1 million in inadvertently double-counted lodestar. As argued in LCHB's Response and Objections, the reported lodestar in this case did not constitute a "fee" that was charged to anyone, but rather simply served as a means of evaluating whether the 25% fee was reasonable or not. And all parties, including the Special Master, agree that a 2.0 lodestar multiplier (which is the multiplier one arrives at by comparing the $74.5 million awarded attorneys fee to the ***corrected*** lodestar figures) is reasonable given the circumstances of this settlement, under guiding legal authority, and does not constitute a "windfall."[3] Lieff Cabraser's position therefore is, and will continue to be, that it is not appropriate for the Customer Class Counsel to have to "disgorge" the nominal dollar value of lodestar which never served as the basis for any payment to Customer Class Counsel to begin with.[4]

If the Court disagrees with the foregoing, it remains important to rule on LCHB's Response and Objections before considering the Proposed Partial Resolution because the latter also seeks to impose a limit on any disgorgements to be made by Labaton either to the class or to co-counsel. As discussed in its Response and Objections (ECF No. 367), Lieff Cabraser was found by the Special Master to bear the least responsibility, of the three Customer Class Counsel, for the "inadvertent" error giving rise to his investigation in the first place.[5] Freezing Labaton's disgorgement would be unfair to Lieff Cabraser because it would cap Labaton's share of any disgorgement that the Court might require relating to the double-counting error without

[3] *See* Special Master Memo at 6 n. 3 (ECF No. 511); *see also* Special Master's Report and Recommendations at 245-46 (citing cases) (ECF No. 357).

[4] *See* LCHB's Response and Objections at 68-74 (ECF No. 367).

[5] *See* LCHB's Response and Objections at 6-9, 98-100 (ECF No. 367).

providing Lieff Cabraser an opportunity to show that the relative responsibility for the error requires a different allocation.[6]

Lieff Cabraser's share of that responsibility, if any, should be far less than the one-third presently implied by the Proposed Partial Resolution, because: (a) as the Special Master found, Lieff Cabraser was the least responsible for the error; (b) Lieff Cabraser's actual share of the double-counted lodestar was substantially less than one-third; and (c) unlike Labaton, Lieff Cabraser lacked the benefit of access to any other firm's individual fee declaration before they were submitted to the Court in support of the initial fee request, which could have enabled it to catch and correct the duplication error. *See* LCHB's Response and Objections at 3-4, 7, 38, 61-62, 65-66, 75-77; *see also* Executive Summary [of] Special Master's Report and Recommendations at 14-15, 18-19 (ECF No. 357-1); Special Master's Report and Recommendations at 224 (ECF No. 357).

Ruling on Lieff Cabraser's Response and Objections prior to ruling on the Proposed Partial Resolution is also important because the Special Master has made it unequivocally clear that he views his recommendations regarding the amount to be forfeited by Customer Class Counsel for the benefit of the class to be non-negotiable. This position was stated to Lieff Cabraser in the "mediation" on September 11, 2018 (which, for Lieff Cabraser, comprised a conversation of less than one hour) and again in a brief telephonic meet and confer on October 19, 2018.[7] Freezing Labaton's proposed disgorgement effectively leaves Lieff Cabraser

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[6] Indeed, the Special Master confirms that one of the goals of the Proposed Partial Resolution—by its incorporation of a putative "bar order"—is to eliminate any opportunity by co-counsel to dispute Labaton's relative disgorgement responsibility as well as the "level of culpability [to be] ascribed to Labaton." Special Master Memo at 11, n. 5 (ECF No. 511). The proposed "bar order" is further discussed below.

[7] The Special Master represents that he "negotiated" with Lieff Cabraser (Special Master Memo at 4, n. 2), but in fact, there was no negotiation at all. The Special Master's non-negotiable

responsible for supplying the bulk of the funds the Special Master believes he has "committed" to delivering to the class by virtue of his initial Report and Recommendations, a position the Special Master has clearly indicated he will continue to advance going forwards.

For all of the foregoing reasons, the Court should not rule on the Proposed Partial Resolution before it has reached a determination on Lieff Cabraser's Response and Objections.

Second, there is no reason or legal justification for the incorporation of a "bar order" under Massachusetts law. On its face, Massachusetts G.L. c. 231B, §1(b) and § 2 is not applicable, nor is it "analogous," to the present situation. Lieff Cabraser is not a "tortfeasor," let alone a "joint tortfeasor" with Labaton. Lieff Cabraser specifically recognizes the Court's inherent authority to allocate the fees and expenses to be awarded in this matter as it sees fit. No "bar order" as contemplated by the Proposed Partial Resolution is necessary, appropriate, or legally justified.

Third, Lieff Cabraser opposes the Proposed Partial Resolution's proposed appointment of ERISA Counsel as additional Lead Counsel for the Settlement Class. As the Court indicated at the October 15, 2018 hearing, any proposed appointment of a firm or firms as Lead Counsel should be done by proper motion. *See* Hearing Tr., October 15, 2018, at 66. Lieff Cabraser agrees that any proposed appointment should be properly briefed so that the parties may be heard on the matter. At such time, Lieff Cabraser will oppose the appointment of ERISA Counsel as additional Lead Counsel on the grounds that, among other things: (1) at least two of the ERISA Counsel firms do not directly represent members of the Settlement Class, but rather individual plan participants whose personal pecuniary interests in the matter are entirely derivative of ERISA plans or trust customers of State Street that, as institutions (along with public pension

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position was that Lieff Cabraser simply accept the Report and Recommendations and withdraw all of its objections.

funds and registered investment companies), are the actual members of the Settlement Class[8]; and (2) one of the ERISA Counsel (Brian McTigue) was found recently by a federal judge in the U.S. District of Massachusetts to be inadequate to serve as an interim lead class counsel under Fed. R. Civ. P. 23 for engaging in conduct that was "contumacious," "deeply disturbing," and "uncivil." *See Henderson v. The Bank of New York Mellon*, 322 F.R.D. 432, 436 (D. Mass. 2017); *see also* Order, *Henderson v. The Bank of New York Mellon Corp.*, C.A. No. 15-10599-PBS (D. Mass.), Sept. 30, 2016 (ECF No. 15) (documenting McTigue's inability "to work constructively as a co-lead counsel"). Additionally, Lieff Cabraser points out that there is no work left to be done by Lead Counsel other than to administer the settlement, which Labaton already has been ably doing (with the input of additional Settlement Class Counsel, including Lieff Cabraser).

For all of the foregoing reasons, Lieff Cabraser respectfully opposes entry of the Proposed Partial Resolution, both as a matter of timing and with respect to certain of its specific terms.

