UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. August 10, 2018

For the reasons stated in court, with the agreement of the parties except as noted in footnote 1, it is hereby ORDERED that:

1. Customer Class Counsel's Motion for an Accounting and Clarification that the Master's Role has Concluded (Docket No. 302) is DENIED.

2. Pursuant to Federal Rules of Civil Procedure 23(h)(4) and 53(f)(1), the Master's Report and Recommendation (the "Report") is resubmitted to the Master to respond to the objections to the Report. In addition, the Master is authorized to: (a) participate in any oral argument concerning the Report; (b) question witnesses if an evidentiary hearing is conducted concerning the Report; and (c) address any issues related to the Report if requested by the court or authorized by the court in response to a request by the Master. See, e.g. Fed. R. Civ. P. 23(h)(4) ("the court may refer issues related to the amount of the [attorney's] fee award to a special master . . . as provided in Rule 54(d)(2)(D)"). The Master and the individuals and organizations he employs shall continue to be compensated in the manner provided in the March 7, 2017 Order, (Docket No. 173) ¶¶13, 14, as amended on May 25, 2017, see Docket No. 206.[1]

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[1] On June 22, 2018, the court issued an order granting Labaton Sucharow LLP's Motion for Relief from Order Awarding Fees, Expenses, and Service Awards (Docket No. 178). See Docket No. 331. That Order vacated the Order Awarding Attorneys' Fees, Payment of

3. The Competitive Enterprise Institute's Center for Class Action Fairness's (the "CCAF") Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master (Docket No. 126) is ALLOWED to the extent it requests leave to file amicus briefs that are invited by the court or authorized by the court in response to a request by CCAF. CCAF's request to serve as a Guardian Ad Litem for the class is taken under advisement.

4. The proposed protocol for adding documents to the Record (Docket No. 259)(the "Protocol") is ADOPTED except as to paragraphs 3 and 4. The Master shall file any exhibits to his response to the objections contemporaneously with the response. The Master and the lawyers shall confer concerning proposed redactions to any exhibits that are not yet part of the Record and file them for the

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Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket No. 111). See Fed. R. Civ. P. 60(b), 1946 Advisory Committee Note ("Rule 60(b) [which provides for "Relief from a Judgment or Order"] does not assume to define the substantive law as to the grounds for vacating judgments . . . .") (emphasis added). The court has not vacated the Order and Final Judgment approving the $300,000,000 settlement of this case (Docket No. 110). However, as the court has vacated the award of $75,000,000 for attorneys, expenses, and service awards, it deems those funds to now constitute class funds. At the August 9, 2018 hearing, the lawyers for the class objected to the court's conclusions that granting the motion for relief from judgment "vacated" the award of attorneys' fees and that the $75,000,000 previously awarded are now again "class funds."

public record, with a motion to impound the redacted information, within 14 days of filing the response. The same procedure shall apply concerning any replies to the Master's response.

5. By August 16, 2016, the Master and the lawyers for the class shall:

(a) Confer and propose a schedule for the Master's response to the objections to the Report and any replies;

(b) File for the public record any exhibits to the objections that were not exhibits to the Report, and any documents the Master added to the Record on August 6, 2018 pursuant to paragraph 3 of the July 9, 2018 Order, and explain the reasons for any proposed redactions. In the alternative, they shall file a motion and affidavit seeking to establish good cause for an extension of time to do so; and

(c) Report any other obligations under the Protocol (Docket No. 259) or the July 9, 2018 Order that have not been satisfied, and propose a deadline by which they will do so.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

THORNTON LAW FIRM LLP'S
NOTICE OF FILING OF OBJECTIONS
TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

On June 28, 2018, the Thornton Law Firm LLP filed under seal its Objections to the Special Master's Report and Recommendations and exhibits in support thereof. A redacted copy of the Objections was filed on the public docket as ECF 361. The Thornton Law Firm hereby files on the public docket a version of its Objections with a more limited set of redactions. The only redactions remaining are those necessary to reflect the redactions set forth on the exhibits to the Special Master's Report and Recommendations, as filed publically by the Special Master with agreement of all counsel at ECF 401. The exhibits in support of the Objections are hereby filed on the public docket in unredacted form, with the exception of exhibits 18 and 19, to which

minor redactions have been made to protect information subject to the attorney work product doctrine.[1]

Respectfully submitted,

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Dated: August 10, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on August 10, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Joshua C. Sharp

Joshua C. Sharp

[1] To the extent such redactions require a Motion to Impound, the Thornton Law Firm respectfully refers the Court to its Motion to Impound Objections to Special Master's Report and Recommendations (ECF 360) and modifies the Motion to request impoundment only of the redacted information in exhibits 18 and 19 and the limited set of redactions to the Objections.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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INTRODUCTION

Following a sixteen-month, $3.8 million investigation, the Special Master has produced a Report and Recommendations (and Executive Summary) that is riddled with factual and legal errors and mischaracterizations of the record, not to mention internal contradictions. Ironically, and disturbingly, in a case in which the Special Master recommends a draconian sanction based on Garrett Bradley's role in "causing" an inadvertent mistake, the number of clear factual and legal mistakes in this Report is stunning. Indeed, if this Report were subjected to the same extreme, misguided analysis being applied to Garrett Bradley's mistakes, the submission of the Report itself would be sanctionable conduct. The Report repeatedly mischaracterizes the applicable law and actual facts of this matter.

Even though the Report concludes that "the $300 million settlement reflected an excellent result for the class members and was the product of the highly professional and skilled work of the class's law firms," R&R at 125, the Special Master goes on to malign the hard-earned reputations of the lawyers who achieved this result with novel theories of ethical improprieties and sanctionable conduct that are unprecedented, unreasonable, and unsupported by evidence. This Court must conduct a thorough *de novo* review and ensure that the facts are all weighed carefully and accurately, and that the law is applied consistently and dispassionately. The Thornton Law Firm is confident that this *de novo* review will reveal what has been evident all along: that Thornton's efforts were instrumental to the excellent result in this case, and that it should not be penalized any more than it already has been for mistakes that are deeply regrettable but inadvertent and immaterial to the attorneys' fee award.

A. Double Counting

This case began after a media inquiry prompted the self-disclosure of inadvertent double counting of certain staff attorneys on the lodestars of the Thornton Law Firm, Lieff Cabraser,

and Labaton Sucharow (collectively, "Customer Class Counsel"). The Special Master's investigation found, as Customer Class Counsel asserted from the very beginning, that the double counting error was an inadvertent mistake. Moreover—and as the Special Master fails to acknowledge—this error has **no effect** on the objective reasonableness of the flat percentage of fund attorneys' fee award. It is important to remember that neither Thornton Law Firm nor any firm in this case was awarded fees for hours worked. The attorneys' fee in this case was, like other cases in this district, a simple percentage of the class recovery amount, 25%. The firms provided hours worked and rates (in lodestars) to the Court not for the purpose of seeking fees for hours worked, but only as a **cross-check** to ensure that the percentage award was reasonable. Of course, this is not to say that firms receiving percentage of fund awards are excused from ensuring that information they submit to the Court is accurate. But the limited function of the lodestar here cannot be ignored. In undertaking a lodestar cross-check, courts look to the "multiplier" (*i.e.,* total lodestar divided by fee award) as the touchstone of their inquiry. If the multiplier is reasonable, the lodestar cross-check is satisfied. Harvard Law School Professor William B. Rubenstein, the author of the leading treatise on class actions, testified in this investigation that multipliers much higher than the one here—indeed, up to 4—are reasonable in cases like this. Rubenstein Dep., 4/19/18, at 216:1-218:4 (SM Ex. 235). In this case, removing the double-counted attorney time from the firms' lodestars increases the multiplier from 1.8 to 2.01. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1). In other words, although certainly unfortunate, the double counting had no material effect on the fee award. The Special Master himself concedes that "all other things being equal, the attorneys' fee award was fair, reasonable, and deserved." R&R at 6.

As described in further detail herein, the double counting was the result of a very basic error. Customer Class Counsel were prosecuting an extremely complex case that included the review of millions of pages produced by their opponent. As co-counsel, they came to an agreement to share both the costs of this work and the work itself, which also had the effect of spreading the risk should the case never produce a monetary settlement. The Thornton Law Firm, which is smaller than both Labaton and Lieff, does not have document review attorneys. Accordingly, after all three firms agreed to split the cost of the document review work, it paid for its share of the work by reimbursing Lieff and Labaton for staff attorneys housed at their firms or, in some cases, by directly paying legal staffing agencies that supplied the staff attorneys. When the time came to submit lodestars to the Court for purposes of the cross-check, through administrative errors and miscommunication, some of the Thornton Law Firm's staff attorneys' time was included on the other firms' lodestars.

Despite finding that the double-counting was "inadvertent," R&R at 363, the Special Master recommends that the three firms "disgorge" the amount of the double counted time—$4,058,000—such that it can be "returned" to the class. This is the first of many logical fallacies in the Report. In urging "disgorgement" of monies, the Special Master **confuses the function of the lodestar cross-check with a lodestar-based fee**. When, as here, the lodestar is used as a cross-check of a percentage award (which the Special Master does not dispute is how the Court awarded the fee), the proper course, taken by numerous courts in similar circumstances, is for the Court to recalculate the multiplier and reassess whether the higher multiplier is reasonable. Because the attorneys' fees were not awarded on a one-to-one basis, "disgorgement" of an amount that was, in actuality, a piece of a piece of a cross-check, is nonsensical. The Special Master did not attempt to calculate an adjusted multiplier (for this or any other of his

recommendations), perhaps because he recognized that the multiplier would still be well within the realm of reasonableness, and therefore there would be no basis for "disgorgement" of any money relating to the double counting error.

B. Intent

The Special Master's most outlandish finding in his Report is that Garrett Bradley intentionally included staff attorneys on Thornton's lodestar—staff attorneys for whom it paid, but who were housed at, and in some cases employed by, Lieff and Labaton— to deceive Thornton's own co-counsel and the Court. The alleged purpose was either to convince co-counsel to give the Thornton Law Firm a greater share of the aggregate fee award, or to mislead the Court into approving the fee award. Indeed, the Special Master's allegation of intentionality is particularly unbelievable because, as he himself concludes, a simple side-by-side comparison would have revealed (and did ultimately reveal) that the same attorneys were incorrectly listed on more than one lodestar.

Unfortunately for the Special Master, "Facts are stubborn things."[1] Here, the facts show that: (1) Customer Class Counsel jointly developed the plan to share the cost of staff attorney work and the risk of failure, and neither Lieff nor Labaton has ever stated they were deceived; (2) the final fee agreement among counsel was executed **before** the fee declarations submitted to the Court ever existed, thereby negating any possibility that the submitted lodestars had any bearing whatsoever on the fee split among counsel; and (3) the fee agreement was the result of a negotiation among sophisticated and experienced counsel who had expressly agreed to split the risk of jointly funding the staff attorneys. More to the point, the Special Master's finding that Thornton intentionally included staff attorneys on its lodestar in order to deceive co-counsel is

[1] Summation of John Adams, *Rex v. Wemms* (Suffolk Superior Court, 1770).

flatly contradicted by his finding that there was an understanding among some of the attorneys at all three firms that Thornton would include the staff attorneys on its lodestar. *See* R&R at 45 n.27, 363. As all firms had attorneys who understood that Thornton would include the staff attorneys on its lodestar, it is impossible that Thornton was attempting to deceive—or ever could have deceived—Lieff or Labaton.

In terms of any alleged deception of the Court, there was simply no motivation to increase the lodestar submitted to the Court in order to generate a larger fee or to get a greater share of the aggregate fee. The Special Master chooses to ignore a basic fact: by the time the lodestar was submitted to Court in September 2016, all of the lawyers had already agreed that they would seek no more than an aggregate 25% fee[2] and the Thornton Law Firm had already agreed to a final fee split agreement with Lieff and Labaton. Additional lodestar would not have generated any additional fee award for the Thornton Law Firm. The only possible motivation would have been to decrease the aggregate multiplier, which is highly implausible for at least two reasons: (1) the multiplier was already well within the range of reasonableness; and (2) the Thornton Law Firm accounted for only 18% of the total lodestar submitted to the Court, so it would not have been able to "move the needle" on the aggregate multiplier. These are important facts that the Special Master ignores. Further, the Special Master insinuates that there was something wrong about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. In fact, Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage.[3]

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[2] In fact, the Court remarked during the pre-filing hearing on June 23, 2016 that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

[3] In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%. These calculations were made using the lodestars submitted to the Court in September 2016.

In a transparent attempt to generate a soundbite, the Special Master and his counsel quote repeatedly (and entirely out of context) an email in which Garrett Bradley states that paying for additional staff attorneys is the "best way to jack up the loadstar [sic]." The Special Master knows that there is nothing wrong with the concept expressed in the email, which is from February 2015 (well over a year before the fee declaration or lodestar was filed with the Court) and contains an invoice for staff attorneys *from Labaton*. The concept was that if the Thornton Law Firm bore more risk by investing in additional staff attorneys vis-à-vis the other law firms (and pursuant to their agreement), Thornton would eventually be able to pursue a greater share of the fee vis-à-vis co-counsel. This would in no way increase the total lodestar submitted to the Court or the amount of fees the class paid to its attorneys. There was always only a finite number of documents to be reviewed and reviewers who could review those documents; the only difference was, for purposes of spreading the internal risk among the firms, which firm would be financially responsible for which staff attorneys. In other words, as is clear from the context, Bradley uses "lodestar" as shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* It is typical of the Special Master and his counsel's approach that they choose to ignore this context (which is clear from the record) in order to generate a catchy—albeit totally misleading—soundbite.

Ultimately, the Special Master is left with a strained theory by which the Thornton Law Firm deceived co-counsel and the Court not by inflating hours worked—the Special Master found all of the hours worked by Thornton Law Firm attorneys reasonable and sufficiently supported—but by correctly listing on its lodestar staff attorneys that the Thornton Law Firm paid for pursuant to an agreement among co-counsel. As the Special Master acknowledges, names of the staff attorneys were listed on the lodestars such that anyone who placed the

lodestars side by side would immediately realize that certain attorneys' time had been double counted. The idea that this could be intentional deception—an idea which the Special Master advocates —is ludicrous.

C. The Boilerplate Affidavit

Failing to find any true evidence of deception—because there was none— the Special Master rests his case for Rule 11 sanctions and professional misconduct on immaterial misstatements in a boilerplate affidavit that was provided to all counsel by Labaton. Bizarrely, the Special Master recommends sanctions only for Garrett Bradley even though almost every law firm in this matter used an identical boilerplate affidavit and therefore could be held responsible—under the Special Master's dubious theories—for similar misstatements. Even stranger, after characterizing the Chargois matter as "[t]he most troubling issue in this case," R&R at 303, the Special Master declines to recommend any sanctions or disciplinary action related to Chargois, but recommends a massive sanction of Garrett Bradley for his role in an inadvertent error that was obvious to anyone who closely read the submissions to the Court.

Garrett Bradley's statements are described in further detail herein, but as an example, the Special Master faults the Thornton Law Firm for stating the rates in the lodestar "have been accepted in other complex class actions." The Special Master's criticism is that the rates for the *individual* staff attorneys listed in the Thornton Law Firm's declaration had not previously been accepted in class actions for those *individual* staff attorneys. Of course, the sentence is intended to convey that the rates for the staff attorney *role* had been accepted in other class actions— which is true— and not that particular staff attorneys had previously performed document review for those same rates in other class actions. The Special Master alleges "deception" with respect to Garrett Bradley, but his investigation made no attempt to inquire whether each of the 20 staff attorneys listed in Lieff's affidavit and each of the 35 staff attorneys listed on the Labaton

affidavit (as well as all of the attorneys in the ERISA firms' declarations) had ever been listed on a lodestar at the same rate.

The fact of the matter is that the rates for Thornton Law Firm staff attorneys—which ranged from $425 to $500 with a weighted average (overall fees divided by overall hours) of $428— was **lower** than both the range and weighted average of the Lieff staff attorneys, $415 to $515, and $438, respectively. As Prof. Rubenstein testified, rates of up to $550 have been accepted for staff attorneys in class actions. Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1). What is more, the Special Master himself found that the staff attorneys' rates in this matter—which for Lieff ranged up to $515—were reasonable. *See* R&R at 176-81.

In what appears to be the crux of his case against Garrett Bradley, the Special Master presents the Court with an opinion from the Rhode Island Supreme Court, *In re Schiff,* which he claims is "eerily similar" to the case at bar. *See* R&R at 244. Nothing can be further from the truth. In *Schiff*, there were not immaterial misstatements in a boilerplate affidavit, but a "grossly inflated" lodestar in a fee-shifting case. The attorney in *Schiff* sought costs and fees 47 times greater than amount of her client's recovery—4,000 billable hours for a case that was "based on a relatively simple sequence of events occurring over a limited period of time." The Court found that "The billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] *sought payment for time not worked*." *Matter of Schiff*, 677 A.2d 422, 423 (R.I. 1996) (emphasis added). In this case, however, the Special Master has made no finding whatsoever of false or unreasonable billings—indeed, to the contrary, he has concluded that "the total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable." R&R at 216. The extensive reliance on *Schiff* is indicative of the fact that the Special Master and his

counsel have acted, and are acting, as overly-aggressive litigants who are accusing their perceived adversaries of not being candid with the Court.[4]

D. Michael Bradley

The Special Master finds that "the total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable," R&R 217, and that such time "is supported by reasonably reliable contemporaneous time records." R&R at 366. The Special Master's concern is not with hours, but with Michael Bradley's rate as listed on the lodestar ($500 per hour), because Bradley's work "most closely resembles that of a junior level associate." R&R at 196. Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in the Report ($325 to $725 per hour). R&R at 164. Moreover, it is substantially less than the $415 per hour rate of another staff attorney who performed exactly the same work and, like Michael Bradley, performed it remotely. There is no basis for reducing Michael Bradley's rate by 50% when the Special Master himself found that staff attorney rates of up to $515 were reasonable in this very case. *See infra* § VII. Even if Michael Bradley's rate is reduced (whether to the rate of the other Thornton Law Firm staff attorneys, or to the $415 per hour rate of the staff attorney who performed exactly the same work, or to the Special Master's arbitrary $250 per hour), the effect on the lodestar and multiplier, as discussed herein, is completely immaterial to the attorneys' fee award.

E. Contract Attorneys

[4] As further detailed herein, the Report and Recommendations is replete with mischaracterizations of the record and propositions that unreasonably stretch the meaning of their purported supporting authorities.

The Special Master recommends that the time agency/contract attorneys expended reviewing State Street's documents—the same work performed by staff attorneys—should be listed as a "cost" rather than as a legal service on Customer Class Counsel's lodestars. The Special Master has **failed to identify a single case** holding that contract attorneys must be charged as expenses. When Customer Class Counsel provided the Special Master with various case law demonstrating that agency/contract attorneys—who are, in terms of work performed and qualifications, entirely indistinguishable from firm-hired staff attorneys—are properly included in fee applications at an hourly rate, the Special Master said that he would simply agree to disagree with those courts. But he has done more here, for he falsely asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue," R&R at 187, which **is simply not true**. Case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar. *See infra* § VI. The Special Master cites a particular case, *In re Citigroup,* in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically *drew* this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his **market rate**." 965 F. Supp. 2d at 395 (emphasis added). Whatever the Special Master's personal policy preference may be in terms of how work performed by contract attorneys should be accounted for, it is clear that there is no legal or factual basis for his recommendation to this Court that contract attorney work be charged as a cost.

