UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this 10th day of July, 2018.

KELLER ROHRBACK L.L.P.

By: */s/ Lynn Lincoln Sarko*

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

CERTIFICATE OF SERVICE

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

/s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. State Street Bank and Trust Company, Defendants.	C.A. No. 11-10230-MLW
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

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

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

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

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

[redacted]

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

[redacted]

The record should be clear: [redacted]

[redacted]

[redacted][1] [redacted]

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

RESPECTFULLY SUBMITTED this 10th day of July, 2018.

KELLER ROHRBACK L.L.P.

By: */s/ Lynn Lincoln Sarko*

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

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

CERTIFICATE OF SERVICE

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

/s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

United States Court of Appeals
For the First Circuit

No. 18-1651

IN RE: LABATON SUCHAROW LLP

Petitioner

CASE OPENING NOTICE

Issued: July 10, 2018

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

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

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

- Notice to Counsel and Pro Se Litigants

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

Margaret Carter, Clerk

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

United States Court of Appeals
For the First Circuit

NOTICE OF ELECTRONIC AVAILABILITY OF CASE INFORMATION

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

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

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

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

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

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

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

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

United States Court of Appeals
For the First Circuit

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

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

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

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

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

cc:
Jonathan G. Axelrod
M. Frank Bednarz
Joel H. Bernstein
Beth E. Bookwalter
Dwight Bostwick
Garrett James Bradley
Graeme Bush
Renee J. Bushey
Catherine M. Campbell
Daniel P. Chiplock
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Theodore H. Frank
Laura R. Gerber
Stuart M. Glass
David J. Goldsmith
Daniel William Halston
Richard M. Heimann
Evan R. Hoffman
Kimberly Keevers Palmer
Carl S. Kravitz
Michael A. Lesser
Robert L. Lieff
Joan A. Lukey
J. Brian McTigue
William Henry Paine
Jeffrey B. Rudman
Lynn Lincoln Sarko
Paul J. Scarlato
Jonathan D. Selbin
Joshua Charles Honig Sharp
Michael R. Smith
Lawrence A. Sucharow
Michael P. Thornton
Mark L. Wolf
Justin Joseph Wolosz
Nicole M. Zeiss

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this 12th day of July, 2018.

ZUCKERMAN SPAEDER LLP

By: /s/ Carl S. Kravitz

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Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

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

/s/ Carl S. Kravitz
Carl S. Kravitz

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

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

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

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

A. Pertinent Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*****

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

Dated: July 12, 2018

Respectfully submitted,

/s/ Carl S. Kravitz

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Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

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

/s/ Carl S. Kravitz
Carl S. Kravitz

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, On behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	§	No. 11-cv-10230 MLW
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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, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	§	No. 12-cv-11698 MLW

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

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

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

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

A. Pertinent Background

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

[redacted][1]

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

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

[2] [redacted]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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