[8] Only one individual client in the ERISA actions, Alan Kober (represented by Keller Rohrback LLP), has been represented to be a trustee and/or fiduciary of an ERISA plan and putative trust customer of State Street with some presumptive decision-making authority for that plan and putative trust customer. *See* Plaintiffs' Amended Class Action Complaint, *The Andover Cos. Employee Savings and Profit Sharing Plan et al. v. State Street Bank and Trust Co.*, C.A. No. 12-11698-MLW (D. Mass.) (ECF No. 9) at ¶¶ 2, 16.

Dated: November 5, 2018 Respectfully submitted,

By: */s/ Richard M. Heimann*

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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.

November 5, 2018 */s/ Richard M. Heimann*
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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THORNTON LAW FIRM LLP'S
RESPONSE TO MEMORANDA IN SUPPORT OF
PROPOSED PARTIAL RESOLUTION OF ISSUES

Pursuant to the Court's October 16, 2018 Order (ECF 494), as modified by the Court's October 25, 2018 Electronic Order (ECF 502), the Thornton Law Firm LLP ("TLF") hereby responds to the three Memoranda in Support of Proposed Partial Resolution of Issues filed by the ERISA law firms[1] (ECF 509), Labaton Sucharow LLP (ECF 510), and the Special Master (ECF 511).

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[1] Keller Rohrback LLP, McTigue Law LLP, and Zuckerman Spaeder LLP.

A. Objections to Proposed Resolution

Except as noted below, TLF does not object to the proposed partial resolution of matters related to Labaton and the ERISA law firms (ECF 485) (the "Proposed Resolution"). TLF defers to the Court as to whether to accept the Proposed Resolution. TLF also defers to the Court as to the timing of acceptance of the Proposed Resolution (*i.e.*, before or after the Court conducts its *de novo* review of the Special Master's Report and Recommendations in light of TLF's and Lieff's Objections).

TLF strenuously objects to the Proposed Resolution insofar as it suggests that TLF must disgorge any amount related to the so-called "double counting" error, for which the Special Master originally found "Labaton must bear ultimate responsibility." *See* Report and Recommendations Executive Summary (ECF 357) at 18. TLF maintains its objections to the Special Master's recommendations regarding the double counting error. *See* TLF Response to Court Order (ECF 504). Labaton's agreement to disgorge any part of its fee relating to the double counting error should not, in any way, affect the Court's *de novo* review of the Special Master's findings as to TLF or Lieff.

TLF further objects to the entry of an order "barring any non-settling party from bringing an action against Labaton or the ERISA plaintiffs[2] for contribution or indemnification regardless of how it is styled or denominated." *See* Proposed Resolution (ECF 485) at 6. Although TLF does not anticipate that it would seek contribution or indemnification from Labaton or the ERISA law firms for a penalty or disgorgement (if any) the Court imposes on TLF, it is too early to tell how this bar order might otherwise affect TLF's rights. For instance, the bar order may affect the allocation among the law firms of the costs of the Special Master's investigation. It

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[2] Presumably the Special Master intended to refer to the ERISA law firms, not the ERISA plaintiffs.

may be appropriate to enter a bar order at the conclusion of these proceedings, but TLF respectfully suggests that entry of a bar order at this time is premature. To the extent a bar order is entered, it should also prohibit Labaton from seeking indemnification from Lieff or Thornton for any amounts it pays under the Proposed Resolution.

B. Fee Declaration Issues

Although the Proposed Resolution does not mention the boilerplate language in the fee declarations, both the Special Master's and Labaton's Memoranda in Support of the Proposed Resolution (ECF 510 and 511) discuss Labaton's fee declaration and assert that Labaton is differently situated than TLF vis-à-vis the boilerplate language. TLF is compelled to respond to this flawed assertion.

As background, TLF's declaration admittedly should have been clearer,[3] but TLF's use of boilerplate language (which was provided to TLF by Labaton) was in no way intended to mislead the Court. *See generally* TLF Objections to Special Master's Report and Recommendations (ECF 446-1) at 22-59. The very same or similar boilerplate language is regularly used by contingent fee law firms in jurisdictions across the country.[4] Although TLF

[3] As Garrett Bradley acknowledged during the March 2017 hearing. *See* Mar. 7, 2017 Hr'g Tr. (ECF 176) at 90:24-91:7. In his Report and Recommendations, the Special Master mischaracterized this as evidence that Mr. Bradley "knew his Declaration contained inaccurate information but he signed it anyway." *See* TLF Objections to Special Master's Report and Recommendations (ECF 446-1) at 41-42.

[4] Two law firms recently submitted fee declarations to this Court containing the "regular rates charged for their services" and "based on my firm's current billing rates" boilerplate language. *See* Decl. of James Harrod, Dkt. 129-3, *Ark. Tchr. Ret. Sys. v. Insulet Corp.*, No. 15-cv-12345 (MLW) (D. Mass. June 1, 2018); Decl. of Joshua Crowell, Dkt. 129-5, *Ark. Tchr. Ret. Sys. v. Insulet Corp.*, No. 15-cv-12345 (MLW) (D. Mass. June 1, 2018). Indeed, one of these law firms filed a declaration in the Northern District of California with the boilerplate language "are the usual and customary rates charged by Glancy Prongay & Murray LLP" one week *after* the August 2, 2018 hearing in which this Court informed attorneys for the *Insulet* class of the potential issues with their fee declarations. *See* Decl. of Lee Albert, Dkt. 2176-9, *In re Capacitators Antitrust Lit.*, No. 3:14-cv-03264 (C.D. Cal. Aug. 13, 2018). At the appropriate time, TLF will submit to the Court declarations from contingent fee law firms filed in jurisdictions across the country that demonstrate the widespread use of boilerplate language in class counsel fee declarations. The widespread use of this boilerplate language does not make such use correct, but it clearly refutes any argument that TLF's use of such language was intentional and therefore justifies a BBO referral and up to $1 million in Rule 11 sanctions.

believes that no firm should be penalized for use of boilerplate language, TLF is particularly troubled because the Special Master found that **only** TLF should be penalized for the boilerplate language, in the form of a disciplinary referral and a Rule 11 sanction of up to $1 million. Strangely, the Special Master declined to find that Lieff and Labaton, **who used the exact same boilerplate language**, should be penalized for their fee declarations.

In response to the Court's questioning at the most recent hearing, which highlighted the fact that Labaton and TLF used the same boilerplate language, Oct. 15, 2018 Hr'g Tr. (ECF 496) at 77:17-78:2, the Special Master now attempts to ignore the issue by arguing that Labaton is in a different position than TLF. This is purportedly so because, as was represented at the hearing, "There were in fact paying [Labaton] clients in the fall of 2016 when the submission was before the Court." *Id.* at 40:3-4. The Court should note that although Labaton has disclosed a very small number of paying clients (apparently a total of five paying clients in the seven-year period between January 1, 2010 and December 31, 2016),[5] Labaton has not indicated the number of hours billed to these clients, or the (likely infinitesimal) proportion of hourly revenue compared to Labaton's contingent fee revenue. Indicative of the paying clients' insignificance, Mr. Sucharow, who is Chairman of Labaton, and who signed Labaton's fee declaration in September 2016, stated at the March 2017 hearing, "We don't have paying clients, your Honor. . . . Most firms in our field do not have billable clients. . . . [W]e don't have billable clients." Mar. 7, 2017 Hr'g Tr. (ECF 176) at 79:9-15.