Accordingly, for the reasons set forth more fully below, this Court should reject the Special Master's recommendations. His Report, which relies in large part on the ever-changing

musings of a self-proclaimed "legal expert" from NYU Law School, is replete with clearly erroneous legal and factual findings and should not be the basis for taking any further action against the attorneys in this case. Besides the substantial expense of the investigation itself (as well as lost opportunity costs), the attorneys have already suffered serious reputational harm, and there is simply no fair or legally sensible reason to continue punishing attorneys who achieved such an excellent result for the class.

ARGUMENT

I. The Double Counting Error Was Inadvertent And The Special Master's Recommendation Of $4 Million Disgorgement Is Unjustified

Although the parties to this investigation dispute many issues, one thing on which everyone agrees is that counsel achieved an outstanding result for the class. *See* Exec. Summ. at 7 ("By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class' law firms, a view with which the Special Master wholly agrees.").

Through their diligent and hard-fought prosecution of this matter, Plaintiffs' counsel ensured the return of hundreds of millions of dollars to pension funds subjected to State Street Bank and Trust's standing instruction foreign exchange ("FX") trading practices. The Thornton Law Firm, which brought the first cases involving standing instruction FX trading, played a critical role in this case from inception to resolution, bringing to bear substantial expertise in the subject matter as well as developing the damages theory for the case.

The Thornton Law Firm and its co-counsel also incurred substantial risk in bringing suit against a large, well-funded bank with no guarantee of any recovery. In approving the 25% fee at a hearing on November 2, 2016, the Court remarked:

> [I]n this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain.
>
> The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that.

11/2/16 Hr'g Tr. at 36:2-14 (SM Ex. 78).

In its ruling on November 2, 2016, the Court identified the factors it considered in approving a 25% fee: (1) the reasonableness of the multiplier produced by the lodestar cross-check (1.8); (2) the Court's tendency to award between 20% and 30% in class action common fund cases; and (3) consideration of awards in comparable cases, and, in particular, the reasonableness of the percentage in the context of other First Circuit cases with comparable settlements (*i.e.,* settlements in the $250 million to $500 million range). *Id.* at 35:3-36:2. The Court's approval of the 25% fee was consistent with its initial remarks during the pre-filing hearing on June 23, 2016, at which the Court stated that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

Throughout the investigation and in his Report, the Special Master likewise recognizes the tremendous efforts of counsel that produced this substantial settlement. Noting the "risks, complexities and legal challenges inherent in the litigation," the Special Master concludes in his Report that the skill and dedication of counsel produced "an excellent result for the class," and was an "undeniable accomplishment" by counsel engaged in "fine and highly effective lawyering." R&R at 6-7. Specifically as to Thornton, the Special Master finds that the rates listed for Thornton partners and associates were justified and reasonable in light of the complexity of the case, R&R at 175; that the number of hours listed for Thornton partners and

associates was justified and reasonable, R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); and that the number of hours listed for Michael Bradley also was reasonable. R&R at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable").

A. The Double Counting of Staff Attorney Hours Was Inadvertent And Not Thornton's Fault

As the Special Master concludes, and as all firms confirmed numerous times during the investigation, the double counting errors made in the fee declarations submitted to the Court were inadvertent. R&R at 7, 352, 363. Without question, the mistakes in the fee declarations should have been caught before filing. But the failure to do so was just that: a mistake. Within two days of realizing the double counting, counsel submitted a letter to the Court alerting it to the errors. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). As explained below, these inadvertent errors in the lodestar calculation, while unfortunate and regrettable, have no impact on the reasonableness of the attorneys' fees awarded pursuant to the percentage of fund method in this case. The impact of these mistakes on Customer Class Counsel already has proven significant, costly, and lasting. Further redress for these inadvertent errors would be needlessly punitive, and is unwarranted.

B. The Proposed "Disgorgement" of $4,058,000 Is Unjustified And Misapprehends the Function of the Lodestar Cross-Check

Despite expressly finding that the errors in the fee declarations were inadvertent, the Special Master asserts that the three firms must "disgorge[]," in equal shares, the amount at issue ($4,058,000),[5] and that the amount should be "returned" to the class. R&R at 364. The Special

[5] The exact amount at issue as a result of the double counting error is $4,058,654.50. *See* Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). However, the Special Master uses a rounded amount ($4,058,000) throughout his Report. Accordingly, undersigned counsel uses the rounded figure ($4,058,000) herein.

Master's terminology reveals the logical fallacy that underlies his conclusion. The attorneys were not paid $4,058,000 that otherwise would have gone to the class. The Special Master's recommendation that Customer Class Counsel "disgorge[]" this amount is based on a fundamental misunderstanding of how attorneys' fees were awarded in this case, and specifically of the function of the lodestar cross-check.

As the Court knows, and as the Special Master acknowledges, R&R at 143-46, the attorneys' fee award in this case was calculated using the percentage of fund method (also called the "common fund" method), which is typically used in cases in the First Circuit.[6] Under the percentage of fund method employed by the Court in this case, the lodestar numbers submitted by counsel **are not the basis for counsel's fee award**; the percentage granted by the court is. *See* Rubenstein Decl., 7/31/17, at ¶¶ 13, 17, 18 (TLF Ex. 1); Rubenstein Decl., 6/20/18, at ¶¶ 18-19. The lodestar cross-check is used **only** as a means of verifying the reasonableness of the percentage of the recovery being awarded to the attorneys. Rubenstein Decl., 6/20/18, at ¶ 18-19. If there are errors in the lodestar, the only inquiry the court must perform is to analyze the revised lodestar number and its impact on the multiplier. Rubenstein Decl., 6/20/18, at ¶¶ 19-20;[7] *see also* Rubenstein Decl., 7/31/17, at ¶ 15 (TLF Ex. 1) ("[U]sing a lodestar cross-check

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6 *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995) (cited in the Report at p. 144); Rubenstein Decl., 7/31/17, at ¶¶ 13, 17 (TLF Ex. 1).

7 Professor Rubenstein explains the relevant authority as follows: *In re Polyurethane Foam Antitrust Litig.,* 168 F. Supp. 3d at 1013 (reducing lodestar in cross-check in part because of contract attorney rate and then re-assessing acceptability of new multiplier); *In re: Cathode Ray Tube (CRT) Antitrust Litig.,* No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("[E]ven if the Court were to reduce the Plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an acceptable range. . . . A lodestar reduction is unnecessary when the effect on the multiplier is not material."); *In re Citigroup Inc. Bond Litig.,* 988 F. Supp. 2d 371, 378 (S.D.N.Y. 2013) ("If the Court reduces the blended hourly rate for staff attorneys to $300—a rate that appears to be either appropriate or slightly high—the modified lodestar is approximately $73.5 million. Such a reduction would make the multiplier closer to 1.59. Assuming even a blended hourly rate for staff attorneys of $250—perhaps somewhat on the low end—the result is a modified lodestar of approximately $65 million and a multiplier of nearly 1.8. All of these figures are within the range of reasonableness. The lodestar cross-check has therefore performed its function, satisfying the Court that an award of 16%—which it has already determined represents a reasonable percentage of the settlement fund—adequately compensates plaintiffs' counsel for their time and effort based on

enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall."). Errors in the lodestar—and particularly if they are inadvertent and self-disclosed—do not warrant return of monies to the class as long as they do not have a material effect on the multiplier and the multiplier is still reasonable. Rubenstein Decl., 6/20/18, at ¶¶ 19-20. The Special Master does not seem to understand this concept. The First Circuit is **not** a lodestar-based jurisdiction, where fees are awarded solely on the attorney's hours and rates. Yet the amount the Special Master recommends be "disgorged" is the amount of the **lodestar** that was inadvertently double counted. When the fee is *percentage-based*, as it was here—which the Special Master does not dispute (Exec. Summ. at 7)—it is black-letter law that the attorneys are not paid dollar-for-dollar for time they submit to the Court. Instead they are paid a percentage of the recovery in the case, with lodestar information only supplied to cross-check the reasonableness of that percentage. As long as the percentage remains reasonable, the fee is reasonable. The Special Master repeatedly admitted that the fee in this case was reasonable and therefore he has no basis—nor is there basis in logic or case law—to recommend "disgorgement" of monies based on inaccurate lodestar numbers.

Indeed, the Special Master's recommendation that the firms "disgorge[]" an amount corresponding to errors in their lodestar submissions is incomprehensible given the role of the lodestar in the fee award in this case. To properly measure the effect of the lodestar mistake, it is only necessary to revisit the two-step lodestar cross-check inquiry. This means reducing the raw

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estimations of reasonable market rates and factoring in an appropriate multiplier."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009) ("[I]f the charges for the contract attorney time were decreased, the multiplier in this case would still be a reasonable multiplier."); *In re Royal Dutch/Shell Transp. Sec. Litig.,* No. CIV.A. 04-374 JAP, 2008 WL 9447623, at *32 (D.N.J. Dec. 9, 2008) ("Even if Lead Counsel reduces plaintiffs' counsel's total lodestar by $7,287,396.25 (the lodestar of the discovery attorneys employed by Lead Counsel)—from $56,891,317.50 to $49,603,921.25—that reduction increases the multiplier only from 1.002 (based upon the total fee of $57 million) to 1.15, an immaterial difference.").

lodestar to account for the errors, recalculating the multiplier, and then reassessing whether that multiplier is still reasonable in the context of the percentage award. Numerous courts in cases in which lodestars have been adjusted post-filing have addressed the issue this way.[8]

This reassessment, as applied to the attorneys' fee award in this case, undeniably shows that, even assuming *arguendo* that *all* of the Special Master's proposed reductions to the overall lodestar should be made, the 25% fee award remains reasonable and entirely justified by the lodestar cross-check:

- Reducing the lodestar by the double counted time ($4,058,000) results in a multiplier increase from 1.8 to **2.01**. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1).

- Reducing the lodestar by (1) removing the double counted time and (2) adjusting the lodestar to reflect contract attorney time as an expense results in a multiplier increase from 1.8 to **2.07.** Rubenstein Decl., 6/20/18, at ¶ 19.

- Reducing the lodestar by (1) removing the double counted time, (2) adjusting the lodestar to reflect contract attorney time as an expense, and (3) adjusting Michael Bradley's hourly rate to $250 results in a multiplier increase from 1.8 to **2.07.**[9]

Every one of these hypothetical multipliers is well within the range of reasonableness for a class action case of this size, duration, and complexity. Lodestar cross-check multipliers as high as 4 have been accepted in similar cases. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1) (concluding that a multiplier of 2.01 "falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past" and "fully supports the reasonableness of the fee the Court awarded Counsel in this matter"); *see also* Rubenstein Dep., 4/9/18, at 56:24-57:2, 216:1-218:4 (SM Ex. 235) (concluding that "for what the attorneys accomplished here a two multiplier is a perfectly reasonable—in fact, quite a modest fee for them," describing

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8 *See supra* footnote 7.

9 The value of the double counted time is taken from the Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). The contract attorney adjustment is taken from the Report and Recommendations at 367.

the factors underscoring the multiplier in this case, and opining that "**I wouldn't have been surprised in a 300-milllion-dollar settlement to see a three or a four multiplier.** I should add multipliers are often higher the higher the settlement. And so I wouldn't have been surprised, and I think it would have been justified to see a three or four.") (emphasis added); Rubenstein Decl., 6/20/18, at ¶ 19 (finding that a 2.07 multiplier, which results if double-counted and contract attorney time are removed, is "fully reasonable, indeed modest").

The Special Master's proposed disgorgement of the lodestar cross-check errors misapplies the applicable law and would result in an unfair and unsupportable result. The inadvertent lodestar errors simply do not materially affect the result of the lodestar cross-check and, therefore, do not affect the reasonableness of the fee.

C. Thornton Is Not Responsible For The Inadvertent Double Counting

The Special Master concludes that Labaton bears "ultimate responsibility" for the double counting because, as lead counsel, it had a duty to cross-check the individual fee petitions of the firms, but failed to do so. Exec. Summ. at 18-19.

Despite concluding that Labaton bears ultimate responsibility for the inadvertent double counting errors, the Special Master recommends that Labaton, Lieff, and Thornton should equally share the remedy he proposes to address the errors, *i.e.,* the "disgorgement" of $4,058,000. As discussed above, disgorgement is unjustified and misapprehends the function of the lodestar cross-check. The double counting errors simply have no material effect on the cross-check, and the multiplier that results when those hours are excluded is well within the range of reasonableness.

The Special Master contends that a remedy is necessary to address the inadvertent double counting, but imposing that remedy on Thornton would be unjustified for reasons additional to the ones stated above. The Special Master attributes the double counting mistakes in the fee

declarations to two core failures: (1) Labaton's failure to inform its partner preparing the omnibus fee declaration, Nicole Zeiss, of the firms' agreement to share the cost of staff attorneys; and (2) the failure of the firms to reduce their agreement regarding the staff attorneys to writing. R&R at 363.

The Special Master also concludes that, as to the firms' agreement to share the cost of staff attorneys, Thornton reasonably understood that it would list the staff attorneys for whose work it paid in its lodestar, and that "at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate[.]" *See also id.* at 220-21, 363 (Special Master concluding "there is sufficient evidence in the record to find that at least some attorneys at both Labaton and Lieff believed that the staff attorneys paid for and allocated to Thornton would be included on Thornton's lodestar petition.").[10]

The Special Master further notes that correspondence contemporaneous with the drafting of the November 10, 2016 letter to the Court, and the November 10, 2016 letter itself, showed Labaton and Lieff acknowledging that the inadvertent double counting was in **their** lodestars, not Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)).

Despite these findings, the Special Master concludes that Thornton shares in the "responsibility" for the double counting errors because Garrett Bradley did not adequately describe the firms' staff attorney agreement in his declaration. Exec. Summ. at 15-16. The

[10] *See also* Thornton Law Firm's Resp. to SM, 11/3/17 (TLF Ex. 2); Thornton's Resp. to Request for Add'l Submission, 4/12/18 (TLF Ex. 3); B. Kelly Ltr. to Sinnott, 4/17/18 (TLF Ex. 4).

statements in Garrett Bradley's declaration are discussed in detail elsewhere in this response. *See infra* § III(B). The Special Master concludes that Thornton shares responsibility for the "administrative confusion" that led to the double counting because it did not modify the boilerplate language in the Labaton-prepared template declaration. Exec. Summ. at 19. This conclusion is wholly speculative, without any basis in the Record, and logically inconsistent.

The Special Master concludes, without **any** supporting evidence, that "[i]t is probable that, had Thornton's petition contained fully truthful and accurate statements describing the actual affiliation and rates of the loaned staff attorneys and agency attorneys, Labaton Settlement Attorney Nicole Zeiss, or the Court, would have been alerted that something was amiss and thereby have detected the double-counted hours." Exec. Summ. at 16. The Special Master drew this conclusion (and went so far as to deem it "probable") despite having never asked Nicole Zeiss—who sat for two depositions in this investigation—what would have happened if Thornton had modified the boilerplate language.

Moreover, this wholly speculative assertion is contradicted by the Special Master's own conclusion that Labaton "fail[ed] to perform a side-by-side comparison" of the declarations. R&R at 56 n.39. It is difficult to imagine, and impossible to conclude based on any fact, that modified boilerplate language would have led to a different result when a basic side-by-side comparison was not done.[11] If a simple comparison of the fee declarations would have revealed the double counting, as the Special Master concludes, it was Labaton that should have, but did not, perform this comparison. *See* Exec. Summ. at 19.

[11] Indeed, Nicole Zeiss testified that, while some firms changed the language in their fee declarations, she did not discuss any changes with any firm, and does not recall whether she noticed the changes before filing, or only after the fact. Zeiss Dep., 6/14/17, at 42:22-43:14 (SM Ex. 79).

The Special Master also concludes that because Labaton did not circulate the individual declarations among the group, the other law firms were not in a position to notice and rectify the double counting.[12] *See* R&R at 224. Though the Special Master mentions only Lieff and ERISA Counsel, the record is clear that Thornton also did not see any other firm's fee declaration before Labaton filed the omnibus fee declaration—and therefore Thornton, like Lieff and ERISA Counsel, did not have an opportunity to identify the double counted time before filing. Evan Hoffman of Thornton confirmed this in response to the Special Master's explicit inquiry during his deposition:

> THE WITNESS: And then it was sent back to Labaton for their review and maybe an edit or two and that was the last we saw of it until it was submitted on ECF for the final, when it was actually given to the judge.
>
> JUDGE ROSEN: You never saw Labaton's fees or Lieff's fees in the declaration?
>
> THE WITNESS: Correct.
>
> JUDGE ROSEN: In the actual fee declaration, did you ever see their fees?
>
> THE WITNESS: No, not until it was already filed.
>
> JUDGE ROSEN: Not until it was filed?
>
> THE WITNESS: Correct.

Hoffman Dep., 6/5/17, at 94:18-95:10 (SM Ex. 63).[13]

The inadvertent double counting of staff attorney time was undoubtedly a regrettable mistake. The evidence in the record, however, does not support holding Thornton accountable

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[12] The Special Master uses the term "double-billing," not "double counting," here. R&R at 224. To be clear, there was no "billing" in this case. This repeated wording is a conscious choice of the Special Master and further demonstrates his fundamental misunderstanding of the purpose of the lodestar cross-check in a percentage of fund scenario. Rather, as described in detail *infra,* the submission of fee declarations showing the time spent on the case was made in conjunction with the lodestar cross-check that was used to support, **not replace**, the percentage of fund method by which attorneys' fees were awarded.

[13] The Special Master does not mention this piece of relevant testimony in the Report, wrongly inferring, and suggesting that the Court infer, that Thornton had an opportunity to review the other firms' fee declarations prior to filing.

for these errors. To the contrary, Thornton acted consistent with the firms' agreement regarding staff attorneys. Even if there was imperfect knowledge of this agreement within the other law firms, due to compartmentalization or other issues, it does not mean that Thornton acted unreasonably. As the November 10, 2016 letter to the Court and contemporaneous correspondence stated, the inadvertent double listing of these staff attorneys' time occurred on the Labaton and Lieff lodestars, not on Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)). And as the Special Master also concludes, the duty to review and cross-check the individual petitions belonged to Labaton, which, as lead counsel, was responsible for drafting and submitting the omnibus fee declaration to the Court. It is notable and illogical that, unlike his suggestion for Thornton and Garrett Bradley, the Special Master proposes no Rule 11 sanction for Labaton despite finding that Labaton "was ultimately responsible for preparing an accurate and reliable fee petition that the Court could rely upon" and failed in its responsibility to ensure the accuracy of the papers it filed with the Court. Exec. Summ. at 19.[14]

As a result of the double counting mistake and this ensuing investigation, the law firms, Thornton included, have no doubt identified areas where there is room for improvement. To that end, the firms jointly proposed a number of best practices recommendations in a submission to the Special Master that, for reason unknown, the Special Master does not include as an exhibit to the Report. *See* Consolidated Resp., 8/1/17, at 20-24 (TLF Ex. 5). Among other things, the firms agreed that, in future complex class cases involving multiple firms, they will report their draft lodestar to lead counsel during the pendency of the litigation, and any firms sharing costs

[14] Such sanction would, of course, be unjustified.

also will review each other's draft fee declarations before filing, so that they can discuss any perceived errors or concerns with all other counsel. *Id.* at 21-22. That did not happen here, and is deeply unfortunate. But hindsight is 20/20, and in light of the record evidence demonstrating that Thornton is not responsible for the double counting, any disgorgement is unjustified.

D. The $425 Per Hour Rate Used By Thornton For Staff Attorney Work Is Reasonable And Justified

The Special Master's Report endorses, with two exceptions, the hours and rates in the firms' fee declarations. The Special Master concludes that, with two exceptions, "the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work." Exec. Summ. at 21-22; R&R at 365-67. The two exceptions are the rate of Michael Bradley and the rate of the agency-employed "contract" attorneys, both of which are addressed *infra* at sections VI and VII.