What is more, of the seventy-one timekeepers on Labaton's lodestar in the State Street

[5] *See* Exhibit A to Wolosz Aff. (ECF 510-2). Although there are only five clients listed, some timekeepers have the notation "general rate for hourly matters" next to their rate. There is no indication what this means, but it is possible that based on this notation the actual number of clients is greater than five.

matter, only four timekeepers had charged time to paying clients in 2016.[6] Crucially, the "2016 billing rates" for these four timekeepers as listed on Labaton's recent filing (ECF 510-2), do not match the lodestar rates submitted to the Court for these four timekeepers. In all four cases, the lodestar rate submitted to the Court is higher than the rate Labaton's billable clients paid. In three instances, the lodestar premium is modest, $10 in one case and $25 in two cases, but for attorney Elizabeth Wierzbowski, the rate submitted to the Court is $140 more than the rate paid by Labaton's billable client for Ms. Wierzbowski's time in 2016.[7] At footnote 10 of his most recent filing, the Special Master writes, "Labaton provided information to the Special Master during written discovery showing that, from 2010-2016, Labaton had a small number of hourly clients who paid by invoice those rates listed on the fee petition, or commensurate with the listed rates." This footnote indicates that either: (1) the Special Master did not check if the rates on Labaton's lodestar and the "hourly" rates actually matched; or (2) the Special Master is intentionally obfuscating the fact that only four of the seventy-one timekeepers on Labaton's lodestar had paying clients in 2016, and none of those clients paid the same rate for the four attorneys as listed on the lodestar.

Simply put, the after-the-fact realization that Labaton did in fact have a very small number of paying clients (all of whom, a comparison shows, paid rates lower than Labaton's lodestar rates for the same attorneys) does not place Labaton in any different position than TLF regarding representations in the fee declaration.

Further, as noted in its Objections, TLF also respectfully reminds the Court that five of

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[6] A fifth, Jonathan Gardner, had a single paying client in 2012, but does not appear to have had any paying clients in the years 2013, 2014, 2015, or 2016. Mr. Gardner's paying client paid a rate of $750 per hour in 2012. Mr. Gardner's rate on Labaton's lodestar in the State Street matter was $925 per hour.

[7] Ms. Wierzbowski also charged her hourly client $585 per hour in 2014 and 2015.

the six ERISA firms who submitted fee declarations in the State Street matter used the exact same (or substantially similar) boilerplate language as TLF, Lieff, and Labaton used. The Special Master did not focus on the ERISA law firms' representations regarding their rates, but he did find that at least one ERISA firm which used the boilerplate language, Richardson Patrick, is "a 100% contingent fee firm." Report and Recommendations (ECF 357) at 68. And McTigue Law, which has "very few" clients who pay hourly rates, McTigue Dep., 7/7/17 (ECF 401-10) at 83:19-84:3, represented on its fee declaration in the BNY Mellon litigation, submitted thirteen months before the State Street fee declaration was filed, that its "regular rates" for attorneys McTigue, Moore, and Markey were $625, $625, and $525—in other words, $100 less per hour than was represented to the Court as the attorneys' "regular rates" in the State Street litigation. The "regular rate" for "Sarah McGuane, MBA," who is a member of McTigue Law's "staff," was $125 less per hour in the BNY Mellon litigation than it was in the State Street litigation. *See* Decl. of Brian McTigue, Dkt. 622-5, *In re Bank of New York Mellon Corp. Forex Trans. Lit.*, No. 1:12-md-02335 (S.D.N.Y. Aug. 17, 2015).

Aside from McTigue Law and Richardson Patrick, TLF does not know whether or not the other ERISA law firms have a non-negligible number of clients who pay by the hour. However, the Special Master does not appear to have undertaken any significant investigation of the other firms' lodestars. For instance, in a declaration submitted to the court on April 20, 2017 in the Western District of Washington, a Keller Rohrback partner represented that "Partner rates in my firm range from $345 to $900." Decl. of William Smart, Dkt. 208, *IDS Prop. and Casualty v. Fellows*, No. 2:15-cv-2031 (W.D. Wash. April 20, 2017). Mr. Sarko's lodestar rate in the State Street matter (2016) was $925. Another filing in the Washington case lists Jennifer Hill's "2017 rate" as $225 ("Keller Rohrback LLP's established hourly rate[] for th[is] timekeeper[]").

Defendant's Motion for Attorney Fees and Costs, Dkt. 206, *IDS Prop. and Casualty v. Fellows*, No. 2:15-cv-2031 (W.D. Wash. April 20, 2017). However, in the State Street matter (2016), Ms. Hill's rate was represented to this Court as $255. The Special Master has not determined whether each of the 56 timekeepers (including 36 paralegals) listed on Keller Rohrback's lodestar were previously billed at the "regular rates charged" that are listed on the lodestar. As set forth in its Objections, TLF does not believe this is the proper standard or that Keller Rohrback should be punished if not all timekeepers had been previously billed at the lodestar rates. This is, however, the standard the Special Master applies to TLF and to TLF only. *See* TLF Objections to Special Master's Report and Recommendations (ECF 446-1) at 50-51.

Of course none of this is to say that TLF, Labaton, or any of the firms involved in this litigation should be penalized for their use of boilerplate language, which could have been clearer but was never intended to mislead the Court. But to the extent the Court considers a penalty for TLF's use of the boilerplate language, the Court should consider the other firms' use of the boilerplate language as well.

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: November 5, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on November 5, 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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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THE COMPETITIVE ENTERPRISE INSTITUTE'S
CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN
<u>RESPONSE TO PROPOSED PARTIAL RESOLUTION WITH LABATON</u>

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In accord with the Court's Order dated October 16, 2018 (Dkt. 494), as extended by the Court (Dkt. 502), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") responds to the memoranda supporting the Proposed Partial Resolution of Issues for the Court's Consideration ("Proposed Resolution," Dkt. 485) filed by Labaton Sucharow LLP ("Labaton"), Dkt. 510; the Special Master, Dkt. 511; and ERISA counsel, Dkt. 509. Appointment of a guardian *ad litem* remains necessary to protect the class, especially given that the Proposed Resolution does not provide global peace against further challenges by non-settling parties—nor does it even guarantee peace with Labaton, if the Court ultimately reduces Labaton's fee award, as it should. Attorneys at Burch, Porter & Johnson PLLC ("Burch Porter") remain willing to serve as guardian *ad litem*.[1]