The Recommendations section of the Report does not recommend any adjustment to the $425 per hour rate assigned to the staff attorneys in Thornton's fee declaration, and none should be applied. However, in the narrative section of the Report, the Special Master states: "Although the Special Master finds nothing unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms, an adjustment of the amounts billed in Thornton's lodestar for staff attorneys will be required."[15] R&R at 181. This sentence is accompanied by a footnote that reads: "Fees for these staff attorneys will be calculated at the same rate as they were billed on the Labaton and Lieff petitions." *Id.* at n.150.

[15] The terminology used here—"billed in Thornton's lodestar"—demonstrates the Special Master's continued confusion of lodestar as the basis of a percentage award cross-check with lodestar as the direct basis for a fee.

Although the Special Master does not ultimately recommend any adjustment to the lodestar on this basis, because his earlier remarks in the narrative section of the Report may be read to call for a reduction, Thornton addresses the reasonableness of the $425 per hour rate as follows.

First, the $425 per hour rate assigned to staff attorney hours by Thornton is an empirically reasonable rate, within the range of court-accepted rates for staff attorney work. In his expert declaration submitted to the Special Master with the Law Firms' Consolidated Submission on August 1, 2017, Harvard Law School Professor William Rubenstein cites empirical research showing that courts have accepted staff attorney rates in the range of $250-$550 per hour in a dozen class action cases decided since 2013. *See* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1); *see generally id.* at ¶¶ 34-38.

Moreover, contrary to the Special Master's assertion that this rate evidenced the "unempirical nature" of the rates used by Thornton, R&R at 70, the Southern District of New York accepted $425 per hour as a rate for staff attorney work in **another FX trading class action case**, *In re Bank of New York Mellon Corp. Forex Transactions Litigation*,[16] a year before the fee declaration filings in this case.

Second, Thornton's use of a $425 per hour rate was reasonable under the circumstances here, and was based on its understanding of previously accepted rates in other litigation and its discussions with co-counsel.[17] Specifically, the Special Master finds that Thornton understood, at the time of the filing of the State Street fee application, that the $425 per hour rate had been

[16] Referred to herein as *BNY Mellon*.

[17] *See also* Hoffman Dep., 6/5/17, at 59:5-12 (SM Ex. 63) ("It was suggested by Dan Chiplock of Lieff and Mike Rogers of Labaton, that we should use for purposes of fee petition rates that had been approved by Judge Kaplan in the Mellon case for the reviewers, which was $425 an hour and that was what was put in on Thornton's end.").

used by Lieff and had been accepted by the Court in the *BNY Mellon* case. R&R at 70. The Special Master further finds that Thornton believed Lieff to be suggesting this rate in the State Street case, R&R at 180 n.146, as Lieff itself surmised in deposition testimony referencing an email exchange between Lieff, Labaton, and Thornton after the staff attorney work was completed:

> And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425.

Chiplock Dep., 6/16/17, at 184:20-25 (SM Ex. 10) (discussing 9/11/15 Email, LCHB-0052627 (SM Ex. 192)).[18]

Without any other basis, the Special Master unreasonably suggests that the passage of time between this email (September 2015) and the filing of fee declaration (September 2016) makes the email less reliable. Such a conclusion ignores the fact that the staff attorneys' work on the case was fully completed as of July 2015, when the parties reached an agreement in principle to settle the case. Although it took more than a year for the parties to finalize the settlement and appear before the Court, the agreement in principle and thus the conclusion of substantive work on the matter, including the document review, was reached in the summer of 2015. Accordingly, it is neither surprising that counsel were discussing their eventual lodestar petitions at this time in 2015, nor is it unreasonable for Thornton to have relied on this information in preparing its fee declaration. Because Labaton did not circulate the fee declarations among the parties before filing, R&R at 224, Thornton did not know that Labaton and Lieff were applying staff attorney rates different from $425 per hour. While perhaps a more perfect practice would have been to

[18] For unknown reasons, the Special Master does not cite this deposition testimony in his discussion of the issue, but it immediately follows the portion of Mr. Chiplock's testimony he does cite. *See* R&R at 180 n.146 (citing to Chiplock Dep., 6/16/17, at 182:5-183:5 (SM Ex. 10)).

exchange this information prior to filing, Thornton reasonably relied on an established, court-accepted hourly rate. It did not simply pluck $425 per hour out of thin air.

Third, applying the Special Master's proposed formula for adjusting the $425 per hour rate (*i.e.,* that the rates on the Labaton and Lieff petitions should be used instead (R&R at 181 n.150)) would not result in any material difference to Thornton's lodestar, much less the overall lodestar or the multiplier resulting from the cross-check. As to staff attorneys overlapping with Labaton, reducing their rates on Thornton's position would result in a cumulative reduction of $412,627 from Thornton's lodestar (5.5% of the Thornton lodestar submitted to the Court, and less than 1% of the overall lodestar submitted to the Court). As to staff attorneys overlapping with Lieff, using Lieff's rates for the staff attorneys on Thornton's lodestar would result in no reduction.[19]

Finally, reducing Thornton's lodestar to adjust the rates as suggested by the Special Master would result in an unjustified double reduction, as overlapping time billed at a higher rate was already accounted for in the double counting reduction. In the November 10, 2016 letter to the Court alerting it to the double counting errors, David Goldsmith of Labaton explained that, "[w]hen a given SA [staff attorney] had different hourly billing rates, we removed the time billed at the higher rate." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178). This approach was not taken because the firms believed that the time on Thornton's lodestar was less legitimate—to the contrary, at least "some attorneys at Labaton, Lieff and Thornton independently assumed that Thornton would claim the SA time on its lodestar." R&R at 220. Rather, the firms took a lowest-rate approach to reducing the overlapping time as a conservative measure.

[19] This is because, as the Special Master notes, Lieff billed two of the overlapping staff attorneys at a rate of $515 per hour. R&R at 180 n.147.

The Special Master at one point suggests that Thornton's use of a rate of $425 per hour for staff attorneys was so unreasonable as to warrant "adjustment" of Thornton's lodestar. Ultimately, perhaps in recognition of the empirical evidence and record evidence that $425 per hour was a reasonable rate, or perhaps having calculated the *de minimis* effect such adjustment would have—or perhaps both—the Special Master does not recommend any reduction to Thornton's lodestar on this basis. Indeed, the Special Master concludes that the hours and rates in Thornton's lodestar (excepting the rates for Michael Bradley and contract attorneys) are "reasonable and accurate." Exec. Summ. at 21-22; R&R at 365-67.

II. Garrett Bradley Did Not Intentionally File A False Declaration

The Special Master's erroneous conclusion that Garrett Bradley intentionally lied to the Court relies on a blatant mischaracterization of the factual record and a fundamental misunderstanding of the fee allocation among counsel.

A. There Was No Motivation To Deceive Co-Counsel

The Special Master's primary "support" for the proposition that Garrett Bradley intentionally lied to the Court is what he perceives as evidence of motivation. In particular, the Special Master finds:

> [T]he statements were false, and the false statements were not due to simple negligence, but rather Bradley intentionally and willfully identified the SAs in his Declaration as members of his firm and that their hourly rates were the same as the firm's regular rates charged for their services. Bradley's motivation for making the false statements is clear and well supported by the record. The record evidence shows that Bradley intentionally sought to "jack up" Thornton's individual firm lodestar vis-à-vis the other Customer Class firms, and representing the SAs as members of Thornton with billing rates of $425 an hour ($500 an hour, in the case of Michael Bradley) was the way to do it.
>
> R&R at 233.
>
> **

> [T]he Special Master concludes that Bradley deliberately and intentionally misrepresented the make-up of Thornton's professional staff and their hourly rates so that Thornton's lodestar petition would be grossly inflated.
>
> R&R at 234-35.
>
> **
>
> [T]he Special Master has found that Garrett Bradley's statements in his sworn declaration that accompanied the Thornton fee petition were knowingly false, and that they were motivated by a desire to greatly enhance the Thornton lodestar and thereby justify a larger fee award . . . .
>
> R&R at 364.

In short, the Special Master has concocted a story in which the Thornton Law Firm claimed staff attorneys as employees in order to deceive co-counsel into paying more of the aggregate fee to Thornton. This is wrong on many levels: (1) Lieff, Labaton, and Thornton jointly developed a plan to perform the necessary review of the millions of pages of State Street documents— neither Lieff nor Labaton ever stated they were deceived; (2) the boilerplate affidavit signed by Garrett Bradley was provided by Labaton; (3) the Special Master found that attorneys at all three firms understood that staff attorneys for which Thornton paid would be included on Thornton's lodestar; (4) the final fee agreement among the firms was executed *before* the fee declarations submitted to the Court even existed; (5) the fee agreement between the firms was not directly dependent upon each firm's lodestar; and (6) the fee agreement was a negotiation among sophisticated and experienced parties who had agreed to split the risk—and therefore the reward—of jointly funding the staff attorneys.

The idea that Garrett Bradley intentionally lied by signing an inaccurate boilerplate fee declaration (that he did not draft) in order to deceive co-counsel defies logic. The Special Master's conclusion is squarely contradicted by the fact that, in the course of a $3.8 million investigation, the Special Master did not uncover a shred of evidence that co-counsel was or felt

that it was deceived. There is no citation anywhere in the Report and Recommendations for this proposition because there is no such evidence; not a single Lieff or Labaton witness stated that the firms were in any way deceived by the Thornton Law Firm's fee declaration or lodestar.[20] The Special Master's motivation argument further hinges on the dubious claim that Garrett Bradley deceived co-counsel by signing (and not modifying) a boilerplate affidavit that co-counsel itself (Labaton) provided to the Thornton Law Firm. It simply does not make sense that Garrett Bradley would try to fool co-counsel by signing a declaration with language prepared by co-counsel.

The Special Master's conclusion that the Thornton Law Firm included staff attorneys on its lodestar in order to deceive co-counsel also **directly contradicts** the Special Master's finding that there was an understanding among attorneys at all three firms that Thornton would include staff attorneys on its lodestar. *See* R&R at 45 n.27 ("Some of the attorneys from Labaton, Lieff, and Thornton, however, independently made assumptions based on the circumstances that Thornton would claim those staff attorneys' time on its lodestar."); *id.* at 363 ("[C]ontemporary email traffic, the billing practices and deposition testimony all bear out that at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate . . . ."). *See also* Lieff's Resp. to Interrog. No. 34, 6/1/17 (SM Ex. 57) ("[I]t was the Firm's understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne

[20] Strangely, the Special Master insinuates that there was something nefarious about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. Yet Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage. In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%.

financial responsibility."); Lieff's Resp. to Interrog. No. 32, 7/10/17 (TLF Ex. 6) ("With respect to Staff Attorneys, the Firm's understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any attorney hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment.").

If attorneys at all three firms understood that Thornton would list the staff attorneys on its lodestar, it is unclear what possible motive there could have been to deceive, as all firms were operating under the same assumption. The Special Master also concluded that the double counting error was "largely inadvertent and the result of a combination of Labaton's internal compartmentalization . . . and a lack of any formal agreement." R&R at 363. It therefore makes no sense to suggest that Garrett Bradley could have *intentionally* caused an *inadvertent* error by signing a boilerplate affidavit.

In finding that Garrett Bradley was motivated to lie on the fee declaration to deceive co-counsel, the Special Master glosses over the incontrovertible chronology of the case. By the time the fee declaration was submitted to the Court, Customer Class Counsel had already decided upon a final division of fees. **There was no way in which the fee declaration submitted to the Court could have affected the proportion of the overall fee which Thornton would receive.** Here, some background is necessary. As the Special Master concedes, in 2011, "[a]t the inception of the case, Customer Class Counsel had agreed to a fee sharing arrangement pursuant to which Labaton, Lieff, and Thornton would each be entitled to 20% of any fee award, with the remaining 40% to be distributed at the end of the litigation . . . ." R&R at 51.

The Special Master does not explicitly say so but appears to believe that the remaining 40% was to be divided up among Labaton, Lieff, and Thornton based on the firms' lodestars

submitted to the Court on September 15, 2016. This was not the case. The final fee agreement among the firms was executed in August 2016, **prior to** the existence of the fee declarations or lodestars submitted to the Court in September 2016. *See* Chiplock Dep., 9/8/17, at 135:7-9 (SM Ex. 41) ("[T]he fee allocation agreement was reached in late August of 2016 . . . ."); Chiplock Dep., 6/16/17, at 131:5-9 (SM Ex. 10) ("So that was divvied up formally before we actually submitted the fee petition."); G. Bradley Dep., 6/19/17, at 46:24-47:2 (SM Ex. 43) ("[T]he fact of the matter is we had a fee agreement in place in August of '16 before we filed the fee application."); 8/30/16 Email, TLF-SST-032696 (TLF Ex. 7) ("Please see the attached fully executed fee agreement in the State Street matter."). Not surprisingly, this important piece of the chronology is absent from the Report.

The final fee agreement provided that of the total fee to be divided among Customer Class Counsel, Labaton would receive 47%, Thornton would receive 29%, and Lieff would receive 24%. *See* Final Fee Agreement, TLF-SST-056305, (TLF Ex. 8). As demonstrated by the below chart, the fee agreement did **not** track the final lodestar agreement. Although Thornton's lodestar was smaller than Lieff's, Thornton received a larger portion of the fee split than Lieff did:

	Agreed Fee Split of Customer Class Counsel (August 2016)	Percentage of Customer Class Counsel Total Lodestar (September 2016)
Labaton	47%	50%
Thornton	29%	22%
Lieff	24%	28%

This is illustrative of a broader point: which staff attorneys were on which lodestar did not at all control the allocation of the fee among counsel. All of the staff attorneys could have been listed on Lieff's or Labaton's lodestar, or all of the staff attorneys could have been listed on Thornton's lodestar—no matter who was on which lodestar, the fee allocation among counsel had already

been determined by negotiations among the three firms.[21] The purpose of the lodestars submitted to the Court on September 15, 2016 was not to set an allocation among counsel but simply to provide backup so that the Court could engage in a "cross-check" and determine whether the aggregate fee of 25% was reasonable. The Special Master refuses to acknowledge this important point.

In terms of rates, the Special Master ignores that some of Lieff's staff attorneys were actually billed at $515[22] and that **the weighted rate (i.e., total fees divided by total hours) for Thornton staff attorneys ($428) was actually lower than the weighted rate for Lieff staff attorneys ($438)**. If the weighted rate is limited to the "double counted hours," **the Lieff weighted rate is $50 per hour greater than the Thornton weighted rate.**[23] It's difficult to see

[21] The Special Master finds something troubling in the fact that there was "intertwining of the fee negotiations in the two cases [*BNY Mellon* and the State Street litigation]" as between Lieff and Thornton. *See* R&R at 52-53. The Special Master's "view [of Bradley intentionally making false statements in Thornton's fee declaration] is informed by the email exchanges between Bradley and Chiplock in which Bradley conveys his belief that Thornton did not receive a fair share of the *BONY Mellon* fee, in part because its lodestar was too low." R&R at 233 n.179. The fee agreement, which was finalized prior to the submission of the lodestars, was negotiated by sophisticated counsel who had entered into a cost-sharing agreement at the beginning of the litigation and who had finalized the fee division prior to submission of the lodestar. It would have been unremarkable (and certainly not cause for any kind of concern) if the fee allocation in the *BNY Mellon* case informed the negotiations among counsel in the State Street matter. The fee allocation among counsel would have **no effect** on the overall amount of attorneys' fees the class would pay to its attorneys.

[22] There are misrepresentations in the Special Master's report with respect to the staff attorney rates. At footnote 134 on page 169, the Special Master states that "Lieff Cabraser staff attorneys were billed at $415, except for two staff attorneys (Joshua Bloomfield and Marissa Oh) who were charged at $515." At page 169 in the text, he states "With the exception of two Lieff staff attorneys, those [staff attorney] rates landed mainly between $335 and $440." Both of these statements are false. Five Lieff staff attorneys were billed at $515, not two. *See* Lieff Decl., 9/14/16, Ex. A (SM Ex. 89). The Special Master himself acknowledges this in another part of his report on page 176: "Lieff's report listed twenty staff attorneys, five of whom were billed at $515 per hour . . . ." There is another misrepresentation on page 181. There, referring to the double counted staff attorneys, the Special Master states "The attorneys were billed by Labaton at Lieff at hourly rates ranging from $335 to $415." Again, this is false. As the Special Master acknowledges in footnote 147 on page 180, "Lieff billed two [double counted] staff attorneys – Ann Ten Eyck and Rachel Wintterle – at $515 per hour." In any case, there is no material difference between the Thornton billing rate for staff attorneys, $425, and the rate at which Lieff billed most of its staff attorneys, $415.

[23] Calculated according to the double-counted hours set forth in 11/9/16 Email, TLF-SST-032267 (SM Ex. 261). According to that email, no hours were double counted for McClelland and Weiss. To be conservative, double-counted hours for Wintterle and Ten Eyck are the lower of the hours on either the Lieff or the Thornton lodestar since "Rachel Wintterle and Ann Ten Eyck should not have been included in LCHB's lodestar at all,"

how Thornton could deceive Lieff when Lieff's effective staff attorney rate was higher than Thornton's. More broadly, the Special Master's laser focus on the $425 per hour rate[24] blinds him to the fact that by almost every metric, Thornton's rates were lower than one or both of co-counsel:

RATES	Average Partner	Weighted Partner	Average Staff Atty	Weighted Staff Atty
Labaton	$905.00	$861.13	$380.42	$376.59
Lieff	$765.50	$690.73	$440.00	$438.02
Thornton	$721.25	$694.36	$428.13	$427.87

Particularly noticeable is that both the average partner rate and weighted partner rate is more than $150 higher for Labaton than for Thornton. In none of the four categories listed above is Thornton the rate leader. This is hardly demonstrative of a law firm that is trying to inflate rates to deceive co-counsel (or the Court).[25]

Even if the fee agreement was based on the lodestar submitted to the Court (which it was not), the Thornton Law Firm's seeking credit for staff attorneys for which it paid could not possibly have deceived co-counsel—especially when the entire effort related to document review

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but Wintterle's hours were slightly lower on the Thornton lodestar and Ten Eyck's hours were slightly lower on the Lieff lodestar.

[24] As discussed *infra* at Section III(B)(iii), the $425 rate was used for Thornton staff attorneys because it was approved by the Court for Lieff staff attorneys in the most analogous case, *BNY Mellon*. Dan Chiplock had expressly suggested that the $425 rate be used in the State Street litigation. *See* note 34.

[25] One statement the Special Master makes with respect to rates is particularly misleading. He notes in the Executive Summary at page 16, "Indeed, the manner in which Thornton implemented this [cost sharing] agreement appears designed from the inception to exaggerate its lodestar. Thornton specifically reimbursed the other two firms for the staff attorneys and agency lawyers 'loaned' to them on a straight cost-only basis yet subsequently claimed them on its own lodestar report at rates much higher than Thornton had actually paid the two firms in cost reimbursement, and even higher hourly rates than Labaton and Lieff claimed for most of these same staff attorneys on their own reports." Here, the Special Master is concerned about the entirely unobjectionable proposition of billing attorneys above cost. Yet elsewhere in the R&R, the Special Master admits, "[T]here is nothing impermissible about marking up an attorney's billing rate above 'cost' so long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed," R&R at 177. And the Special Master later finds that the billable rate for the staff attorneys was reasonable. R&R at 172, 180.

and subsequent work was jointly planned and executed by the three customer class firms. The Special Master found that "Labaton, Lieff, and Thornton entered into a fee agreement to 'allocate' the costs of certain staff attorneys employed by and working at Labaton and Lieff's offices to Thornton. . . . The purpose of the cost-sharing agreement was to share the cost and risk burdens of the litigation among the three Customer Class firms." R&R at 43. Lieff and Labaton are sophisticated parties. They did not think that Thornton should have borne the risk of paying for staff attorneys during the pendency of the litigation if it was not going to be rewarded for taking on such risk if the litigation was successful. And Lieff and Labaton would not have themselves agreed to the cost-sharing agreement if it was not in their best interest to distribute some of the risk—and therefore some of the reward—to Thornton. *See, e.g.*, Chiplock Dep., 6/16/17, at 129:6-13 (SM Ex. 10); Belfi Dep., 6/14/17 at 51:8-13 (SM Ex. 17); Rogers Dep., 6/16/17, at 91:18-92:16 (SM Ex. 54).