EXECUTIVE SUMMARY

The Special Master and Labaton ask the court to approve a Proposed Resolution, which would permanently discharge Labaton from the case and enter an order barring any other firm from seeking any portion of Labaton's new fee award, which would total over $25 million, less an uncertain proportion of the cost of the Special Master's investigation. Relative to the Special Master's Report and Recommendations (Dkt. 357, "Report"), most of the money proposed to be disgorged from Labaton, $2.75 million out of $4.8 million, goes not to the class—to whom Labaton indisputably owed a fiduciary duty—but as a windfall to other counsel. Even assuming Labaton pays 47% of the $4.8 million deposited to pay the Special Master to date, its net fee represents a 1.34 lodestar multiplier over the lodestar hours it claimed for the class, or nearly $6 million dollars more than its "regular

[1] Due to institutional logistics, CCAF cannot presently serve as guardian *ad litem* in this case. Instead, CCAF recommends the appointment of Joseph (Jef) Feibelman as guardian *ad litem*. Jef Feibleman has nearly fifty years' worth of complex business litigation experience including appointments as a special master. As shorthand, this filing will refer to appointment of "Burch Porter" to mean Jef Feibelman with the assistance of attorneys at his firm, billing at modest market rates of $200-475/hr. *See* Dkt. 451 at 15. If appointed, Burch Porter will retain independent local counsel.

rates charged for their services." (Labaton continues to deny that this statement is misleading, though 67 of 71 timekeepers in this matter have not charged paying clients on an hourly basis.)

While the Proposed Resolution provides coverage for Labaton to seek appointment in future cases, it does little to help the class in this case, and instead shifts most of its money to other law firms. Bizarrely, the Proposed Resolution proposes that Labaton and ATRS—whose officer professed intentional disinterest concerning referral fees—are supposed to serve as co-lead counsel and plaintiff for the class. Perhaps this explains why the Proposed Resolution dwells more on public relations and wordsmithing (like the Special Master's incantation that Labaton "fell short of emerging best practices") than remedying substantive issues relating to the class members and their interests. The Proposed Resolution may not have reached such an underwhelming result if the class had independent representation that cared more about the class than preserving Labaton's reputation. All of the above is why the class needs a guardian *ad litem* more than ever to protect its interests.

ARGUMENT

I. The Proposed Resolution highlights the need for a guardian *ad litem*.

While a favorable *global* resolution of Class Counsel's claims might have lessened the need for a dedicated advocate on behalf of the class, the *Proposed Resolution* presents all the same issues as before. Even Labaton may yet object and appeal should the Court decide that, as a matter of proportionality, it must bear more of the burden for the (presently) undisputed mistakes it made. Although it now conveniently pleads contrition, Labaton reserves the right to contest and appeal every finding and monetary adjustment that the Court might impose if the Proposed Resolution is not accepted.

This is problematic because the Proposed Resolution falls well short of the adjustments the Court should impose on Labaton. While the Special Master has attempted to balance the interests of Labaton and ERISA counsel, he was not in a position to advocate on behalf of the class, and the Proposed Resolution reflects this lack of solicitude.

Contrary to the Proposed Resolution, ATRS cannot serve as a class representative (which must under all circumstances guard the interests of fellow class members) at this stage in the proceedings. *See, e.g., Foley v. Buckley's Great Steaks, Inc.*, No. 14-cv-63, 2015 WL 1578881 (D.N.H. Apr. 9, 2015) (holding that adequacy is not satisfied where the putative representative has abdicated control of the case to counsel). The Special Master—who, to be clear, has done important work in this case—got this right earlier: "We cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately protect the class's interests moving forward." Report at 257-58 n.207. While the ERISA representatives may continue to serve as representatives for their respective subclasses, they cannot serve as class-wide representatives because their claims are not typical of class claims. Thus, the need for a class-wide guardian *ad litem* remains.[2]

The Proposed Resolution also disserves the class because it refunds only $2.05 million to class members ($700,000 for the hidden Chargois bare referral agreement and $1,352,666.67 for one third of the double-counting error), but sends $2.75 million to ERISA counsel. While the Court will undoubtedly reallocate attorneys' fees among the firms, a Partial Settlement that provides most of its benefits to other law firms is not in the interests in the class, and a class representative would not have struck such a bargain. Indeed, a compelling argument can made that most or all of the Chargois payment should go to the class, who Labaton owed a fiduciary duty toward. The ethical duties Labaton breached through the Chargois agreement (and the overbilling) run to its clients, the absent class members. *See* Fed. R. Civ. P. 23(a), (e)(3), (h); Mass. R. Prof. Cond. 1.5. Any fee forfeiture resulting from that misconduct should return to the class's coffers. *See, e.g. Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012) (affirming total fee disqualification); *see generally Burrow v. Arce*, 997 S.W.2d 229, 237-40

[2] Burch Porter and CCAF do not object to Labaton's or ATRS's continued ministerial role in administering the fund, which they cite as cause for their retention as representatives. *See e.g.* Dkts. 510 at 17; 427 at 9. Instead, Labaton and ATRS inadequately represent the class *with respect to Labaton's fee request*, as we have previously argued. Dkts. 420 at 14-15; 451 at 20.

(Tex. 1999) (discussing well-established doctrine of fee forfeiture); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (same).

The Proposed Resolution also fails the class because it misallocates fee reductions for the double-counting error, effectively assigning Labaton just one-third of the responsibility, which is far too low in light of the facts. Labaton drafted the declarations, was tasked with reviewing the fee application, and was the only party to have all firms' fee applications in its possession prior to filing. It is unreasonable to assign Labaton only one third of the responsibility, and Lieff and TLF have already flagged their objections to this finding. Unlike with a criminal plea, where lenience might be provided to a cooperating witness, the Court must find facts supporting a new fee award for all counsel. Therefore, disparate treatment in Labaton's favor ties the Court's hands with respect to Lieff and TLF, likely shortchanging the class.

Likewise, Labaton is more than one third responsible for the costs of the investigation. It is unclear whether Labaton has irrevocably offered to cover 47% of the Special Master's costs through October 15, 2018, but even this share may be too small. Labaton imposed much of the cost on itself by egregiously refusing to disclose the existence of the Chargois agreement, which necessitated numerous repeat depositions and was the focus of most expert discovery. In contrast, TLF properly disclosed the emails available to it concerning Chargois, and might appropriately seek to contribute fewer costs attributable to Labaton's questionable candor.