This Court should understand the context of what the Special Master perceives as the "smoking gun"—an email in which Garrett Bradley receives an invoice *from Labaton* for staff attorneys and writes to Michael Thornton and Michael Lesser, "First month bill. . . . This is the best way to jack up the loadstar [sic] . . . ." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64).[26] This email was sent in **February 2015**—more than a year before the fee declaration or lodestar was filed with the Court. What Garrett Bradley is referring to is the fact that if Thornton bore more risk by investing in additional staff attorneys over the course of the litigation in relation to the other firms (and pursuant to the firms' agreement), Thornton would reap a greater reward **in the fee split among counsel** if the litigation was successful. **This would in no way increase the aggregate lodestar submitted to the Court or the amount of fees the class would pay its**

[26] This email is a long thread that continues into March, but the cited email was sent in February.

lawyers. In fact, Bradley is not referring to the aggregate lodestar, but is using shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* Although the Special Master or his counsel may think "jacking up" serves as a great soundbite, the concept is entirely proper and unobjectionable.

It is worth noting that the very same document demonstrates the Thornton Law Firm's attentiveness to avoiding any inaccuracies in the lodestar. Michael Lesser later writes, "Just following up on the doc review recordkeeping. The attached invoice is dated 2/6/2015 (and was sent by email on 2/6 as well) but includes billables through 2/28. Can you ask them to confirm whether these hours billed were for 2/6 – 2/28? **I don't want us to double-count anything**." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64) (emphasis added).

Perhaps what the Special Master really finds objectionable, as his so-called expert witness certainly does, is that plaintiffs' lawyers are interested in their fees. *See* Benjamin Weiser, *Tobacco's Trials*, WASHINGTON POST (Dec. 8, 1996) ("'The plaintiffs' bar is peopled by lawyers who are permanently hungry,' says Stephen Gillers, professor of legal ethics at New York University. 'They're like red ants at a picnic. There are an unlimited number of them, and if the food is good, they'll keep coming at you.'"); Stephanie Clifford and Benjamin Weiser, *In Shift, New York City Is Quickly Settling Big Civil Rights Lawsuits*, N.Y. TIMES (July 24, 2014) ("'It's like ants at a picnic,' said Stephen Gillers, an expert in ethics and the legal profession at New York University School of Law. 'All of a sudden the food's on the table and here they come.'").[27]

[27] The Thornton Law Firm objects to Prof. Gillers' participation in these proceeding as a "legal expert." *See* Supplemental Ethical Report for Special Master Gerald E. Rosen at 2 (SM Ex. 233) (stating "I understand that I am the equivalent of a court appointed expert" and noting "the District Court in Massachusetts has recognized legal ethics experts."). The Court should not permit Prof. Gillers to assume the imprimatur of the Court as an expert on the law. *See Reed v. Cleveland Bd. Of Ed.*, 607 F.2d 737, 747 (6th Cir. 1979) ("[W]e do not approve the practice of appointing legal advisors to a master or the court. To the extent that the master was not qualified to make recommendations to the court because of a lack of experience in constitutional law, he

B. There Was No Motivation To Deceive The Court

It is telling that the Special Master appears to find only that, in signing the boilerplate declaration, the Thornton Law Firm was motivated to deceive co-counsel, and not the Court. Again, in a percentage fee jurisdiction, additional lodestar simply does not provide additional funds to attorneys seeking a fee award—the lodestar is only used as a cross-check to ensure that the aggregate fee amount is reasonable. *See* Rubenstein Decl., 6/20/18, at ¶¶ 19-20; Rubenstein Decl., 7/31/17, at ¶¶ 14-18 (TLF Ex. 1). In this case, months before the lodestar was submitted to the Court, it was already understood by all parties that the attorneys would seek an aggregate fee of approximately 25%. *See*, *e.g.*, Chiplock Dep., 9/8/17, at 70:14-71:24 (SM Ex. 41). The 25% figure was represented to the Court in June 2016, three months before the lodestars were filed, *see* 6/23/16 Hr'g Tr. at 15:5-16:2 (Dkt. 85), and was published in the Notice of Pendency dated August 22, 2016. By the time the lodestars were submitted to the Court in mid-September 2016, the attorneys could not have asked for anything beyond 25%. It is not as if, for instance, the Thornton Law Firm could have showed its co-counsel a particularly large lodestar and convinced them to seek leave to request 27% or 30%. **The aggregate fee request was already set and, no matter how large their lodestar, there was zero possibility that Thornton could receive more than their agreed upon share (29% of Customer Class Counsel allocation) of the 25% fee request.**

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should have submitted such legal issues to the court."); *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code."); *In re: Initial Public Offering Securities Litigation,* 174 F. Supp. 2d 61, 69 n. 11 (S.D.N.Y. 2001) ("Each courtroom comes equipped with a 'legal expert,' called a judge.") (quoting *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997)). The Thornton Law Firm also objects to Prof. Gillers's report on the basis that the factual background section of the report (which, at 58 pages, is the more than half of the report) is replete with mischaracterizations and omissions of record evidence. This is not surprising, as Prof. Gillers acknowledges that the Special Master and his counsel drafted the factual background section of his report, Gillers Supp. Report, 5/8/18, at 2, and as those mischaracterizations and omissions are repeated in the R&R.

Perhaps the Special Master will next speculate that the Thornton Law Firm might have been motivated to increase its lodestar to provide further support for the Court's cross-check in support of the 25% award. In other words, the higher the lodestar, the lower the multiplier, and the more likely that the Court would find the fee award reasonable. But this is not a realistic motivation for at least two obvious reasons. First, the aggregate fee multiplier in this case was modest and well within the range of what courts find acceptable in awarding fees. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1); Rubenstein Decl., 6/20/18. There was therefore no need to decrease the multiplier to ensure the Court would approve the award. And second, it would be incredibly difficult for any one firm, especially Thornton, to "move the needle" on the multiplier. Thornton's lodestar represented just 18% of the overall lodestar submitted to the Court. Even if there were an additional $1 million on Thornton's lodestar which was removed, it would have only moved the overall multiplier from 1.804 to 1.849, which is negligible. Indeed, even if Thornton billed all of its staff attorneys at $300 per hour rather than $425 or $500 per hour and the difference was removed, the overall multiplier would have only moved to 1.865, which is also negligible.

It is important to recall the manner in which the Special Master believes the Court was supposedly intentionally deceived. The manner of deception was not falsely increasing hours worked, which would have been very difficult for the Court or anyone else to detect. In fact, the Special Master found that all of the Thornton Law Firm hours were reasonable. R&R at 216-17. The supposed manner of deception was instead signing a boilerplate affidavit (which the Thornton Law Firm did not even draft) and correctly listing on the Thornton's Law Firm's lodestar those staff attorneys which the Thornton Law Firm paid for pursuant to an agreement among co-counsel. The names of the staff attorneys were explicitly listed on the lodestars such

that **anyone** who placed the lodestars side by side would immediately realize that certain attorneys' time had been double counted. It is ludicrous to suggest such an obvious and basic mistake was intentional deception—indeed, it would be perhaps the lamest attempt at deception in the history of the federal courts. *Cf. Awkal v. Mitchell*, 613 F.3d 629, 655 (6th Cir. 2010) (Martin, J., dissenting) ("At some point, Ockham's Razor [sic] must apply—the simplest answer is usually the correct one."); *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004) ("Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made . . . .").

C. The Special Master's Assertion That Garrett Bradley Did, In Fact, Closely Review The Declaration Prior To Submission Is Based On A Blatant Misrepresentation Of The Evidence

With no true evidence of motivation, the Special Master next finds intentionality based on "evidence" that Garrett Bradley closely read the boilerplate declaration before singing it and therefore was aware of his misstatements. The Special Master states:

> Emails among Garrett Bradley, Mike Lesser and Evan Hoffman show that drafts of the declaration were circulated among these Thornton attorneys for their review. This is confirmed by the testimony of Evan Hoffman: "[w]e put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then **mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed**" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15.

R&R at 229 (emphasis in Special Master's R&R).[28]

Although the Special Master's description makes it seem that he has found another "smoking gun," the Court's attention should always be piqued when a litigant replaces the material words of a quotation with his own characterization, and this instance is no different. In fact, Mr. Hoffman **does not** say at lines 9 through 15 of page 94 that Messrs. Lesser, Bradley,

[28] The Special Master uses the same quote in his R&R at 59.

and Thornton reviewed the entire boilerplate declaration prior to Mr. Bradley signing it. Mr. Hoffman instead explained:

> [T]here was a section on fill in what your hours are, fill in what your expenses are, fill in what your lodestar is, fill in what your specific contributions were to the case, and the rest of the language was sort of, it was called a model fee declaration. And so that's what we did, he put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed **the sort of narrative about the firm's contribution, which I believe mostly Mike Lesser drafted**.

Hoffman Dep., 6/5/17, at 94:1-17 (SM Ex. 63) (emphasis added—the emphasized portion was omitted from the Special Master's quotation of this deposition).

This is perhaps the most egregious example of the Report's overreaching to identify non-existent misconduct. The Special Master or his counsel have lifted a partial quote, omitted the most material aspect of the quote, and substituted their own words to create an entirely different meaning. Mr. Hoffman **did not** testify that Mr. Bradley reviewed "the declaration" as a whole, but only that he reviewed the "narrative about the firm's contribution." *Id.* For the Special Master to find otherwise—and to use it as purported evidence to impose severe sanctions—is disingenuous and highly misleading. As the Court is aware, the boilerplate Labaton declaration was a "fill-in-the blank" document. *See* Hoffman Dep., 6/5/17, at 93:14-22 (SM Ex. 63). There were two primary portions of the template declaration that each firm needed to customize: the actual lodestar itself and paragraph 2, in which each firm described its unique contribution to the litigation. *See* Template Decl., TLF-SST-029797 (TLF Ex. 9) (noting, in paragraph 2: "Supplement to explain role in the Class Actions and give overview of work performed."). The rest of the declaration was Labaton's boilerplate and, as the Special Master concluded, the majority of the firms did not modify the boilerplate section at issue in these proceedings. *See* R&R at 57. Like the other firms, the Thornton Law Firm carefully drafted a narrative of its

particular contributions and submitted the narrative to the Court as paragraph 2 of its declaration. This is the "narrative" to which Mr. Hoffman is referring as being reviewed by Mike Lesser, Mike Thornton, and Garrett Bradley. It makes sense that the Thornton Law Firm partners carefully reviewed the customized section of the fee declaration, but in no way does this prove that Garrett Bradley must have also carefully reviewed the entire boilerplate portion of the fee declaration. The Special Master's (or his counsel's) decision to replace the content of sworn deposition testimony with their own words was obviously not done as a matter of summarization or for ease of reading: one can only conclude it was intended to change the meaning of the testimony in order to advance a false narrative.

D. The Special Master's Assertion That Garrett Bradley Had The "Opportunity" To Give The Declaration A "Close Read" Is Unobjectionable, But Does Not Prove Bradley Intentionally Filed A False Declaration

Without proper evidence of motivation or that Garrett Bradley in fact closely reviewed the boilerplate portions of the fee declaration, the Special Master also tries to prove that Garrett Bradley made intentional misrepresentations based on the fact that Bradley had the **opportunity** to scrutinize the boilerplate declaration. *See* R&R at 229 ("Though Bradley testified that he only looked at his declaration before it was filed . . . the record shows that Bradley had ample opportunity to give the declaration the 'close read' that was required."). This is, of course, a classic strawman argument. No party in these proceedings has ever contended that Garrett Bradley did not have the "opportunity" to closely read the declaration prior to signing it. Garrett Bradley himself has certainly never made this argument. *See* G. Bradley Dep., 6/19/17, 84:22-85:1 (SM Ex. 43) ("I saw the final. Evan brought it in. I gave it, obviously, not a close read and then I signed it. I'm sure I was on e-mail traffic for the draft form, as well."). Quite simply, the fact that Garrett Bradley had the opportunity to closely review the boilerplate sections of the declaration does not mean that he actually did so, and therefore that he knowingly and

intentionally made misrepresentations to the Court. Certainly Labaton, whose attorneys had the opportunity (and indeed, whose job it was as lead counsel) to review all fee declarations side by side and scrutinize them for inaccuracies, did not do so. The fact that Labaton had the opportunity to correct the inaccuracies but did not do so does not mean that they made intentional misrepresentations any more so than the fact that Garrett Bradley had the opportunity to review the affidavit means he made intentional misrepresentations.

E. The Special Master's Finding Of Intentional Misrepresentation Is Belied By His Inability To Decide Whether Or Not Garrett Bradley Actually Read The Declaration

It is emblematic of the Special Master's scattershot approach and ever-changing theories that, in one section of the Report (discussed above) he presents what he believes is hard evidence that Garrett Bradley carefully reviewed the declaration before it was filed and in the next section he alleges that "Garrett Bradley did not read the narrative section at all." In particular, the Special Master writes:

> Bradley admits that he did not take the time to "closely read" the Declaration before signing it. **The Special Master believes Bradley did not read the narrative section at all** or if he did, even in a cursory fashion, he turned a blind eye to the falsity of the statements, ignoring the ethical obligations imposed by Rule 11 and the potential impact of the false statements upon the attorney fees approval process.

R&R at 231 (emphasis added).

But the Special Master cannot have it both ways. The argument is ridiculous on its face—the Special Master cannot find both that Garrett Bradley read the declaration, knew it was false, and signed it anyway, and that he signed the declaration without reading it at all. When considering the imposition of sanctions, it is the factfinder's job to "marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402 (1990). Here, the Special Master's own factual

determinations flatly contradict themselves; he therefore could not have properly applied the "fact-dependent" legal standard required by Rule 11.

F. The Special Master's Assertion That Garrett Bradley Admitted He Intentionally Lied To The Court Grossly Mischaracterizes The Evidence

Lacking any support for the propositions that Garrett Bradley (1) had motivation to lie to the Court; (2) closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court; or (3) had the *opportunity* to closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court, the Special Master's final argument is that Garrett Bradley simply admitted that he lied to the Court: "At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway." This statement appears twice in the Special Master's Report. *See* R&R at 60, 229. The problem of course is that Bradley **did not** acknowledge during the hearing that "he knew his Declaration contained inaccurate information but he signed it anyway." The citations for this "fact" are: "3/7/17 Hearing Tr. P. 87:13-14; 88:2-9; 14-18 [sic]; 91:5-7; 92:3-8." Below is the transcript of the cited portions of the March 7, 2017 hearing:

87:13-14:

The Court:	Well, you signed the affidavit.
Mr. G. Bradley:	I did, your honor and within that . . . .

88:2-9:

The Court:	The Court was told that was their billing rate.
Mr. G. Bradley:	That is what the rate was that the Court approved in that case.
The Court:	Had you ever charged any of those individuals, paying client, at $425 an hour?
Mr. G. Bradley:	We don't have paying clients, your . . . .

88:14-18:

> Mr. G. Bradley: The staff attorneys that were listed on there that under – paragraph 4 in my affidavit where it says that we paid them is a mistake, your Honor. Those individuals were actually housed at Labaton Sucharow or Lieff Cabraser. We had not used those before. That paragraph, quite frankly, should . . . .

91:5-7:

> Mr. G. Bradley: [A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph.

92:3-8:

> Mr. G. Bradley: There was a discussion at the time as to what to use, and then our firm and, I believe, the Lieff firm used the same rates that were used within the *Mellon* case, but everybody understood that those were the rates that were going to be applied to the type of work being done by that group of people.

In no way do these cited statements show that Bradley "knew his Declaration contained inaccurate information but he signed it anyway." Mr. Bradley simply did not say so. What these excerpts instead show is that Garrett Bradley made a basic and very unfortunate mistake. The Special Master has mischaracterized the record here in the manner one would expect of an overly-aggressive litigant, not a supposed neutral court-appointed factfinder.

G. In Fact, Garrett Bradley Made A Mistake And Corrected The Mistake At the Appropriate Time

As demonstrated above, none of the Special Master's evidence even suggests that Garrett Bradley intentionally misled the Court. Although the Special Master may think he is obligated to justify his $3.8 million investigation by finding some form of intentional misconduct, in actuality, the root of the case is a basic and unfortunate inadvertent error—or in more simple terms, a mistake. The fact of the matter is that Labaton sent all firms a boilerplate, fill-in-the blank fee declaration with customizable sections for fees, expenses, and a narrative for each firm's unique contribution to the litigation. *See* Hoffman Dep., 6/5/17, at 93:14-94:8 (SM Ex.

63); Template Decl., TLF-SST-029797 (TLF Ex. 9). Thornton Law Firm attorneys drafted the fees, expenses, and firm contribution section and Messrs. Lesser, Bradley, Hoffman, and Thornton reviewed the firm contribution section. Hoffman Dep., 6/5/17, at 94:9-17 (SM Ex. 63). The Thornton Law Firm did not modify the boilerplate portion of the fee declaration at issue here but neither, as the Special Master found, did six of the nine firms who submitted fee declarations. *See* R&R at 57.

As Garrett Bradley testified in his deposition, when he signed the boilerplate declaration he "gave it, obviously, not a close read." G. Bradley Dep., 6/19/17, at 84:22-23 (SM Ex. 43). In other words, he did not scrutinize the boilerplate portion of the declaration to the extent necessary to have realized that some of its statements were incorrect, or at the very least, unclear. The errors in the affidavit, although unintentional and, as set forth below, immaterial, are "messy and . . . embarrassing." G. Bradley Dep., 6/19/17, at 82:20-21 (SM Ex. 43). Bradley admitted this mistake to the Court during the March 7, 2017 hearing, noting: "That paragraph, quite frankly, should have been clarified by me at that time. It was not," 3/7/17 Hr'g Tr. at 88:18-19 (SM Ex. 96), and "[A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph," *id*. at 91:5-7.

The double counting, which (as discussed above) was not the Thornton Law Firm's error, was immediately disclosed to the Court by Customer Class Counsel after a media inquiry alerted the law firms to the issue. As the Special Master found, on November 8, 2016, Garrett Bradley learned from counsel that the *Boston Globe* identified potential double counting on Customer Class Counsel's lodestar. *See* R&R at 126-27. The same day, Bradley contacted Lieff and Labaton, and all three firms worked diligently to determine the extent of the error and to prepare a revised and corrected lodestar figure. *Id*. A letter informing the Court was filed on November

10, 2016. The letter, which was signed by Labaton attorney David Goldsmith, noted that counsel "sincerely apologize[s] to the Court for the inadvertent errors in our written submissions and presentation during the hearing" and that counsel was "available to respond to any questions or concerns the Court may have." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178).

III. The Thornton Law Firm Did Not Violate Rule 11

A. Isolated Factual Errors Cannot Serve As The Basis For Rule 11 Sanctions

Sanctioning a lawyer or law firm pursuant to Federal Rule of Civil Procedure 11 is a severe penalty that should not be imposed broadly. "Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps." *McGee v. Town of Rockland*, No. 11-CV-10523-RGS, 2012 WL 6644781, at *1 n.2 (D. Mass. Dec. 20, 2012). As the First Circuit noted in reversing a district court's imposition of sanctions, "[c]ourts ought not to invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39-40 (1st Cir. 2005). This is especially so where sanctions are imposed *sua sponte* and counsel are not able to avail themselves of the Rule's safe-harbor provision when they realize they have erred and may withdraw a pleading without penalty. *Young*, 404 F.3d at 40 (noting that, when imposed *sua sponte*, Rule 11 sanctions are reserved for instances of "serious misconduct"); *Vollmer v. Selden*, 350 F.3d 656, 663 (7th Cir. 2003) ("Absent extraordinary circumstances not shown here, *sua sponte* sanctions are generally limited to several thousand dollars."); Fed. R. Civ. P. 11 advisory committee's note ("[S]how cause orders will ordinarily be issued only in situations that are akin to a contempt of court."). *See generally* Vairo Decl., 3/26/18 (TLF Ex. 10).

In this proceeding, it is vital to heed the First Circuit's warning that "Civil Rule 11 is not a strict liability provision." *Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 88 (1st Cir.

2017) (internal quotation marks omitted). Statements that are "literally inaccurate" may not be sanctionable because "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) (Breyer, J.).[29] *See also Young*, 404 F.3d at 41 (reversing sanctions imposed by district court where "memorandum may otherwise have been misleading or inaccurate in certain of its detail"); *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987) ("[Rule 11] does not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well grounded in fact.'").

The case at bar is on all fours with *Navarro-Ayala*. There, the First Circuit reversed the district court's finding of sanctions because "the motion, **read fairly and as a whole**, contain[ed] **no significant false statement** that **significantly harmed** the other side." *Navarro-Ayala*, 3 F.3d at 467 (emphasis added). In so holding, the First Circuit noted that "We emphasize the word 'significant' because the district court found one sentence literally false," and further explained that, "the district court, at most, could have found a few isolated instances of noncritical statements that further inquiry might have shown to be inaccurate or overstated. That further inquiry would not have shown the motion's requests to have been baseless." *Id.* at 467-68. *See also Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) (reversing Rule 11 sanctions where "the affidavit was not knowingly false as to any material fact, although one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization" and describing the affidavit as "an unsound piece of lawyer advocacy rather than a lie about a fact").

[29] Although this case construed the pre-1993 version of Rule 11, the 1993 amendments are immaterial to the First Circuit's analysis.

B. The Statements In The Affidavit Do Not Support Rule 11 Sanctions

The Special Master identifies what he believes are six discrete "false statements" in Garrett Bradley's affidavit. Upon closer examination, it is clear that none of the "false statements" can serve as a proper basis for imposing Rule 11 sanctions. *See* Vairo Dep., 4/10/18, at 47:23-48:8 (SM Ex. 202).

i. Staff Attorneys As Employees

The first two alleged "false statements" are variations on the same criticism—that the attorneys listed on Thornton's lodestar were not technically "employed" by the Thornton Law Firm. Specifically, the Special Master identifies as false: (1) the statement that the lodestar summarized "time spent by each attorney and professional support staff-member *of my firm* who was involved in the prosecution of the Class Actions"; and (2) the statement that "[f]or personnel who are no longer *employed* by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of *employment* by my firm." R&R at 227 (emphasis added). Of course, both statements are true with respect to the four partners, one associate, and one paralegal listed on the affidavit. These attorneys and the paralegal were bona fide employees of the Thornton Law Firm. With respect to the staff attorneys, the statement is literally incorrect in the sense that the staff attorneys were not technically, as a legal matter, employees of the Thornton Law Firm. It is not, however, as if the staff attorneys had no relationship with Thornton. In fact, it is undisputed that Thornton paid for all of the staff attorneys listed on its lodestar, whether directly through a staffing agency, or through co-counsel. And the Special Master has conceded that attorneys at all three law firms understood that the Thornton Law Firm would include the staff attorneys for which it was paying on the Thornton lodestar. *See supra* § II(A).

The error of including the word "employed" with respect to the staff attorneys was introduced only because Thornton used the boilerplate template of Labaton, a larger firm which predominantly and regularly brings class action cases and has the capacity to employ its own staff attorneys. Most crucially, by its nature, the error had absolutely no effect on the lodestar figure. The purpose of the lodestar is to show hours worked—not employment status. There is no question that the attorneys listed actually worked the hours included on the lodestar, as the Special Master concedes the hours were reasonable. R&R at 210.[30] Instead, the Special Master raises only the technical question of whether all attorneys were described properly as "employees."

If the Special Master believes that the reference to staff attorneys (housed at co-counsel but paid for by the Thornton Law Firm) as "employed" is false and sanctionable, it is curious that the Special Master does not recommend Rule 11 sanctions for Lieff and Labaton, both of whom used the **exact same boilerplate** the Special Master finds objectionable as to Thornton. The Lieff and Labaton affidavits, under the Special Master's hyper-technical reading, also appear to be false. The Lieff affidavit, for instance, lists as Lieff Cabraser "employees" attorneys who were actually "contract" or "agency" attorneys with whom Lieff Cabraser did not have an employer-employee relationship.[31] *Compare* Chiplock Decl., 9/14/16 (SM Ex. 89) (referring to

[30] The Special Master does not question any of the hours expended by any of the attorneys in this matter.

[31] In fact, it seems to be a fairly common practice to list contract attorneys as "employees" or attorneys "of the firm" on lodestars, even though such attorneys are technically not employees. *Compare* Friedman Decl., Dkt. 916-29, *In re Anthem, Inc. Data Breach Litigation*, No. 5:15-md-02617 (N.D. Cal. Dec. 1, 2017) (noting lodestar contains "detailed summaries of the amount of time spent by my firm's partners, attorneys, and professional support staff") (TLF Ex. 11), *with* Ex. 1, Dkt. 916-10, *Anthem* (listing 15 contract attorneys alongside partners, associates and staff in the firm's lodestar) (TLF Ex. 12); Shuman Decl., Dkt. 506-7, *In re: Oppenheimer Rochester Funds Group Securities Litigation*, No. 1:09-md-02063-JLK-KMT (D. Colo. June 6, 2014) (stating that the lodestar calculation is based on "my firm's current billing rates" or on billing rates "in his or her final year of employment by my firm" for "personnel who are no longer employed at my firm" and attaching a lodestar report that includes a "contract attorney") (TLF Ex. 13).

all attorneys in same manner as Bradley Declaration) *with* Lieff's Resp. to Interrog. No. 24, 7/10/17 (TLF Ex. 6) (noting some attorneys listed on lodestar were contract attorneys). The Labaton affidavit is similarly "flawed" because it lists as "employees" those attorneys who were paid by Thornton pursuant to the cost-sharing agreement. *Compare* Sucharow Decl., 9/15/16 (SM Ex. 88), *with* Labaton's Resp. to Interrog. No. 18, 6/1/17 (SM Ex. 249) (noting that the cost of certain staff attorneys was invoiced to Thornton). By listing staff attorneys as "employees," the Labaton affidavit implies that Labaton paid for all such attorneys when in fact it did not. This is certainly not to say that Lieff and Labaton should be sanctioned for these misstatements, but to emphasize that such misstatements are not sanctionable for any of the three firms. *See Obert*, 398 F.3d at 143 (attorneys should not be sanctioned for erroneously describing a chambers conference as a "hearing").

ii. Time Records

The Special Master next contends that the Thornton Law Firm should be sanctioned because the Bradley affidavit states that the lodestar "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court." Here it is worth noting that the Special Master finds this statement sanctionable because it is "untrue" on pages 227-28 of his R&R, but on page 59 of his R&R **declines to find that the exact same statement untrue**. R&R at 59 n.46 ("The Special Master, however is unable to conclude that this statement is untrue."). Putting aside the obvious irony of such a clear error in the context of this case, this demonstrates that the "time records" statement is not, as the Special Master contends on pages 227-28, actually false.

If the Court is inclined to accept the Special Master's finding on pages 227-28 rather than the exact opposite finding on page 59, it is important to note the Special Master finds this statement false and sanctionable (on pages 227-28, at least) for two reasons. The first reason is

that "Thornton did not prepare or maintain daily time records of the hours worked by the SAs listed on its lodestar." R&R at 227-28.

The Special Master's quibble is simply that co-counsel, rather than the Thornton Law Firm, and in some cases perhaps staffing agencies, *prepared and maintained* time records for certain staff attorneys listed on the lodestar.[32] Again, there is no allegation that the hours were not actually worked, only that the Thornton Law Firm did not state with adequate precision who *prepared* and *maintained* the records. But the Special Master ignored (at least in this section of the report) evidence that the Thornton Law Firm did, in many cases, *maintain* the time records of staff attorneys for whom it paid, including lawyers at Lieff and Labaton, and Michael Bradley. *See, e.g.*, R&R at 44 (describing how Thornton partner Evan Hoffman kept track of staff attorney time). Even if the Thornton Law Firm did not maintain or prepare any of the time records, it is certainly a stretch to say a technical error in who *prepared* and *maintained* the time records warrants Rule 11 sanctions.

The Special Master's second criticism is that the clause "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm" is false because "Thornton [did not] maintain *sufficiently reliable* contemporaneous time records for all of the attorneys working on the State Street case." R&R at 227-28 (emphasis added). But the Special Master specifically found that Thornton Law Firm partners Michael Lesser and Evan Hoffman *did* maintain sufficiently contemporaneous time records, R&R at 205, and does not appear to take any issue with the timekeeping of the staff attorneys. The Special Master has only criticized the timekeeping of Garrett Bradley and Michael Thornton. R&R at 208-09. In other

[32] Regardless, however, of the Special Master's criticism, for the partners, associate, and paralegal listed on Thornton's lodestar, all time records *were* prepared and maintained by the Thornton Law Firm.

words, the Special Master takes issue with the timekeeping of *two out of the thirty* timekeepers listed on the Thornton Law Firm's lodestar. Crucially, he does not conclude that the time records of these two attorneys were **not** contemporaneous, but that "**it is questionable** whether the handwritten notes and calendars of Garrett Bradley and Michael Thornton are sufficiently reliable to constitute contemporaneous records of their time." R&R at 228 n.178. Despite his questions as to whether the time records of two attorneys are sufficiently contemporaneous, he nonetheless concludes that "the total hours expended by each of the Thornton lawyers were **reasonable** and **sufficiently reliable**." R&R at 216 (emphasis added). The finding that a small number of time records *may not* have been contemporaneous (at least in one section of the R&R, which is flatly contradicted by another), but that nonetheless the time was reasonable, the records were reliable, and the hours were actually worked, clearly does not support a Rule 11 violation.

iii. Rates Accepted In Other Actions

The Special Master finds the statement that lodestar rates "have been accepted in other complex class actions" false because "[w]ith the exception of 4 staff attorneys, the $425 rate charged for the remaining staff attorneys listed on the lodestar, including Michael Bradley, had not been accepted in other complex class actions." R&R at 228. The Special Master appears to read the statement as an attestation that each *individual* staff attorney had previously been listed on an approved lodestar petition at the same rate. If the Special Master is correct in the meaning of this phrase, then he would have been obligated to inquire whether each of the 20 staff attorneys listed on the Lieff affidavit and each of the 35 staff attorneys on the Labaton affidavit (as well as, for that matter, all of the attorneys on Customer Class Counsel and the ERISA firms' declarations) had actually been listed on an approved lodestar petition at the relevant rate, or whether, for instance, some were recent law school graduates who had never previously

appeared on a lodestar.[33] That the Special Master does not appear to have undertaken this exercise undermines his interpretation of this phrase. Clearly the statement that certain "rates" have been accepted refers to rates for attorney **positions** (such as the staff attorney position), not rates for **individual** staff attorneys themselves. This reading is the only one that makes sense because staff attorneys are often temporary employees who move from firm to firm and document review to document review and whose rates are often not determined on an individual basis.

In any event, the rate of $425 per hour, which Thornton charged for its staff attorneys in this case, **was accepted** by the court in the *BNY Mellon* litigation for the staff attorneys listed on Lieff's lodestar. *Compare* Chiplock Decl., Ex. B, Dkt. 622-1, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Aug. 17, 2015) (SM Ex. 186) (listing $425 as the rate for nine contract attorneys on Lieff's lodestar) *with* Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, Dkt. 637, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Sept. 24, 2015) (SM Ex. 9) (allocating attorneys' fees "based on the multipliers applied to each firm's lodestar . . . which are adopted by the Court"). Although Michael Bradley's rate ($500) was not the rate for staff attorneys in the *BNY Mellon* litigation, the affidavit was not limited to that litigation, but rather cited "other complex class actions." G. Bradley Decl., 9/14/16, at ¶ 4 (SM Ex. 66). As Professor Rubenstein explained in his expert report, rates of up to **$550** per hour have been accepted in class action litigation for staff attorneys. *See* Rubenstein Decl.,

[33] For instance, is doubtful that Ann Ten Eyck and Rachel Wintterle, two contract attorneys, had ever been billed on an approved lodestar at $515 per hour. Lieff intended all staff attorneys to be billed at $415 per hour. The $515 rate was likely unintentional. Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the $515 rate was not reasonable or that it had not been approved for staff attorneys in other actions, only that it may not have been previously approved for Attorneys Ten Eyck and Wintterle as individuals.

7/31/17, at ¶ 36 (TLF Ex. 1). Even in this case (the instant State Street litigation), the Court approved Lieff's lodestar, which listed the rates of five staff attorneys as **$515** per hour, and the Special Master accepted these rates as well. *See* R&R at 180-81 (noting "the Special Master finds noting unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms . . . ."). In other matters, Labaton has set its staff attorney rates at $500 per hour. *See* Labaton's Resp. to Interrog. 48, 7/10/17 (TLF Ex. 14) (referencing *In re Barrick Gold Securities Litigation*, No. 13-cv-3851 (S.D.N.Y.)). The statement regarding rates "accepted in other complex class actions" is therefore true and cannot be the basis for Rule 11 sanctions.

Here, it is worth noting that the Special Master implies that it was somehow untoward for the Thornton Law Firm to use the $425 rate for staff attorneys because he has concluded that Lieff and Labaton suggested that $425 serve as a cap, not that Thornton actually charge $425 for its Staff Attorneys.[34] *See* R&R at 225. Regardless of the Special Master's insinuations, it is undisputed that the $425 rate was accepted in the *BNY Mellon* litigation. It is unclear why it would be inappropriate for the Thornton Law Firm to use the rate its co-counsel used (and the court approved) in the case most analogous to the one at bar. *See* Chiplock Dep., 6/16/17, at 184:20-25; 227:2-4 (SM Ex. 10) ("And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425," and "[t]hey [*BNY Mellon* rates] were generally 425, which is the guidance that Thornton used when they submitted their declarations."). Moreover, there is hardly any difference between the rate Lieff set for most of its staff attorneys in the State Street matter (generally $415,

[34] The Special Master's comment that $425 was a "cap" is also inconsistent with the record testimony, which was ignored by the Special Master. *See* Chiplock Dep., 9/8/17, at 52:2-5 (SM Ex. 41) (with respect to same email Special Master discusses, stating "It was my expectation that the three firms would be billing their document reviewers at comparable rates. And perhaps the same rate as I'm suggesting here.").

but going up to $515) and Thornton's rate. As set forth *supra* at section II(A), the average weighted rate for Lieff staff attorneys was actually higher than the average weighted rate for Thornton staff attorneys.

iv. Current And Regular Rates

The final two errors identified by the Special Master are that the lodestar was "based on my firm's current billing rates" and that the rates "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." It is understandable that the Court interpreted the phrases "current billing rates" and "charged for their services" to mean that each firm had paying clients who actually compensated the firms at the hourly rates listed in the lodestars. But the message perhaps intended by Labaton's boilerplate template—albeit unclear and with a poor choice of words—was that these are the regular rates of the firms which are charged against the common fund in class actions.[35] This is a plausible meaning if one understands that plaintiffs' firms, as evidenced by this case, usually do not have clients who actually pay by the hour. A simple modifying clause such as "in contingent fee matters" would have made the matter much more clear for the Court. Although the misunderstanding is regrettable, when considered with lack of both intent and materiality, the statement does not support Rule 11 sanctions.

It is of paramount importance that, although the Special Master has decided to single out the Thornton Law Firm with respect to the statements "based on my firm's current billing rates" and "the same as my firm's regular rates charged for their services," **identical phrases** appear in the Lieff and Labaton fee declarations. At the March 7, 2017 hearing, all three firms

[35] *See, e.g.*, Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174) ("The intent of the statement used by Labaton, as set forth above, was to convey to the Court that the rates in Exhibit A are the firm's regular standard rates, which are not applied for a specific case or depending on the nature of the work performed, **and that other Courts had found them reasonable when charged to a class in other litigation.**") (emphasis added).

acknowledged that, generally, they do not have clients who pay by the hour. *See, e.g.*, 3/7/17 Hr'g Tr. at 79:9-22; 88:8-9; 93:11-21 (SM Ex. 96). Further, the law firm of Richardson Patrick also submitted a fee declaration containing the **exact same** boilerplate language, SM Ex. 95 at ¶ 4, even though the Special Master found that Richardson Patrick is "a 100% contingent fee firm," R&R at 68. The McTigue Law Firm has "very few" clients who pay hourly rates, McTigue Dep., 7/7/17, at 83:19-84:3 (SM Ex. 11), yet also used nearly the same boilerplate language.[36]

There is no principled basis by which the Special Master can recommend that the Thornton Law Firm should be sanctioned for these misstatements when Lieff, Labaton, Richardson Patrick, and the McTigue Law Firm committed the same non-material error. This is not to say that all five firms should be sanctioned, but that the error itself is not the proper basis for sanctions. In fact, the types of phrases about which the Special Master is concerned, although admittedly confusing, appear to be quite common in fee declarations. For instance, in response to the Special Master's interrogatories, Labaton identified ten cases in which it submitted fee declarations with identical or similar language. *See* Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174). *See also* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174) (stating that such language "has appeared in Labaton Sucharow's fee petitions for several years."). The leading treatise in this area, *Newberg on Class Actions*, includes in its appendix a sample "Declaration of lead counsel in support of motion for attorney's fees from common fund"

[36] The McTigue Law Firm's declaration used slightly different language. As relevant here, the declaration stated, "The hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." McTigue Decl., 9/13/16, at ¶ 20 (SM Ex. 91). In his deposition, when asked whether the language "might lead a judge to believe that the references to amounts that were actually charged to a paying client," Mr. McTigue responded, "I think it could. And I'm learning." McTigue Dep., 7/7/17, at 87:9-12 (SM Ex. 11).

(Appendix XV-B) and "Declaration of lead counsel in support of motion for attorney's fees" (Appendix XVI-C). 9 NEWBERG ON CLASS ACTIONS (5th ed.). Those two sample declarations contain language, respectively, that the "lodestar is calculated based on the current hourly rates of the firm" and that "[b]ased upon hourly rates historically charged to my firm's clients, the total lodestar value of this billable time is . . . ."[37] This is not to say that the language should not be clarified in the future for all plaintiffs' firms, but to suggest that singling out one firm for Rule 11 sanctions is not the appropriate means of doing so.

With respect to the phrase "regular rates," in particular, to the extent plaintiffs' attorneys (who generally do not charge by the hour) have "regular rates," they can only be the rates that they have charged in past actions. The testimony of Keller Rohrback managing partner Lynn Sarko is particularly illuminating on this point. Mr. Sarko testified:

> I know in this litigation there's been some questioning about what does the term "regular rates" mean. And I guess, to me, that is a common term that's used in class actions by judges. And what it means is your standard listed rate. And if you're a firm that has all contingent fee work, that's your listed rate that you submit your time at, that isn't made up for this case, isn't made up, isn't higher, isn't raised or ballooned or anything, but that's the rate that you offer your services at . . . . [I]n the cases that I regularly appear in and judges that actually have you have fee orders at the beginning, regular rates, at least to me in the industry that I've seen, are the regular rate, posted rates, whether or not – doesn't mean and charged to individual clients because most firms – many of the firms don't have that.