Finally, the structural changes proposed in the Proposed Resolution provide little relief to the class and in fact constitute what the Court correctly called "enlightened self-interest" for Labaton at this point. Transcript of Hearing October 15, 2018 ("Tr.") at 31. Labaton will surely seek appointment as lead counsel in future securities cases, and the retention of one (or two!) retired jurists provides cover for reasonable questions about the firm's qualifications. One could even plausibly imagine Labaton touting their oversight as an affirmative reason to prefer Labaton over alternate counsel. The

fairness of this Partial Resolution "must be evaluated on how it *compensates class members*—not on whether it provides relief to other people [*i.e.* future shareholders represented by Labaton]." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 720 (6th Cir. 2013) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)). The Proposed Resolution also glosses over Labaton's conduct with public relations-speak, saying only that Labaton fell short of "emerging best practices." Poppycock! Labaton refused to tell its own client about a bare referral arrangement, misled co-lead counsel about the arrangement, concealed it from the class and the Court, refused to disclose it to a Special Master specifically appointed to investigate the billing in this case, declined to tell even its own outside counsel about it, and may well have never disclosed it except that one of its co-counsel reasonably responded to the Special Master's discovery requests. Candor to the Court is not an "emerging best practice," nor is complying with the terms of Rule 23(e)(3), nor is accurately responding to discovery requests that were designed to ferret out the conduct.

A. The primary beneficiary of Proposed Resolution is ERISA counsel.

The Proposed Resolution subordinates the class's interests to those of counsel because, at this point in the case, there is no one advocating on behalf of the class. It is beyond dispute that a proposed class action settlement's fairness should be judged mainly by how it benefits class members, and not class counsel or anyone else. *See Dry Max Pampers*, 724 F.3d at 720. Here, although there is undoubtedly a significant amount of money to be returned to the class at this procedurally unusual post-settlement stage, the Proposed Resolution proposes to send only $700,000 of the Chargois payment (plus $1.35 million of the double-counting) to the class while ERISA counsel will receive $2.75 million. True, ERISA counsel did not engage in the misconduct that Labaton did and perhaps would have negotiated more money had they been fully informed, but Labaton owed a fiduciary and professional ethical duty to the class that it represented. This distinction is significant because the Proposed Resolution goes to great lengths to balance the competing interests of lawyers in this case. The Proposed Resolution's

focus on peacemaking with lawyers underscores the need for a guardian *ad litem* for the class; a guardian *ad litem* would have advocated for more money to go to the class. Finally, the apparent willingness of ERISA counsel to accept $2.75 million as a compromise supports the inference that the Court could resolve any issues relating to ERISA counsel's fees down the road rather than accepting this flawed Proposed Resolution.

B. The Proposed Resolution inappropriately regards Labaton as one-third responsible for the double-counting.

The Proposed Resolution draws a highly questionable line in assigning Labaton only one third responsible for the $4.05 million double counting error. Even if Class Counsel were truly equally responsible for the error, Labaton should be expected to shoulder a proportional burden to the fee they received from it: 47%. The Proposed Resolution ties the Court's hands with respect to Lieff and TLF, who can credibly argue that Labaton is much more than one third culpable.

Labaton filed the fee motion and had the only opportunity to catch the mistake before filing. Labaton drafted the declaration templates sent to TLF and Lieff, and reviewed other firms' bills. Report at 55-56. Although it was the was only firm to see all submitted hours before they were filed, Labaton did not compare them side-by-side, which "contributed to the failure to catch" error. *Id.* at 56. While the Report assigns TLF some responsibility for the error, this can be colorably contested,[3] and the factual findings do not implicate Lieff at all for the double-counting. Lieff and TLF dispute

[3] The Report blames TLF for not editing the template language of the declaration: "Had Bradley accurately and fully described the true status of the Labaton and Lieff staff attorneys, it is probable that a diligent attorney such as [Labaton's settlement associate] would have been alerted to the discrepancy and would likely have caught the double-counting in the three Customer Class declarations." Report at 364. This speculation seems questionable. Had Garrett Bradley described the hours as kept by attorneys "of my firm or under the supervision of attorneys at my firm," it would have been accurate, but would not necessarily alert Labaton to the issue. TLF's false statements under oath should be sanctioned as the Report recommends, but the double-counting error was not necessarily a direct consequence of the misleading prose, which Labaton drafted.

that they are one-third responsible for the double counting (Tr. 60, 45), and the distribution seems untenable.

It's no answer to rely on Massachusetts joint tortfeasor law, as Labaton proposes. Dkt. 510 at 5 n.3. Class counsel did not act "jointly," and the Court is not disposing of a tort. The Court's fiduciary responsibility to the class in awarding fees should be guided by equity, and no law supports cabining the Court's discretion. *See Rodriguez*, 688 F.3d at 654; *see also In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation*, 56 F.3d 295, 312 (1st Cir. 1995) (denoting the "equity-based common fund doctrine"). The Court isn't governed by strictures relating to comparative fault liability, but by its duty to award reasonable attorneys' fees under Rule 23(h).

C. Labaton is also disproportionally responsible for costs of investigation.

The Proposed Resolution proposes that Labaton pay its "proportionate share of the remaining amounts due to the Special Master and his team for their unpaid work." Dkt. 485 at 11. While Labaton apparently might agree their "proportionate share" through October 15 is 47% (Tr. 77-78), this share may still understate its culpability.

The length of the investigation is largely attributable to Labaton's concealment of the Chargois arrangement. The Special Master intended to conclude his investigation and submit a report on October 10, 2017 as the Court ordered. Dkt. 173 at 3. To this end, the Special Master had conducted dozens of depositions and intended to wind down discovery in August 2017 when it recognized the Chargois issue from documents produced by TLF. Report at 87 n.66. Labaton entirely concealed this issue from the Master, even though one of the interrogatories sought "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." Report at 122.[4] In fact, Labaton did not even

[4] Lieff also failed to produce the Chargois emails they possessed in first round of discovery, but Lieff did not fully understand the nature of the arrangement. "Lieff was misled into agreeing to

tell their outside counsel about the Chargois arrangement, but nevertheless instructed her to minimize the scope of discovery from Labaton. *Id.* at 119 n.99. Indeed, the Chargois arrangement was responsive to several discovery requests, but Labaton did not properly respond to any of them before the Special Master discovered the issue in August 2017. *Id.* at 119-23. Inexplicably, "the Special Master does not conclude that the nondisclosure constitutes discovery misconduct," but merely suggests Labaton's concealment was not "prudent" under the circumstances. Report at 119 n.98. The bulk of the Special Master's work, including the retention of Prof. Stephen Gillers, was likewise due to the questionable conduct of Labaton. Only Labaton and Garrett Bradley knew that Chargois' payment was a bare referral. Report at 353. Labaton hid this from Lieff, and entirely hid the existence of Chargois from the Court, the class, and ERISA counsel. The Special Master had to respond to these issues and also had to respond to Labaton's tooth-and-nail opposition to the Special Master's work.

While the public does not have access to the Special Master's billing, it seems likely that work and expenses attributable to Labaton exceed 47% for the period since August 2017. The Court should make an accounting of this work, or have the Master make such an accounting, before discharging Labaton with an inappropriately small contribution.

D. Structural changes by Labaton provide no relief to class in this case, and little relief to future classes.

And the structural changes that are supposedly being undertaken by Labaton have little to no bearing on whether the Proposed Resolution should be accepted. First, although an obvious point, those changes cannot possibly benefit the class here, and the Court has a fiduciary duty as a "guarantor of fairness" to this class, not to hypothetical future ones. *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). The Court has already recognized this fact when it observed that

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share in the Chargois payment." *Id.* at 352.

Labaton's better-late-than-never "enlightened self-interest" is the component of the case that's "of the least interest to me." Tr. 31.

Furthermore, some of the purported structural changes at Labaton raise more questions than they answer. One example involves Labaton's revised referral agreement template. Dkt. 498-3. That template provides in part that the lawyers shall perform "work commensurate with the fee to be provided." *Id.* at 4. The rule—adapted from New York ethics rules—bars naked referral fees, but relies on referring fees and Labaton to decide the "commensurate" value. Given that Labaton granted Chargois 20% fees in perpetuity, supposedly for making some phone calls in 2007, they apparently value the time of referring fees very highly. The Chargois arrangement would be no less troubling if Mr. Chargois sat on a dozen conference calls or conducted freelance undirected document review.

Worse, even the Special Master now soft-pedals Labaton's misconduct in the service of lobbying for a piecemeal settlement. Labaton has only "acknowledge[d] that the emerging best practices" require the disclosure of the Chargois arrangement. Dkt. 511 at 15, 17, and 24. This is a huge understatement. The Special Master's Report catalogs Labaton's obfuscation efforts and utter failure to respond fully to the Special Master's discovery requests. Labaton didn't even disclose the existence of the Chargois arrangement to its own outside counsel, and those lawyers were (in ignorance of the true facts) tasked with limiting the scope of the Special Master's discovery powers. Report at 119 n.99. And at least one of the discovery requests propounded by the Special Master indisputably encompassed the Chargois arrangement. That request asked Labaton to "[i]dentity 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 121. Although the Special Master (for reasons unclear) declined to conclude that Labaton's discovery lapses amounted to discovery misconduct despite calling them "somewhat disconcerting" (*id.* at 119 n.98), providing complete and truthful responses to the Special Master's discovery requests is not an emerging best practice, it is a

fundamental obligation of counsel. Apart from the lack of disclosure of the Chargois arrangement, its very existence calls into question the adequacy of ATRS and Labaton's representation of the class in this case. Dkt. 420 at 20-21 (discussing implication of pay-to-play arrangements). The Proposed Resolution seeks to paper over Labaton's bad behavior with public-relations bromides, which the Court should reject.

II. The Proposed Resolution also leaves key issues from the Report unresolved, and more difficult to resolve between Lieff and TLF alone.

Lieff, TLF, and the Court have all appropriately suggested that decision on the Proposed Resolution should be held in abeyance until Lieff and TLF's objections are decided.[5] At minimum the Court should do this because the overall fairness of the fee award should be judged holistically, but approval of a partial settlement with Labaton ties the Court's hands.

As discussed above, the apportionment of responsibility for the double-counting error and fees for the Special Master are manifestly suspect. But if the Court were to adopt the Proposed Resolution and grant a bar order, it would have no fair way to disgorge all of the recommended money to class members. It could recommend that TLF and Lieff contribute *less* than Labaton for the double-counting error and investigation, but then the class necessarily picks up the tab for the remainder, watering down the Report's already modest recommendations. Additionally, the Report's recommendations to disgorge contract attorney markup from Lieff and impose sanctions on TLF need to be squared with pass that the Proposed Resolution gives Labaton for similar conduct, as discussed below.

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[5] *See* Tr. 47 (Court); 59 (Lieff). While TLF says they don't anticipate objecting to the resolution *per se*, to "extent that the proposed resolution implies in any way that TLF is responsible for any disgorgement related to the 'double counting' issue." Dkt. 504 at 1. It does—and the proportionality of sanctions between firms will be disputed.

A. Other issues not resolved by the Proposed Resolution impact the fairness of remedies proposed against Lieff and TLF.

In addition to the unfairness of fixing Labaton's contributions for the double-counting and investigation, two major Report recommendations are unresolved by the Proposed Resolution. These recommendations, contested by Lieff and TLF, may seem especially unfair in view of the treatment of Labaton.

First, the Report saddles Lieff with disgorging over $4 million to the class due to their exorbitant markup of contract attorneys. While Burch Porter and CCAF agree with this recommendation, it may be difficult to support in isolation because Lieff happens to have employed seven contract attorneys while its co-counsel employed all staff attorneys. Contract attorneys should be billed at cost, as the private legal market does, but unless the Court also adopts our recommendation to align the staff attorney rates with market rates (see Section III.A.1, *infra*), Lieff will be singled out for essentially a historical accident that its team employed several contract attorneys, while other Class Counsel relied on nearly-as-cheap staff attorneys, which the Report oddly endorses reimbursing at up to $515/hr before allowing a 1.8 multiplier. Unless the Report's recommendation on contract attorneys is more evenly applied (by, for example, using reasonable rates for staff attorneys), disgorgement from Lieff—a relative innocent in comparison to Labaton—will be difficult to sustain, ultimately at the expense of the completely innocent class.

Second, the Report recommends monetary sanction and disciplinary referral for false statements in Garrett Bradley's declaration on behalf of TLF (Report at 365), but Lawrence Sucharow's declaration on behalf of Labaton is nearly as misleading and receives no penalty. Both declarations speak of rates "based my firm's current billing rates" and "regular rates charged," which is misleading because neither firm normally bills to paying clients. Report at 57, 227. Labaton attempts to rationalize the disparate treatment by pointing to the handful of attorneys who have billed on a small number of matters over the years (Dkt. 510 at 16), but this does not make the declaration true.

Labaton submitted hours for 71 different timekeepers in this case (Dkt. 104-15 at 7-9), and only 4 of these individuals submitted bills to paying clients between 2010-16 based on Labaton's interrogatory answers. Dkt. 510-2. And of these four rates, two of them charged at least $140/hour less to paying clients than Labaton claimed in this case. *Compare* Dkt. 510-2 at 25 *with* Dkt. 104-15 at 7. (Ms. Wierzbowski, an associate listed at $725/hr here, billed $585 to paying client in 2016). For all but these 2 or 4 attorneys, the Labaton declaration is as misleading as the TLF declaration.[6]

These potential disparities in treatment of Class Counsel also militate in favor of at least deferring acceptance of the Proposed Resolution.

B. At minimum, the Proposed Resolution cannot be approved now.

Labaton and the Special Master assure the Court that the Proposed Resolution will reduce the cost and expense of proceedings, but this is only true if the resolution can be prejudged while similar objections by Lieff and TLF remain pending. This is because the Proposed Resolution provides no global peace, so disputes about relative culpability remain potent as long as any party continues to object. Closely-related issues still need to be decided and will likely still be appealed. Discharging Labaton now therefore saves little time and simply risks shortchanging the class after other objections are resolved. The Court correctly observed: "I don't see how I can make a properly informed decision on what Labaton should pay until I resolve everything I need to resolve regarding the roles and responsibilities of Thornton and Lieff to, you know, decide how to allocate things." Tr. 47.