Sarko Dep., 7/6/17, at 90:1-11, 98:23-99:5 (SM Ex. 28).

Here, Thornton's rates were similar or identical to the approved lodestar rates in the most analogous case the Thornton Law Firm handled, the *BNY Mellon* litigation. The rates for Michael Thornton and Garrett Bradley were identical to the rates approved in the *BNY Mellon*

[37] The Thornton Law Firm does not know whether the law firms who drafted these declarations work solely on a contingency basis. The mere fact, however, that these are the sample declarations in the treatise regularly consulted by contingent plaintiffs' attorneys suggests that this type of language is widely used by contingent firms.

litigation. The rates for both Evan Hoffman and Michael Lesser were $50 greater than in the *BNY Mellon* litigation to reflect that Hoffman had become a partner and that Lesser had gained valuable expertise in FX litigation from the *BNY Mellon* case. The rate for associate Jotham Kinder was $30 greater than in the *BNY Mellon* litigation. The paralegal rate, $210, was identical to the *BNY Mellon* rate. As discussed above, Thornton is a small firm that had not previously listed staff attorneys on its lodestars, so Thornton used the exact same "regular rate" that Thornton's co-counsel, Lieff, had used (and the court approved) for the staff attorney position in the *BNY Mellon* litigation.

But regardless of whether they were "regular" or not, the Special Master found the rates of the Thornton attorneys reasonable. "[G]iven that the rates at which Thornton partners and associates were billed were comparable to (and indeed generally less than) Labaton's and Lieff's billing rates, and given the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness. The Special Master is particularly persuaded that Thornton's billing rates here . . . are reasonable because rates in this range were previously approved for Thornton by the Court in the *BONY Mellon* case." R&R at 175.

If one ignores the fact that Michael Bradley was working on a purely contingent basis, perhaps it could be argued that his rate should have been listed as $425 per hour to reflect that he was a staff attorney and to match the "regular rate" that Thornton's co-counsel had listed for the staff attorney position in the *BNY Mellon* litigation.[38] $500 was still well within the range of

[38] There may have been exceptions on the Lieff declaration as well. For instance, the $515 rate at which certain staff attorneys were billed was likely an error since Lieff had made a decision to generally charge staff attorneys at $415. *See* Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the rates were not reasonable, only that they may not have been regular, and that Thornton should not be sanctioned for a single $500 rate any more than Lieff should be sanctioned for the $515 rates.

rates which have been accepted for the staff attorney position in other class actions, *see* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1), but it may well have been an error to describe it as a "regular rate" for the staff attorney position in this matter. As a mitigating consideration, it is important to note that if Thornton had listed the staff attorney "regular rate" of $425 rather than $500 for Michael Bradley, Thornton's lodestar would have decreased by only $30,480, which represents less than one half of one percent of the Thornton lodestar, and .0007 of the overall lodestar.[39] Moreover, as discussed above, even when Michael Bradley's rate is included, the weighted average rate for the Thornton Law Firm staff attorneys ($428) was actually lower than the weighted average rate for the Lieff staff attorneys ($438).[40]

C. Double Counting

Although the Special Master does not identify the double counting error as a basis for Rule 11 sanctions, it is clear that this error colors his view of the misstatements he identified in the affidavit. The Special Master, however, has found that the double counting "was simply a mistake that grew out of combination of different circumstances," R&R at 221, and that it was "inadvertent," R&R at 363. Moreover, as demonstrated above, Thornton cannot be held responsible for the double counting errors, as it is clear that the staff attorneys were double counted on Lieff's and Labaton's lodestars, not on Thornton's. *See supra* § I(C). If there is any sanction based upon the double counting issue (which the Special Master does not recommend

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[39] Calculated from the overall lodestar figure as submitted to the Court in September 2016. As noted elsewhere, Michael Bradley's rate was higher than the other staff attorneys, in part, because he was compensated on a contingent basis. That is, if the class action against State Street did not succeed, Michael Bradley would have been paid absolutely nothing for the over 400 hours of document review he performed.

[40] It is worth noting that an inadvertent error in Labaton's fee declaration resulted in an overstatement of over $80,000 but that the Special Master did not find this sanctionable or even worthy of mentioning in his Report and Recommendations. Lawrence Sucharow executed the Fee Declaration in this matter stating that the "[t]ime expended in preparing this application for fees and payment of expenses has not been included in this [fee] request." Later, it came to light that over 100 hours of time totaling $80,330 related to fee applications was mistakenly included in Labaton's lodestar submitted to the Court. *See* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174).

and which would, in any case, be unwarranted), there would be no principled legal basis to simply levy the sanction on Thornton.

D. Materiality And Intent

Given the nature of the statements that the Special Master identifies as "false," it is highly relevant that: (1) the "false" statements were immaterial to the overall motion; and (2) Garrett Bradley did not have any intent to deceive the Court. In terms of materiality, none of the statements in the affidavit affected the overall lodestar amount, which was the purpose of the motion. *See Navarro-Ayala*, 3 F.3d at 467 (reversing district court's finding of sanctions because "the motion, read fairly and as a whole, contain[ed] no significant false statement that significantly harmed the other side."). In terms of intent, section II, *supra*, explains why the Thornton Law Firm's fee declaration was not intentionally deceptive but rather the result of inattention. This fact is crucial. *See Young*, 404 F.3d at 41 ("We are not suggesting that a deliberate lie would be immune to sanction merely because corrective language can be found buried somewhere else in the document. But here the trial judge did not find, and in these circumstances could not have found, that plaintiff's counsel had intended to deceive."). *See also* Vairo Dep., 4/10/18, at 35:17-22, 36:6-7 (SM Ex. 202).

Seen in context, Bradley's affidavit was an isolated instance of inattentiveness due to reliance on a boilerplate affidavit that Bradley knew was prepared by experienced counsel. *See* Vairo Dep., 4/10/18, at 61:7-12; 78:2-3 (SM Ex. 202) ("Garrett Bradley made a mistake by not taking a closer look at the template before he submitted it to the Court. But that does not mean he violated Rule 11," and "[t]his is not the type of misstatement that should give rise to Rule 11 sanctions."). With respect to the double counting, Bradley immediately contacted co-counsel once alerted to the issue and ensured that within two days the Court was informed of the errors. R&R at 126-28. With respect to the additional statements in the affidavit, Bradley took

responsibility for the errors when he acknowledged, during the March 2017 hearing, that certain aspects of his affidavit were factually incorrect. 3/7/17 Hr'g Tr. at 88:8-21 (SM Ex. 96). Clearly sanctions are not warranted in these circumstances. *Cf. United States v. Jones*, 686 F. Supp. 2d 147, 156 (D. Mass. 2010) (Wolf, J.) (in criminal context, imposing no sanctions against prosecutor who, due to "inexcusable and inexplicable" errors, inadvertently neglected to disclose important exculpatory material to defendant). *See also Garbowski v. Tokai Pharm., Inc.*, No. 16-CV-11963, 2018 WL 1370522, at *8 n.5, *11 n.7 (D. Mass. Mar. 16, 2018) (Wolf, J.) (no discussion of sanctions for attorneys who "filed . . . documents in a manner that misrepresented the contents of the Certification" and filed an inaccurate declaration).[41]

IV. The Recommended Sanctions Are Incompatible With Rule 11

If the Court were to find that the Thornton Law Firm did violate Rule 11, a conclusion with which the Thornton Law Firm strenuously objects, the Court should not accept the Special Master's proposed sanction of $400,000 to $1 million for three reasons: (1) Rule 11 requires that

[41] Immaterial (or even material) errors, when not committed with ill intent, should not generate Rule 11 sanctions. In this very case, for example, the Special Master has made misstatements to the Court. In a letter to the Court dated April 23, 2018, the Special Master requested a delay in the submission of his Report and Recommendations. He stated that "[w]e were prepared to file under seal with the Court by today a hard copy of the Report and Recommendations, together with all exhibits" but noted that certain technical delays in creating a searchable disk with hyperlinks to exhibits necessitated a request for an extension. (Dkt. 217-1). It is clear, however, that the Report and Recommendations was not finalized by April 23, 2018, as the Special Master erroneously represented to the Court. Included as an exhibit to the Report and Recommendations is a "Supplemental Ethical Report for Special Master Gerald E. Rosen" dated **May 8, 2018** (totaling, with exhibits, over 700 pages) (SM Ex. 233), which the Special Master cites throughout the Report and Recommendations.

Also worth noting is that on June 7, 2018, the Special Master filed "Special Master's Responses (Under Seal) to Various Motions of Plaintiffs' Counsel On Redaction and Related Issues" but did not serve the filing on all counsel. On June 9, this Court issued an order citing the Special Master's submission. Once alerted to the existence of the Special Master's submission, counsel inquired of the Special Master's counsel why the Special Master filed an *ex parte* motion with the Court. In response, the Special Master's counsel acknowledged the error and provided all parties with the filing. The copy of the filing provided did not include a certificate of service, which means either that the filing did not conform to Federal Rule of Civil Procedure 5 or that there was a certification on the copy submitted to the Court but that such certification was false because the parties were not actually served. This is not to say that the error was anything other than inadvertent or that the inadvertent error should subject any firm to sanctions, but to highlight the absurdity of the Special Master's hyper-technical reading of the Rules.

sanctions must be "limited to deter repetition of the conduct or comparable conduct of others similarly situated"; (2) the dollar amount of the sanction sought is wildly out of proportion with other sanctions imposed in the First Circuit; and (3) monetary sanctions may not be imposed *sua sponte* if there has been a settlement of the underlying litigation.

A. The Recommended Sanction Exceeds What Is Necessary For Deterrence

As an initial matter, it is axiomatic that the central purpose of Rule 11 sanctions is deterrence. *See Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 247 (1st Cir. 2010) ("Rule 11 . . . finds its justification exclusively in deterrence."); *Carrieri v. Liberty Life Ins. Co.,* No. 09-12071-RWZ, 2012 WL 664746, at *5 (D. Mass. Feb. 28, 2012) ("It is well established that the purpose of Rule 11 sanctions is to deter rather than to compensate.") (internal quotation marks omitted); *Ultra-Temp Corp. v. Advanced Vacuum Sys., Inc.*, 194 F.R.D. 378, 384 (D. Mass. 2000) ("[U]nder the amended version [of Rule 11], sanctions should be imposed for the purpose of deterrence rather than to compensate the opposing party."). The Rule explicitly states that any sanction imposed "**must be limited** to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4) (emphasis added).[42]

Here, there is no plausible argument that a sanction of between $400,000 and $1 million is needed to deter an inadvertent error in a boilerplate affidavit prepared by another law firm.[43]

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[42] Rule 11 was amended in 1993. The Rule may well have had compensatory purposes prior to the amendment, but it is clear that the current version of Rule 11 finds its purpose in deterrence. *See Silva v. Witschen*, 19 F.3d 725, 729 n.5 (1st Cir. 1994) ("Under amended Rule 11, however, 'the purpose . . . of sanctions is to deter *rather* than to compensate.'") (quoting Fed. R. Civ. P. 11 advisory committee's notes) (emphasis added by *Silva*); 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.) ("[T]he 1993 revision makes it clear that the main purpose of Rule 11 is to deter improper behavior, not to compensate the victims of it or punish the offender."). Unfortunately, some courts erroneously cite pre-amendment cases for the proposition that today's Rule 11 serves a compensatory purpose.

[43] The Special Master has set sanctions at 10% to 25% of the double counting error. As explained above, the disgorgement of the double counting error is unjustified because the lodestar figure served only as a cross-check and not a dollar-for-dollar fee request. **If the correct disgorgement is $0, Rule 11 sanctions, to the extent any should be imposed, should also be $0.**

Both the monetary and reputational impact of this case on the Thornton Law Firm have already been severe. In monetary terms, the Thornton Law Firm (and its co-counsel Lieff and Labaton) have **already** funded the Special Master's $3.8 million investigation. As the exclusive purpose of Rule 11 is deterrence, it is of no moment where the $3.8 million went— the point is that the Thornton Law Firm has already been sufficiently deterred by paying its ratable share of the investigation, as well as paying for counsel to represent it during the investigation, and by the attendant reputational consequences. It goes without saying that in a typical Rule 11 case, counsel would not have been charged millions of dollars for the investigation of its own conduct. The Court therefore must consider the deterrent effect of the funds the law firms have spent on the investigation in the context of any additional deterrent purposes served by Rule 11 sanctions.

In terms of general deterrence, the $3.8 million investigation as well as the Special Master's recommendation that the three law firms be disgorged of an additional $6 million has sufficiently deterred other lawyers who may otherwise sign boilerplate documents without a sufficiently careful review. This proceeding and the Special Master's investigation have been widely covered in the legal press, ensuring that lawyers in this jurisdiction and others are aware that they introduce errors into fee declarations at their own peril. It is not a stretch to imagine that, in light of the extensive coverage of this case, class action attorneys will significantly revise their boilerplate fee declarations to ensure that all possible ambiguity is removed from their representations to the court.

It appears that the Special Master's recommendation of a Rule 11 sanction of $400,000 to $1 million is tainted by his opinion that the sanction should serve a compensatory purpose rather than a deterrent purpose. Rule 11 states that sanctions are limited to "nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion . . . an order directing payment to the

movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11. The Advisory Committee Notes further note that "a monetary sanction imposed after a court-initiated show cause order [is] limited to a penalty payable to the court." The Special Master has ignored the Rule, instead crafting his own remedy "that the monetary sanctions should be awarded to the class." R&R at 365. This is clear legal error. *See Lamboy-Ortiz,* 630 F.3d at 244 n.27 ("[A]ny monetary sanction imposed by the court *sua sponte* must be payable to the court alone."); *Medina v. Gridley Union High Sch. Dist*., 172 F.3d 57 (9th Cir. 1999) (table decision) (vacating order to pay *sua sponte* Rule 11 sanctions to party rather than to the court); *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, No. 06-CV-00258-JAW, 2008 WL 2679630, at *2 (D.N.H. June 26, 2008) (on reconsideration, vacating award of Rule 11 sanctions to party, and noting, "[t]he only monetary sanction a court may order on its own initiative is a penalty to the court itself."); *Balerna v. Gilberti*, 281 F.R.D. 63, 71 (D. Mass. 2012). The Special Master's proposed remedy suggests that he views Rule 11 as compensatory and has disregarded the deterrent effect of the Thornton Law Firm's funding of his $3.8 million investigation.

B. The Recommended Sanction Is Extraordinary When Compared With First Circuit Precedent

The First Circuit has warned that "the power to impose sanctions is a potent weapon and should, therefore, be used in a balanced manner." *Navarro-Ayala*, 968 F.2d at 1426-27. Courts "take pains [not] to use an elephant gun to slay a mouse." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990). The sanction recommended by the Special Master here is truly extraordinary. Undersigned counsel has searched for Rule 11 opinions in all courts in the First Circuit in the last twenty years. The sanction proposed by the Special Master is wildly inconsistent with the sanctions generally imposed in the First Circuit. Undersigned counsel has

identified only **three** cases in the last twenty years where courts in the First Circuit have imposed sanctions of over $100,000.[44] These cases are particularly instructive because they show the type of conduct that does—and does not—qualify for severe Rule 11 sanctions. Notably, in one of the cases, the First Circuit reduced a sanction of $250,000 to only $5,000.

i. *In re Nosek*

In 2008, the bankruptcy court issued a $250,000 *sua sponte* sanction against a mortgage company because the company represented to the court on multiple occasions that it held a certain mortgage when, in fact, it did not hold the mortgage.[45] *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2008). As later explained by the district court:

> Despite the fact that it had not held the loan since 1997 or serviced it since early 2005, Ameriquest and its attorneys made contrary representations. It filed a proof of claim and an amended proof of claim in 2002 and 2003 . . . listing itself as creditor without any reference to the assignment of the loan and without attaching a copy of the power of attorney. It filed pleadings signed by [its] attorneys in 2003 stating that it 'is the holder of the first mortgage . . . .' It filed an Answer signed by [its] attorneys in 2005 admitting the allegation that it is the holder of the first mortgage. It conducted an eight-day adversary proceeding in 2006, with representation by [its attorney], without ever notifying the Bankruptcy Court that it was neither the holder nor the servicer of the note and mortgage.

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[44] There are occasionally matters where the district court or the bankruptcy court orders sanctions in the amount of costs or fees and the amount of costs or fees does not appear in the opinion. *See, e.g.*, *Rivera v. Lohnes*, No. 10-2114, 2012 U.S. Dist. LEXIS 29441 (D.P.R. March 5, 2012). Although it is quite difficult to verify, even in these cases undersigned counsel is not aware of any case in which the amount of costs or fees is or exceeds $100,000. *See, e.g.*, Judgment, Dkt. 62, *Ruiz-Rivera v. Lohnes*, No. 12-1520 (1st Cir. Jan 8, 2014) (noting that "the district court never set the amount of attorneys' fees that appellant would be required to pay" and that "even if the sanction order were before this court, we could not affirm it.") (TLF Ex. 15). In a recent opinion, Judge Young discussed Rule 11 and ordered a party to submit a claim for attorneys' fees and costs. *Shire LLC v. Abhai LLC*, No. 15-13909, 2018 U.S. Dist. LEXIS 46946 (D. Mass. Mar. 22, 2018). The party's revised motion for fees seeks over $2 million but makes clear that the fees sought are pursuant to Fed. R. Civ. P. 37, the court's inherent power, and 35 U.S.C. § 285 (not, in other words, pursuant to Rule 11). *See* Plaintiff's Application for Reasonable Attorneys Fees and Expenses, Dkt. 342, *Shire LLC v. Abhai LLC*, No. 1:15-cv-13909 (D. Mass. Apr. 19, 2018) (TLF Ex. 16).

[45] Sanctions were imposed under the bankruptcy analogue to Rule 11. In addition to Ameriquest, additional sanctions were imposed on two law firms, an attorney, and another financial services company. The individual attorney's sanction was vacated on reconsideration by the bankruptcy court. The other sanctions were vacated by the district court, with the exception of a $25,000 sanction on one of the law firms. *See In re Nosek*, 406 B.R. 434, 436 (D. Mass. 2009).

In re Nosek, 406 B.R. 434, 437 (D. Mass. 2009).

On appeal, the mortgage company admitted that it had misrepresented the status of the mortgage, but argued that the sanction imposed was unreasonable. In reducing sanctions from $250,000 to $5,000, the First Circuit held that, "accuracy of representations is an objective matter, as is the reasonableness of any inquiry actually made. But subjective intent can bear on whether to impose a sanction and what amount to fix. Even a dog, said Holmes, distinguishes between being kicked and being stumbled over." *In re Nosek*, 609 F.3d 6, 9-10 (1st Cir. 2010) (citing O.W. HOLMES, JR., THE COMMON LAW 3 (1881)) (additional citations omitted).

ii. *In re 1095 Commonwealth Corp.*

The bankruptcy court imposed an approximately $143,000 sanction on Citizens Bank under the bankruptcy analogue to Rule 11 for substantial misrepresentations regarding the amount of attorneys' fees sought. *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997).[46] Specifically, in support of a motion for attorneys' fees, Citizens Bank filed an affidavit in which it stated that it had "incurred" legal fees in the amount of $262,419.40 and had paid such fees to its law firm. In fact, the law firm had an arrangement whereby it charged Citizens a special negotiated rate for fees actually paid by Citizens, but "in the event that [the bankrupt party] should ultimately be responsible to Citizens for fees, Brown Rudnick would charge Citizens the standard, generally higher hourly attorney rates. In effect, the higher fees would only be charged if Citizens was not going to pay the fees." *In re 1095 Commonwealth Corp.*, 236 B.R. 530, 533 (D. Mass. 1999). After the dual-fee arrangement was uncovered, one of the lawyers for Citizens "continued his attempt to conceal from the Court and the Debtors the nature of the agreement." *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. at 299. In affirming

[46] The sanction was imposed over twenty years ago, in 1997, but undersigned counsel includes this case because the affirmance by the district court occurred in 1999.

the imposition of $143,000 in sanctions, the district court noted that the bankruptcy court "found that the intentional nondisclosure of the fee agreement was the equivalent of fraud." *In re 1095 Commonwealth Corp.*, 236 B.R. at 533. The amount of the sanction (imposed on motion, not *sua sponte*) was equivalent to the attorneys' fees and expenses the bankrupt party incurred in opposing Citizen's fee petition.[47]

iii. *Sanchez v. Esso Standard Oil de Puerto Rico*

The District of Puerto Rico sanctioned plaintiffs approximately $513,000, which represented certain costs incurred by defendant defending environmental litigation which was "frivolous, unreasonable, and lacking a factual foundation" and in which plaintiffs "wrongfully procured injunctive relief based upon false testimony." *Sanchez v. Esso Standard Oil de Puerto Rico, Inc*., No. CIV 08-2151, 2010 WL 3809990, at *10, *14 (D.P.R. Sept. 29, 2010). The court noted that the plaintiffs' attorneys "acted in bad faith by . . . attempting to deceive this court . . . and dragging out the expensive litigation for over a year without factual support and without any reasonable hope of prevailing on the merits." *Id.* at *18 (internal quotations omitted). The court also ordered that plaintiffs and their attorney pay the defendants' attorney's fees for part of the litigation. Although undersigned counsel is including this case among the three First Circuit cases in the last twenty years where Rule 11 sanctions exceeded $100,000, it should be noted that the sanction was imposed in the first instance under 28 USC § 1927 and in the alternative under Rule 11, the court's inherent sanction power, or the fee-shifting section of the statute pursuant to which the underlying action was brought. The sanction was unusual in that the court appears to

[47] For sanctions imposed on motion, "under unusual circumstances . . . deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party." Fed. R. Civ. P. 11 advisory committee's note.

have approved a settlement between the parties in which plaintiffs paid defendant $315,000 to settle all claims, including any costs and fees pursuant to the court-ordered sanction.[48] *See* Agreed Final Judgement, Dkt. 513, *Sanchez v. Esso Std. Oil Co.*, No 3:08-cv-02151 (D.P.R. Apr. 13, 2011) (TLF Ex. 17).

C. The Special Master Has Ignored Rule 11's Prohibition On Imposition Of Monetary Sanctions Post-Settlement

In recommending a significant monetary sanction, the Special Master has wholly ignored section 5 of Rule 11, titled "Limitations on Monetary Sanctions," and thereby committed another serious legal error. That section states that "The court must not impose a monetary sanction . . . on its own, unless it used the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned." Here, the Court entered its Order and Final Judgment approving the settlement between State Street and the Class (i.e., the "settlement of the claims made by or against the party") on November 2, 2016. *See* Order and Final Judgment, 11/2/16 (SM Ex 113). The Court has not issued a show-cause order contemplated by Rule 11(c)(3). Even if one were to interpret the Court's February 6, 2017 Order as a Rule 11(c)(3) show-cause order, it was still issued after the settlement. The Special Master's failure to even consider this strict requirement is another example of his and his counsel's inattention to the law and to the facts. *See, e.g.*, *Wohllaib v. U.S. Dist. Court for the W. Dist. of Washington, Seattle*, 401 F. App'x 173 (9th Cir. 2010) (reversing *sua sponte* monetary sanction and noting "Rule 11 clearly prohibits a district court from *sua sponte* issuing an order to show cause why the court should not impose a monetary sanction if the parties have already settled a case."); *Steeger v. JMS Cleaning Servs.*, No.

[48] The court also agreed that plaintiffs' attorney could pay defendant $10,000 in lieu of court-ordered sanctions.

17CV8013, 2018 WL 1363497 (S.D.N.Y. Mar. 15, 2018) (on reconsideration, vacating monetary sanctions imposed *sua sponte*). *See also* 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.); MOORE'S FEDERAL PRACTICE, § 11.22(2)(b) (3d ed.).

V. Garrett Bradley Should Not Be Referred To The Board of Bar Overseers

A. The Conduct At Issue Affects All Firms Yet The Special Master Unfairly Recommends Only Garrett Bradley For Discipline

As an initial matter, the Special Master's recommendation that Garrett Bradley be referred to the Board of Bar Overseers for inadvertent misstatements in a boilerplate affidavit contradicts "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp*., 546 U.S. 132, 139 (2005). As demonstrated above, nearly identical misstatements were made by lawyers from the other law firms involved in this litigation—the majority of whom used the same boilerplate affidavit— yet the Special Master recommends discipline only for Garrett Bradley. Further, with respect to the Chargois arrangement (supposedly "the most disturbing aspect of what was learned during the entire investigation," R&R at 330), the Special Master found violations of multiple ethical rules, *see* R&R at 250, 255, 286, 322, 326, yet recommends "no professional disciplinary action be taken," *id.* at 371. This is not to say all firms should be referred for professional discipline, but to note that Garrett Bradley's conduct does not warrant professional discipline for him or his firm, particularly with respect to the technical and immaterial misstatements in the fee declaration. *Cf*. Lieberman Dep., 4/4/18, at 91:21-92:6 (SM Ex. 228).

B. The Special Master's Reliance On *Matter of Schiff* Is Clearly Wrong

As further evidence of the serious flaws in the Special Master's Report and Recommendations, the Court need look no further than the Special Master's primary authority for the proposition that Garrett Bradley should be referred to the BBO—*Matter of Schiff*. The

Special Master writes of this case, "The Rhode Island Court's handling of *Schiff* informs the Special Master with regard to Bradley's false Declaration in this matter." R&R at 241. But the *Schiff* case has absolutely no bearing on any potential discipline for Garrett Bradley or the other lawyers who signed boilerplate fee declarations. The Special Master's extensive discussion of this case—which takes up nearly three pages of his Report and Recommendations— suggests that the Special Master or his counsel are either: (1) disingenuous because they know the *Schiff* case has no relevance here but rely on it anyway; or (2) simply unable to understand the difference between two readily distinguishable cases. Both possibilities are cause for concern.

The procedural history underlying the *Schiff* case is "bizarre, not to say byzantine." *Pontarelli v. Stone*, 978 F.2d 773, 774 (1st Cir. 1992). Attorney Schiff represented a police fraternal organization and five police officers in an eight-count civil rights lawsuit against Rhode Island and four Rhode Island officials filed in June 1986. *Pontarelli v. Stone*, 930 F.2d 104, 107 (1st Cir. 1991). At the conclusion of the district court proceedings, all defendants prevailed against all plaintiffs except for three judgments on a single count of sex discrimination obtained by one plaintiff against Rhode Island ($2.00), and two officials ($10,002 and $5,002.). *See id; Pontarelli v. Stone*, 781 F. Supp. 114, 118 (D.R.I. 1992). Despite the relatively modest judgment, plaintiff moved for attorneys' fees of $511,951.00 and costs of $203,268.28 (in other words, over forty times greater than the recovery) pursuant to 42 U.S.C. § 1988. *Pontarelli*, 781 F. Supp. at 118. In connection with the fee petition, Attorney Schiff signed an affidavit stating that "the summaries of time and charges for my services attached hereto present an accurate statement of services performed in connection with this litigation and was prepared from contemporaneous time records, and with respect to sums for costs and expenses, from accounting records." *Matter of Schiff*, 684 A.2d 1126, 1140 (R.I. 1996). The district court found the

affidavit to be false and referred Schiff to the Rhode Island Supreme Court, which ultimately imposed an 18-month suspension. *Id.* at 1127, 1138; *Matter of Schiff*, 677 A.2d 422, 425 (R.I. 1996).

There are two similarities between *Schiff* and the case at bar: both are about attorneys' fees and both concern boilerplate statements in an affidavit. The similarities end there. The nature of the falsity in the *Schiff*—where the court found "**the fee claimed has been grossly inflated**" and the fee declaration was "**riddled with misrepresentations**"—is worlds apart from the nature of the alleged falsity in this case.[49] *Schiff*, 684 A.2d at 1134, 1136 (emphasis added). In *Schiff*, the "**[t]he billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] sought payment for time not worked.**" *Schiff*, 677 A.2d at 423 (emphasis added). The records demonstrated a "lack of good faith effort to eliminate time expended on separate unsuccessful claims or on behalf of unsuccessful litigants or to exclude hours which [were] 'excessive, redundant, or otherwise unnecessary.'"[50] *Pontarelli*, 781 F. Supp. at 121. The Rhode Island Supreme Court found that the "misrepresentations to the court bear a close resemblance to an attempt to obtain money under false pretenses." *Schiff*, 677 A.2d at 425. The nature of the "grossly inflated" billing is astounding:

> For example, according to the records submitted, Ms. Schiff worked on this case for 25.7 hours on October 9, 1988, and 26.6 hours on October 10, 1988. While it may be possible to work around the clock for two consecutive days without respite, it clearly is impossible to do so for more than 24 hours in any one day. The summary also indicates that on April 14, 1988, Ms. Schiff spent 8.9 hours travelling

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[49] As explained above, the lodestar was submitted in this case so that the Court could determine whether the 25% fee was reasonable (*i.e.*, the "cross-check"). Additional hours or fees on the lodestar would not have increased the fees paid to the plaintiffs' attorneys, but simply reduced the multiplier, making it more likely that the court would find the 25% fee reasonable. This is wholly different from the fee petition Attorney Schiff filed pursuant to 42 U.S.C. § 1988, where the hours and fees listed on the declaration represented the actual funds sought from the defendants.

[50] In addition to this malfeasance, the Court found Plaintiff engaged in "an effort to accomplish a goal completely unrelated to the stated purpose of litigation by making unsupportable claims against third persons." *Pontarelli*, 781 F. Supp. at 127.

> to New York for a meeting. That was only two days after she wrote to the Court advising that she was unable to meet a filing deadline because of a totally incapacitating illness that would prevent her from engaging in normal activities for 7–10 days. Her incapacity was confirmed by another letter she sent to the Court on April 20 indicating that she had been hospitalized until April 19.
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> [C]ompensation is sought for more than 4,000 billable hours which represent more than two full years of a lawyer's billable time. However, despite the sweeping allegations contained in the complaint, the "plaintiffs'" claims were based on a relatively simple sequence of events occurring over a limited period of time. It is inconceivable that even the most vigorous advocacy of those claims required anywhere near the number of hours for which the "plaintiffs" seek recovery.

Schiff, 684 A.2d at 1133-35.

There were also serious allegations that Schiff inflated costs:

> [T]hey assert that they have paid $22,510.17 for the services of three private investigators and approximately $40,000.00 in expert witness fees and expenses. However, they are unable to produce any bills or other documentation showing what services were performed, when they were rendered, how much time was involved, what rates were charged or what expenses are included in those sums.
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> A total of nearly $15,000.00 is claimed for "lodging" expenses. Of that amount, $4,800.00 is identified as "apartment rental" for the two out-of-state attorneys who participated in the trial. That sum, itself, seems excessive inasmuch as the trial lasted for only 17 days. The remaining $10,200.00 consists of hotel bills for unidentified "expert witnesses" who never testified and other individuals who were identified but whose roles in the case, if any, are unknown.
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> Superimposed on this complete absence of documentation is the same kind of misrepresentation that permeates the "plaintiffs'" requests for attorneys' fees. Thus, the plaintiffs seek reimbursement for very precise amounts allegedly expended for items such as office supplies ($479.50 and $877.75), postage ($548.40), and photocopying ($10,320.00, $550.00, $3,689.23). Those figures clearly convey, and presumably were intended to convey, the impression that they were derived from detailed records or exact measurement of the quantities of each item involved. However, on cross-examination, Ms. Schiff admitted that they were only "estimates" and that there is no documentation to support them.

Id. at 1135-36.

Contrast the findings in *Schiff* with the case at bar. **Here, there is no evidence whatsoever of false, inflated, or unreasonable billings.** Instead, the Special Master himself found that: (1) the total fees awarded to class counsel were justified and reasonable, *see* R&R at 6 ("By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved."); (2) the rates listed for Thornton partners and associates were justified and reasonable, s*ee* R&R at 175 ("[G]iven the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness."); (3) with the exception of Michael Bradley and the contract attorneys, the rates listed for the staff attorneys were reasonable and justified, *see* R&R at 172, 180 ("[W]e find that the higher rates billed were justified in this instance" and "[t]he Special Master concludes that the staff attorney billing rates in the lodestar fee petition are generally reasonable . . . ."); and most importantly, (4) the Thornton attorneys actually worked the hours listed on the lodestar, and the number of hours worked was reasonable, *see* R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); *id.* at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable.").

In short, the nature of the falsity in the *Schiff* case goes to the very essence of the fee request—the number of hours actually worked and the reasonableness of those hours—whereas the nature of the falsity alleged here relates to erroneous (or at the very least, ambiguous) and immaterial statements that did not affect the overall lodestar. In *Schiff,* the declaration was false because—boilerplate or not— the attached statement of fees was not true and correct. Here, the

declaration *language* itself contained errors regarding, for instance, the nature of the employee-employer relationship between the Thornton Law Firm and the staff attorneys for whom it paid; the Special Master found the accompanying hours and time to be reasonable and reliable. There simply is no comparison between the two and it is bizarre that the Special Master concludes that "[t]he facts in *Matter of Schiff* are **eerily similar** to those here."[51] *See* R&R at 244 (emphasis added). Justice Holmes' axiom, cited above by the First Circuit, again seems particularly apt: "Even a dog knows the difference between being kicked and being stumbled over." O.W. HOLMES, JR., THE COMMON LAW 3 (1881).

C. Garrett Bradley Did Not Violate MRPC 3.3 or 8.4

If the Court were to consider referring Garrett Bradley to the BBO—a step which should be reserved for only serious misconduct—it would have no basis for doing so.[52] In signing a boilerplate affidavit that contained inadvertent and immaterial errors, Bradley violated neither Massachusetts Rule of Professional Conduct 3.3(a)(1) nor 8.4 because he did not have actual knowledge of any false statement.

Rule 3.3(a)(1) states in relevant part that "[a] lawyer shall not **knowingly** make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law

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[51] *Compare* R&R at 244 ("Just like Schiff's affidavit, Garrett Bradley's Declaration here was a sworn statement designed to convince Judge Wolf that Thornton's fee petition was fair, reasonable, and accurate") *with* R&R at 6 ("[T]he attorneys' fee award was fair, reasonable, and deserved.").

[52] The Court's Local Rules regarding disciplinary procedures and referrals were amended effective January 1, 2015. Pursuant to the new rules, there is now a question of whether the judicial officer presiding over the case should be the judicial officer who determines whether or not to refer attorneys to the Board of Bar Overseers. *Compare* L.R. 83.6.5 (effective Jan. 1, 2015) *with* L.R. 83.6.5(A) (version which appears to have been in effect prior to Jan. 1, 2015) ("When misconduct or allegations of misconduct that, if substantiated, would warrant discipline as to an attorney admitted to practice before this court, is brought to the attention of a judicial officer, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the judicial officer may refer the matter to counsel for investigation, the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate."). *See Gonsalves v. City of New Bedford*, 168 F.R.D. 102, 107 n.100 (D. Mass. 1996) (Wolf, J.); *Blake v. NSTAR Elec. Corp.*, No. 09-10955, 2013 WL 5348561, at *1 n.1 (D. Mass. Sept. 20, 2013).

previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1) (emphasis added). The Rules define "knowingly" as "**actual knowledge** of the fact in question." Mass. R. Prof. C. 1.0(g) (emphasis added). This intent standard does not reach negligent or inadvertent misrepresentations. The drafters of the Rule knew how to employ a negligence standard but affirmatively did not do so in the candor to the tribunal provision. *See* Mass. R. Prof. C. 4.3 (using the "[w]hen the lawyer knows or reasonably should know" standard for communications with unrepresented parties); Mass. R. Prof. C. 8.2 (using the "knows to be false or with reckless disregard as to its truth or falsity" standard for statements regarding integrity of judges).[53]

Indeed, as the Special Master's own so-called expert acknowledged, the test for whether an attorney violated Rule 3.3(a)(1) is **subjective**. Gillers Dep., 3/20/18, at 272:4-21 (SM Ex. 253). That is, in determining whether there has been a violation, the tribunal must ask not what the reasonable attorney *would have known*, but what the attorney *actually knew* when he presented facts to the Court. *See* W. Bradley Wendel*, Monroe Freedman: The Ethicist of the Non-Ideal,* 44 HOFSTRA L. REV. 671, 680 n.8 (2016) ("Knowledge is defined in the *Model Rules* as actual (that is, subjective) knowledge.") (citations omitted); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act As Gatekeepers*, 56 RUTGERS L. REV. 9, 51 (2003) ("[T]he Model Rules eschew an objective standard . . . opting instead to judge the propriety of the lawyer's conduct under a subjective, actual knowledge standard.").

As with violations of Rule 3.3, Rule 8.4(c) does not apply to mistakes. *See In re Murray*, 455 Mass. 872, 881 (2010) (upholding hearing committee's finding that attorney did not violate

[53] In *In re Hilson,* 448 Mass. 603 (2007), the Supreme Judicial Court suggested, but did not hold, that Rule 3.3 could be violated by "reckless disregard for . . . truth or falsity."

Rule 8.4(c) where "no intent to mislead"); *Matter of McCabe*, 13 Mass. Att'y Disc. R. 501 (Appeal Panel Report, September 1997) ("[T]he conduct must be intentional, not merely negligent."); *Matter of Thurston*, 13 Mass. Att'y Disc. R. 776 (Board Memorandum, May 12, 1997) (striking hearing committee's finding that attorney violated DR 1-102(A)(4) [predecessor to 8.4(c)] and noting, "As Bar Counsel concedes, a negligent misrepresentation does not violate DR 1-102(A)(4) because the rule prohibits only intentional conduct."). Professor Gillers agrees and stated in his deposition that the mental state required for a Rule 8.4 violation should not be lower than the mental state required for a Rule 3.3 violation. Gillers Dep., 3/20/18, at 275:9-21 (SM Ex. 253).[54]

The Supreme Judicial Court's *In re Diviacchi* opinion, which the Special Master cites, is not to the contrary. There, the attorney committed multiple ethical violations, including charging excessive fees, and sued his client in both federal and state courts. In one of the lawsuits, the attorney alleged the client had a "standard habit" where she "hires an attorney, works him or her until she stops paying the bills, fires that attorney and disputes the bill and files a [BBO] complaint, and then gets another attorney and starts the process again." *In re Diviacchi*, 475 Mass. 1013, 1017 (2016). In fact, there was no evidence of such a pattern, and in particular, there was no evidence of any BBO complaints. In upholding the sanction, the Court cited a comment to Rule 3.3 and rejected the attorney's argument that his statements "should be

[54] The BBO has not always spoken with one voice. In a few instances, particular fact summaries compiled by the BBO have suggested that a negligent misrepresentation may be sufficient for a violation of Rule 8.4. For instance, in *In re Ged* (Public Reprimand 2004-17), the attorney received a public reprimand for erroneously including hours that he did not actually work on a fee petition. The matter, however, was resolved by a stipulation which waived a hearing. Similarly, in *In re Tiberii* (Public Reprimand 1996-4), the BBO imposed a public reprimand for negligent misrepresentations under both the predecessor to 8.4 and the predecessor to 3.3. *See also In re Paul J. Pezza* (No. BD-2013-116) (although the paucity of facts prevents the reader from understanding which intent standard was actually used). The precedents cited above, and that of the Supreme Judicial Court, however, suggest that intentionality is required. *See In re Discipline of an Attorney*, 448 Mass. 819, 831 n.17 (2007); *Matter of Zak*, 476 Mass. 1034, 1038 (2017).

evaluated under a subjective, good faith basis standard" even though he could not provide any factual basis for them. *Id.* at 1020. *Diviacchi* did not alter the "actual knowledge" standard in Rule 3.3; the *Diviacchi* attorney was not merely inattentive in reviewing an affidavit, but intentionally concocted, and swore to the truth of, defamatory allegations about his client.