Should the Court reject key terms of Labaton settlement after holistic review, Labaton's objections still need deciding, Labaton could potentially appeal.

[6] Additionally, the Special Master found several factors leaning in favor of sanctioning Labaton for their misleading omission of the Chargois arrangement, but ultimately declined to recommend sanction, which was a "close question" because the First Circuit had not clearly spoken on the duty to disclose. Report at 318 n.256.

The Special Master's arguments for immediate approval of the Proposed Resolution should not persuade the Court. While Labaton has indeed transformed in the face of an "existential" threat, this transformation seems skin deep—contingent on approval of terms it clearly found more favorable than litigation. Contrary to the Special Master, Rule 23(e) militates against approval because the Proposed Resolution is unlike a true fee request because Labaton retains the power to revert to challenging any issue if the Court does not award its desired fee. (And in any event, none of the class protections for a fee request have been followed at this point.)

1. Labaton's change of heart is encouraging, but does not provide any remedy to the class.

The Special Master is right to be astonished that Labaton no longer publicly calls the Report "wholly unmoored from the relevant law and the actual facts" nor claims that the Master as "elected not to act as a neutral fact-finder." Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton*, Dkt. 451-7, available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/. This is indeed a "marked shift." Dkt. 511 at 12.

But Labaton—one of the most culpable parties—cannot be discharged at this early date without assessing the reasonableness of fees relative to other Class Counsel. Labaton's expressions do not themselves fairly resolve the class interests, and Labaton's supposed contrition is employed as a means to a resolution it obviously finds more favorable than the risk of litigation. Should the Court decline to adopt the resolution, Labaton reverts to challenging the Special Master's Report and any sanction or recommendation. Dkt. 510 at 13.

2. The Special Master's analogy to Rule 23(e)/(h) fee agreement counsels holding the Proposed Resolution in abeyance, not swift approval.

The Special Master says that the Court can treat the Proposed Resolution as a Rule 23(e) request and approve it now (Dkt. 511 at 7-11), but this argument misconstrues the resolution and Rule 23(e).

The Proposed Resolution is fundamentally unlike an attorneys' fees request under Rule 23(e). Fair and reasonable settlements do not make class benefits contingent upon the Court's approval of a particular fee request because they recognize that the district court has an obligation "not to accept uncritically what lawyers self-servingly suggest is reasonable compensation for their services." *Weinberger*, 925 F.2d at 525. Yet that's exactly what the Special Master and Labaton propose to do.

Even if Labaton's exploding fee request was properly evaluated under Rule 23(e), it fails under almost every factor the Special Master cites. Dkt. 511 at 9. "The impact on the class" is not clearly favorable given the modesty of the Report recommendations in view of Labaton's conduct during the case and investigation. *See* Section III.A, *infra*. Disparate treatment between Labaton, Lieff, and TLF is actually quite difficult to explain, and the Court would need to decide Class Counsel's objections to fairly decide the issue. "Counsel's recommendation" bears little weight when one counsel seeks to avoid "existential" sanctions, another set of counsel is being paid $2.75 million for their assent;" and other counsel oppose immediate approval of the agreement.

Most preposterous is "failure of class members to object." The class has not been notice of the Report, let alone the Proposed Resolution with Labaton, which was only filed 26 days ago. The reaction of the class cannot be gauged given the lack of notice and rational disinterest of class members. 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).

Notice should advise class members of the Partial Settlement *and* their right to object, as it has previously argued. Dkt. 451 at 8-9. The Court long ago determined that it would allow class members to object following the release of the Special Master's Report. Dkt. 192 at 4. The rationale for such notice applies doubly here, especially where the Special Master seeks swift approval of a deal with Labaton based on the class's supposed tacit support of the deal.

III. Appointment of a guardian *ad litem* remains necessary to advocate for issues where the Report does not go far enough in protecting the class.

Although the Special Master did important work and produced a detailed Report, the Special Master's Report repeatedly fails to go far enough because the Special Master admittedly had to "balance the interests of the class, the law firms, the legal profession, the public and the institutional needs of the Judiciary." Report at 327. What the Special Master did not do was advocate exclusively on the class's behalf, which is what a guardian *ad litem* would do. The adversarial process breaks down in class action settlements (and in post-settlement proceedings), and that breakdown harms the class. *See Redman*, 768 F.3d at 629 (discussing the limits of the adversarial system of justice in this context).

This breakdown and the resulting harm to the class are precisely the reasons why the appointment of a guardian *ad litem* remains warranted. A guardian *ad litem*, for example, would almost certainly take issue with the Special Master's decision not to recommend a reduction of the (roughly) 2.0 multiplier. Even the Special Master has acknowledged (albeit most recently in a footnote) that "several courts have adopted a practice of lowering the fee award percentage to avoid giving attorneys a windfall at the plaintiffs' expense" in mega-fund class action settlements. Dkt. 511 at 5 n.3. The Special Master further makes the Delphic statement that the "percentage of fund is, of course, only a starting point in the Court's calculation of an appropriate fee award" and that the "Court should consider the entirety of the circumstances surrounding a fee petition." *Id.*

A guardian *ad litem* would not be so circumspect. To the contrary, a guardian *ad litem* would seek to protect the class's interests at every turn, including (but not limited to) advocating for a reduction of the total fee award. A $300 million settlement is a mega-fund, and courts routinely award less than 25% of the fund as fees in mega-fund cases of this size. *See, e.g.,* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 265 tbl. 7 (2010) (10.2% median fee for megafund cases over $175 million). Attorneys who have deceived the Court are even less entitled to a windfall than unfailingly scrupulous counsel, so there is simply no good reason not to apply a misconduct-related reduction here. A guardian *ad litem* would fully develop these arguments and others on behalf of the class.

A. The Special Master's Report is modest.

Counsel was awarded nearly $85 million dollars by this Court in its now-vacated Order on Fees. Dkt. 111. In spite of false statements in attorney declarations, shocking concealment of a bare referral fees to politically-connected Texas attorneys who did no work in the case, and grotesque markup of attorney time far beyond market billing rates, the Special Master proposed reallocating only $7.4 to 8.1 million to the class. 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. Put another way, the Report proposes cutting attorneys' fees from 25% to perhaps 22.2%—even though the Special Master acknowledges some courts would award no more than 20% in such a "megafund" case where absolutely no questionable conduct had occurred. Dkt. 511 at 5-6 n.3.

The Special Master's Report is quite modest, and a guardian *ad litem* would serve the class by arguing that the class deserves a more aggressive reallocation in their favor.

1. Above-market staff attorney rates were endorsed by the Report.

The Report's failure to adjust the multiplier or percentage downward seems especially unfair given the above-market leverage that the Special Master endorsed. With the solitary (and admittedly egregious) exception of Michael Bradley, 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 market for legal services compensates time for staff attorneys differently than partnership-track associates because they *are* different—they are paid less and generally confined to lower level work even if they have a seemingly senior graduation year. 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.

Adjusting staff attorney time to a realistic market rate helps remedy Class Counsel's deceptive statements about the "regular rates charged" for attorneys' services.[7] The market rates for staff

[7] Labaton argues that its declaration was factually correct because they have occasionally billed paying clients at similar rates. Dkt. 510 at 12. Labaton does not identify a single *staff attorney* ever paid by a client, so their declaration is false at least with respect to staff attorneys.

attorneys can be discovered from WilmerHale, which employs them. "One way to judge the legitimacy of the plaintiff's fees is to look at the defendant's fees." *Dreher v. Experian Info. Solutions, Inc.*, 2016 WL 4055638, at *2 (E.D. Va. Jul. 26, 2016). Failing that, staff attorney time should be adjusted to the rates of junior associates, which better comports with the Report's findings about their work level, and which are inconsistent with $415/hr and higher rates. *See* Report at 169 ("the staff attorneys performed associate-level work (albeit that of a junior-level associate)").

2. The Report shied away from sanctioning Labaton in part because it's effectively "too big to sanction."

Labaton has been an extremely difficult litigant, coming close—if not over—the line of discovery misconduct and erecting "a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." *Id.* at 362. However, the Report declined to adopt sanctions against Labaton—unlike TLF—in part 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, unhelpful to future absent shareholders at the mercy of their representatives, and most importantly, unhelpful to the class here. 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.

A guardian *ad litem* who has not settled with Labaton would be free to pursue referral for discipline and law enforcement follow-up. The Special Master did not determine what Chargois did in order to retain ATRS as a client, finding the issue was outside the mandate of his appointment. Report at 125 n.111. The class deserves a guardian without such constraints given that FBI agents not

so long ago interviewed Tim Herron of Chargois & Herron about his free-rent tenant circa 2008, former Arkansas Treasurer and ATRS Trustee Martha Shoffner, who was convicted of public corruption—accepting cash payment in exchange for official favors.[8] An unconstrained guardian *ad litem* might also inquire into the donation of five Labaton partners to Martha Shoffner's reelection campaign in 2009 and Labaton's assertion in open court to have provided no "campaign contributions or any other form of benefit to Senator Faris or anyone else?" Dkt. 244 (transcript of sidebar to May 30, 2018 hearing), at 5.

Labaton has said these proceedings pose "a substantial and existential, even, effect" on it. Dkt. 435-21 at 41. This may be entirely appropriate given the underlying conduct. One notable securities class action commentator recently opined that the referral arrangement "could prove to be a legal 'Watergate', one that could reshape class action practice." John C. Coffee, *The Market for Lead Plaintiffs*, N.Y.L.J. (Sept 19, 2018). For the sake of the class, the relationship between Chargois and Labaton deserves more scrutiny and referral to investigative bodies. A public relations-friendly settlement that mostly shuffles payment between attorneys does not serve the class or the public.

At minimum, the Court should ascertain that Labaton would not deem referral of the matter as a breach of the Proposed Resolution. The Court retains broad jurisdiction to sanction misconduct that occurred before it. *See Cooter v. Gell & Hartmarx*, 496 U.S. 384, 395 (1990). To the extent that the Proposed Resolution purports to constrain the Court's responsibility, it should be rejected now.

B. No conflict of interest exists with the Special Master, but the class should have a dedicated advocate.

Mr. Frank's statement at the hearing did not concern any hypothetical conflict of interest with Special Master, though it has apparently been misinterpreted as such. Dkt. 499 at 2 (writing to "address any concerns the Court . . . [had] that may have been occasioned by Mr. Frank's comments."). Instead,

[8] *See* Dkt. 420-1 (Chad Day, ARK. DEMOCRAT-GAZETTE (May 22, 2013), *Shoffner lived rent-free near the Capitol for most of her first term, landlord says*).

CCAF and Burch Porter are troubled that the Proposed Resolution pays the class only $700,000 for the concealed Chargois arrangement. Judge Holderman and JAMS might end up with more fees for Labaton's future compliance than the class receives for the undisclosed $4.1 million bare referral fee. The Proposed Resolution does not address the underlying problems identified in the Court's February 2017 order (Dkt. 117), but instead mostly shifts fees to yet more attorneys. The proposed settlement would not have reached such a result if the class had dedicated representation.

C. Appointment of Burch Porter as guardian *ad litem* would greatly enhance the process and ensure that an unconflicted advocate has standing to defend any order against Class Counsel on appeal.

Several prior filings explain why the Court should appoint a guardian *ad litem* if further advocacy for the class is needed. Dkt. 451 at 5-7, 11-20; Dkt. 420 at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12. 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). 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)). The costs would be especially beneficial here where Memphis-based Burch Porter have offered to accept approximately *half* the billing rates levied by Class Counsel and the Special Master. Dkt. 451 at 15.

CONCLUSION

Because the Proposed Resolution does not unambiguously waive counsel's ability to collaterally attack the settlement in the future, appointment of a guardian *ad litem* remains necessary to protect class interests. Even Labaton may revert to its former scorched-earth tactics if the Proposed Resolution is not accepted in full—even if the Court simply wants to apportion costs among Class Counsel to better reflect their relative culpability.

Given the continued near-certainty of appellate challenges to any adverse ruling against Lieff and TLF (and the likely challenge Labaton if their fees are adjusted beyond the Proposed Resolution), the Court should appoint an independent guardian *ad litem*. The Special Master may serve this role if the parties unconditionally waive their right to challenge such appointment. Otherwise, Burch Porter remains well-positioned to serve in this role, and their proposed rates are modest, especially compared to Class Counsel.

Respectfully submitted,

Dated: November 5, 2018

/s/ M. Frank Bednarz

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Competitive Enterprise Institute
Center for Class Action Fairness

CERTIFICATE OF SERVICE

I certify that on November 5, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: November 5, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz

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

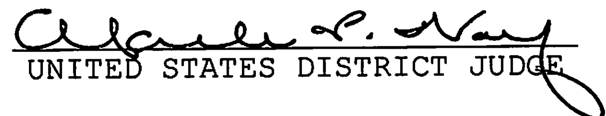
ORDER

WOLF, D.J. November 5, 2018

In its Memorandum in Support of the Proposed Partial Resolution of Issues, Labaton Sucharow LLP stated that it intends to retain Retired Judge Garrett E. Brown, Jr., instead of Retired Judge James Holderman. See Docket No. 510 at 12. Accordingly, it is hereby ORDERED that:

1. Judge Brown shall attend the hearing on November 7, 2018, at 2:00 p.m. He shall be prepared to discuss the Cover Memorandum to the Special Master's First Submission of Documents to Supplement the Record (Docket No. 423).

2. Judge Holderman is no longer ordered to attend the hearing on November 7, 2018, at 2:00 p.m.


UNITED STATES DISTRICT JUDGE