Nor could the "actual knowledge" standard be changed by a comment to a Rule.[55] As the First Circuit has noted regarding the Rhode Island Rules of Professional Conduct, "[a] Comment cannot substantively change the text of [a] Rule." *Whitehouse v. U.S. Dist. Court for the Dist. of Rhode Island*, 53 F.3d 1349, 1358 n.12 (1st Cir. 1995). And the Rules themselves state, "Comments do not add obligations to the Rules. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[56] Mass. R. Prof. C. Scope §§ 1,9. *See also Clark v. Beverly Health and Rehab. Servs., Inc.*, 440 Mass. 270, 275 n.8 (2003) ("[A Comment] is an illustrative tool, not a bootstrap. While it provides guidance to the practitioner in certain circumstances, it cannot enlarge, diminish, or in any way affect the scope of the . . . rule itself."); *Matter of Larsen*, 379 P.3d 1209, 1214 (Utah 2016) ("[Ou]r rules require proof of *actual knowledge*. That concept is distinct from constructive knowledge or recklessness. . . . [Rule 3.3], as written, does not lend itself to the interpretation that a false statement made

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[55] The Special Master believes Comment 3 to Rule 3.3 is applicable, which states "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." *See* R&R at 240; Mass. R. Prof. C. 3.3.

[56] In any event, a federal court is not bound by a state's interpretation of disciplinary rules. *See Grievance Comm. For S. Dist. of New York v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) ("[W]ell-established principles of federalism require that federal courts not be bound by either the interpretations of state courts or opinions of various bar association committees."); *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445, 1450 (D.P.R. 1985) ("The manner in which the Supreme Court of Puerto Rico applied its disciplinary code was, of course, useful precedent in our own interpretation of that code's application to a particular situation before us, but it is essential to understand that the primary responsibility for supervising the conduct of the attorneys who practice before this court lies precisely with this forum.").

without a 'reasonably diligent inquiry' is a *knowing* misstatement in violation of the rule. . . . We accordingly repudiate Comment 3 in the Advisory Committee Notes to rule 3.3.").

Here, as set forth above, there is no evidence that Garrett Bradley had "actual knowledge" that the affidavit submitted in September 2016 contained "false" information.[57] Bradley's admission of an inadvertent mistake does not lead to the conclusion that Bradley knowingly made false statements to the court. As even Professor Gillers acknowledged in his deposition, a careless mistake is not equivalent to a knowing misrepresentation. Gillers Dep., 3/20/18, at 269:5-7 (SM Ex. 253). And here, there is a question about the ambiguity, materiality, and import of the statements in the affidavit. *See Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 8 (1st Cir. 2005) ("Anyway, it seems to us that a finding of ethical misconduct, so fraught with consequences for a lawyer's professional reputation, should not rest on such fine distinctions. If the court has trouble coming to an unqualified conclusion about the parties' settlement status, then [respondent] can hardly be charged with telling a knowing falsehood—the standard set forth by the Rules of Professional Conduct—under such circumstances.").

There is also no evidence to support the proposition that Garrett Bradley violated Rule 3.3(a) by failing to correct a false statement of material fact.[58] The Special Master is only able to conclude Bradley violated 3.3(a) in this manner because he assumes that, when Bradley submitted the Declaration in September 2016, Bradley had actual knowledge that his Declaration was false. *See* R&R at 233. If that assumption were correct, it may well follow that Rule 3.3(a) was violated from the moment Bradley submitted the Declaration until the moment the errors were disclosed to the Court in the March 2017 hearing. But, as noted, the "evidence" cited for

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[57] The nature of this "false" information is discussed *supra* § III(B).

[58] The Thornton Law Firm objects to the characterization of the errors in the fee declaration as material. This is an additional reason why Garrett Bradley did not violate this provision of Rule 3.3.

the predicate proposition that Bradley had actual knowledge he submitted false evidence in September 2016 is spurious, and there is no other support offered for the violation. *See supra* § II. Nor could there be. All of the evidence, including Bradley's contrition and acceptance of responsibility for the mistakes, as well as the lack of any motive whatsoever to falsify any passages of his Declaration, suggest that Bradley first realized the inaccuracies when Judge Wolf issued the February 2017 order and further inquired during the March 2017 hearing.[59]

The case at bar is similar to those in which courts and other tribunals have found an attorney's mistakenly incorrect statement is not a violation of Rule 3.3 or analogous provisions. For instance, in *Obert v. Republic W. Ins. Co*, 398 F.3d 138, 143 (1st Cir. 2005), the First Circuit found there was no knowing violation of Rule 3.3(a)(1) even where "one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization." Even in the much more egregious case of *In re Auerhahn*, No. 09-10206, 2011 WL 4352350, at *16 (D. Mass. Sept. 15, 2011),[60] a three judge panel of the District of Massachusetts found that an attorney who failed to turn over potentially exculpatory documents in a habeas proceeding did not "knowingly disobey an obligation under the rules of the tribunal" (a rule analogous to Rule 3.3 and requiring the same mental state). In that case, the court found

[59] Contrary to the Special Master's insinuations, *see* R&R at 235-36, there is no evidence that Bradley became aware of the errors in the boilerplate affidavit prior to the Court's February 2017 order. The media inquiries which prompted the November 2016 letter to the Court focused on the double counting error, and counsel's efforts were directed at disclosing the error and submitting a revised and corrected lodestar as soon as possible. The February 2017 order, which raised the issue of "regular hourly billing rates" listed in the affidavit, set a date for a hearing on the matter. Memo. and Order, 2/6/17, at 6, 13 (SM Ex. 180). At that hearing Bradley addressed the inaccuracies in the declaration. The Special Master seems to suggest Bradley should have somehow addressed the inaccuracies after the February order but before the hearing. This would be contrary to common practice—when the Court sets a hearing date, attorneys address the issues raised by the Court at the hearing. Moreover, none of the other law firms notified the Court of any inaccuracies prior to the March 2017 hearing—even though, as discussed above, the fee declarations of all three law firms were inaccurate in certain respects.

[60] Since the *Auerhahn* case, the District of Massachusetts has amended its Local Rules regarding the standard of proof in attorney discipline proceedings. *See* L.R. 83.6.5(i)(6).

the attorney was "lackadaisical at best" and conceded negligence. *Id.* But as the *Auerhahn* court noted, "[n]egligence, however, is not enough here." *Id.* Surely if a prosecutor's "lackadaisical" and negligent failure to turn over potentially exculpatory evidence did not violate the Rules of Professional Conduct because it was not done "knowingly," Garrett Bradley cannot be sanctioned for mistakenly submitting a boilerplate fee application containing inaccuracies.

VI. The Customer Class Law Firms Properly Listed Contract Attorneys On The Lodestars

In pages 181-89 of his Report, the Special Master expresses a strong personal policy preference for listing contract attorneys' time as expenses rather than legal fees. But his personal preference is merely that: a personal preference. The Special Master has **failed to identify a single case which holds contract attorneys must be listed as expenses**.[61] In fact, the Special Master's Report cites a number of cases that actually support counsel's decision to include contract attorneys in the lodestar. *See Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009), *aff'd*, 355 F. App'x 523 (2d Cir. 2009) (finding that contract attorneys were properly included in the lodestar where contract attorneys' work was supervised by plaintiffs' counsel); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) ("[C]ourts have . . . regularly applied a lodestar multiplier to contract attorneys' hours.");[62] *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) ("[I]t is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm[.]"); *In re Enron Corp. Sec., Derivative &*

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61 The Special Master asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue[.]" R&R at 187. However, case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar.

62 The Special Master cites *Citigroup* in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically drew this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his market rate." 965 F. Supp. 2d at 395.

ERISA Litig., 586 F. Supp. 2d 732, 784-85 (S.D. Tex. 2008) (allowing counsel to recover fees for contract attorney services at market rates rather than their cost to the firm); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 272 (D.N.H. 2007) ("It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); s*ee also In re AOL Time Warner S'holder Derivative Litig.*, No. 02 CIV. 6302 (CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) ("The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary.").

The only cited authorities that even come close to supporting the Special Master's preference that contract attorneys should be listed as expenses are cases in which counsel, on their own initiative, included contract attorneys as expenses and the court did not consider whether including them in the lodestar would have been appropriate. *See Dial Corp. v. News Corp.*, 317 F.R.D. 426, 438 (S.D.N.Y. 2016) (noting counsel's decision to include contract attorneys as an expense despite the fact that it is permissible to "mark[]-up contract attorney fees"); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2016) (approving request for expenses including expenses for document review by contract attorneys).

Further, the ABA Standing Committee on Ethics and Responsibility has advised that "a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000). Surprisingly, the Special Master cited ABA Formal Opinion 00-420, yet instead of acknowledging that it affirmatively answers the exact question he is posing, stated that it "leave[s] attorneys a wide degree of latitude to decide"

whether to bill contract attorney services as fees for legal services or as costs incurred by the firm.[63] *See* R&R at 186.

The Special Master contends that decisions allowing contract attorneys to be included in lodestars at market rates are "not acceptable for purposes of this Report" because they are based on the "faulty premise" that "contract attorneys [are] indistinguishable from off-track associates[.]" R&R at 184. This assertion is based on a clear mischaracterization of the cases. In *Tyco*, the only decision from a court within the First Circuit cited by the Special Master, the court explicitly found that "[a]n attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney." 535 F. Supp. 2d at 272. The other decisions referenced by the Special Master also demonstrate a clear understanding that a contract attorney's work is temporary and often project-specific. *See, e.g.*, *Carlson*, 596 F. Supp. 2d at 409 ("A contract attorney is one hired 'to work on a single matter or a number of different matters, depending upon the firm's staffing needs and whether the temporary attorney has special expertise not otherwise available to the firm.'") (quoting *Enron*, 586 F. Supp. 2d at 782).[64] At no point do the decisions cited by the Special Master conflate a "contract attorney" with an "off-track associate" permanently employed by a firm. The Special Master also claims that those courts including contract attorneys in lodestars "accepted, without discussion, the billing of contract attorney expenditures as legal fees rather than as a cost or expense." R&R at 186. This is simply

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63 It is curious that the Special Master cites ABA Formal Opinion 00-420, which is directly on point, but did not include the full opinion as one of the 266 exhibits attached to his Report.

64 The Special Master cites *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400 (D. Conn. 2009) after acknowledging that "[s]everal courts, *including two within this Circuit*, have applied market rates without regard to the actual wages paid to a contract attorney." R&R at 184 (emphasis added). While *Carlson* does support the fact that firms may bill for contract attorneys at market rates, it is worth noting that *Carlson* is a decision out of the District of Connecticut, a court within the Second—not the First—Circuit.

incorrect. *See Citigroup*, 965 F. Supp. 2d at 394 ("[C]ourts routinely reject claims that contract attorney labor should be treated as a reimbursable litigation expense.").

The Special Master's policy-based arguments fare no better. He claims that "the decision to bill a contract attorney as an expense or as a legal service fee" is a matter of "professional judgment" that should be "informed by the role of the contract attorney vis-à-vis the other attorneys in the case." R&R at 186. According to the Special Master, the contract attorney's role is determined not by the work performed, but by the financial obligations incurred by the law firm. He attempts to compare the cost of hiring contract attorneys with that of hiring a stenographer, or with paying for transportation, meals, and lodging, since the firm does not face "long-term financial obligations" with contract attorneys.[65] Yet, the Special Master does not explain, nor provide any authority for, the proposition that a firm's financial obligations should have any bearing on whether to treat contract attorneys' work as legal fees. Courts considering the issue focus instead on the type of work performed by the contract attorneys. *See AOL Time Warner*, 2010 WL 363113, at *25 (allowing a multiplier on contract attorney fees where those attorneys "were not mere clerks" but "exercised judgments typically reserved for lawyers, under the supervision of the firms' regular attorneys"). The Special Master has offered no explanation as to why the contract attorneys here—who were making legal judgments under the supervision of the firms' regular attorneys—were more akin to stenographers than associates. As the Special Master recognized, "contract attorneys . . . perform work readily assigned to a first- or second-

[65] The Special Master claims that the cost of contract attorneys is "most akin to a disbursement of funds passed along to the client at face value." R&R at 187 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (SM Ex. 193)). According to ABA Formal Opinion 00-420, Formal Opinion 93-379 was "made in the context of goods or services of non-lawyers," and "does not speak directly to the subject of . . . contract lawyers, in the context of disbursements or expenses." The principles laid out in Opinion 93-379 are "applicable to surcharges for legal services provided by contract lawyers *when billed to the client as a cost or expense*." ABA Formal Opinion 00-420 (emphasis added).

year associate in a traditional law firm model." R&R at 183-84. The contract attorneys in this case provided valuable legal services. They were doing the same work as the "staff attorneys" who, as the Special Master himself admits, were appropriately included in the lodestar.[66] *See* R&R at 176-181. And as the Special Master acknowledges, "similar work justifies similar rates." *Id.* at 182.

Even if the Court were to adopt the Special Master's personal policy preference for listing contract attorneys as reimbursable expenses, it would be inappropriate to apply that preference retroactively. *See In re Beacon Assocs. Litig.*, No. 09 CIV 3907 (CM), 2013 WL 2450960, at *18-19 (S.D.N.Y. May 9, 2013) (the court expressed that if it had thought ahead it "would have included in [its] order appointing Lead Counsel specific directives about how much [it] was prepared to authorize in terms of an hourly rate for document reviewers," but having failed to do so it was "unfair to impose such a rule *ex post facto*"). The attorneys agreed to take this case on a contingency basis, believing that they would be paid appropriately. Their belief that they would be compensated at market rates for contract attorneys' time was not only reasonable, but in line with common practice and supported by legal authority. It would be unfair to impose a retroactive rule reducing counsel's recovery for no reason other than to satisfy the Special Master's personal preference, which has no basis in prevailing case law.

In any event, the Special Master's proposed remedy is improper. Even if the firms were required to list contract attorneys as expenses rather than legal fees—and according to every

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[66] *See* Heimann Dep., 7/17/17, at 51:18-52:15 (SM Ex. 19) ("There is no distinction that I am aware of between the work that's assigned to attorneys who are employed by the firm directly and those that are employed through an agency. There is no difference between the expectations for the work to be performed by those lawyers. There is no distinction with respect to the quality of the work that is expected to be performed by those lawyers. There is no distinction between how those lawyers are trained to to [sic] their work. There is no distinction between how they are supervised in connection with the work that they do. They are one and the same.").

court to have considered the issue, they were not—the proper remedy would not be to disgorge that amount from the lodestar to the class, but to remove that value from the lodestar and then determine whether or not the multiplier was still reasonable. *See* Rubenstein Decl., 6/20/18. When the total contract attorney value is removed, the total lodestar comes to $35,940,307.75.[67] Comparing this against the total fee award, $74,541,250, results in a multiplier of 2.07. This is well within the reasonable range approved by courts in complex class-action litigation. *See, e.g.*, *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (finding that a 28% fee award yielding a multiplier of 3.32 was "well within the range").

VII. The Special Master's Proposed 50% Reduction In Rate For Michael Bradley's Work Is Unjustified

The Special Master finds that Michael Bradley performed document review work on this case, on a contingency basis, between 2013 and 2015, R&R at 189-90, and that his work was supported by contemporaneous time records, R&R at 366. The Thornton Law Firm agrees with these findings. However, the Special Master's concern is not with the hours in the Thornton fee declaration attributed to Michael Bradley—indeed, he finds those hours to be supported by time records produced by Thornton, R&R at 217 n.171, 366—but, rather, he takes issue with the hourly rate applied to Mr. Bradley's work for purposes of the lodestar cross-check. The Special Master recommends that Michael Bradley's rate be reduced by 50%, and that the difference between the amount listed in the Thornton lodestar, multiplied by 1.8, and the amount calculated at the new rate, multiplied by 1.8, be "returned to the class." R&R at 366.

[67] This number is calculated by reducing the original lodestar ($41,323,895.75) by the amount of double counted time ($4,058,000) and the Special Master's "original petition" "lodestar value" of "contract attorneys time" ($1,325,588.00).

In assessing the value of the work performed by Michael Bradley in this case, the Special Master finds that Mr. Bradley's work "most closely resembles that of a junior level associate."[68] R&R at 196. For this and for other reasons, he recommends a reduction in the $500 hourly rate associated with Mr. Bradley's work.[69] Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in his report ($325 to $725 per hour). R&R at 164. Moreover, it is less than the $415 per hour rate used for at least one other staff attorney who performed exactly the same work (*i.e.,* document review, no drafting), and who also worked remotely. *See* p. 86, *infra*.

The Special Master finds that Michael Bradley "had no experience relevant to the case and the work he performed was simple, straightforward, and unmonitored document review."

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[68] The Special Master makes this recommendation despite finding elsewhere in his report that Mr. Bradley had more than eight years of legal experience when he signed on to assist with the State Street matter—years that included serving as an Assistant District Attorney in Norfolk County, as the Executive Director of a Commonwealth Task Force dedicated to detecting fraud in the underground economy, and as a solo practitioner. R&R at 190-91.

Regarding the work performed, the Special Master claims that Michael Bradley had no contact with the Thornton firm regarding this case beyond sending in his hours and raising "technical concerns about the software." R&R at 193. This finding clearly ignores record evidence that Michael Bradley contemporaneously raised substantive questions to Evan Hoffman regarding documents he was reviewing in the Catalyst database. The Special Master selectively quotes deposition testimony from Evan Hoffman but curiously ignores testimony from the same deposition in which Mr. Hoffman recalled conversations with Mr. Bradley about substantive case questions. *See* Hoffman Dep., 6/5/17, at 109:17-110:7 (SM Ex. 63) (recalling, *e.g.,* discussion about trade tickets).

[69] One of these reasons, apparently, is that Michael Bradley performed work "fully on his free time and when it was convenient for him to do so." R&R at 366. The Thornton Law Firm is aware of no authority stating that the time at which worked is performed has a bearing on the rate at which that work can be charged. Setting aside the fact that "free time" and "convenient" are surely subjective concepts, Mr. Bradley did not testify that he did work in his "free time" (or at "odd hours," as the Special Master asserts elsewhere (R&R at 196)). To the contrary, Mr. Bradley testified that his practice was to work on the matter in the afternoons or evenings, when he had available time after attending to other client matters in the mornings, and that he tried to review for a consistent amount of time each week. M. Bradley Dep., 6/19/17, at 51:14-52:8 (SM Ex. 67). The fact that Mr. Bradley was performing this work in addition to other case matters, over a two-year period, makes him no different from any other associate or partner working on this case who also worked on matters for other clients during the years this case was pending.

R&R at 366. These distinctions apply equally to some of the staff attorneys performing document review for both Lieff and Labaton. Yet, despite this similarity, only Michael Bradley's rate is singled out for a 50% reduction. The Special Master's asserted distinctions based on "experience," the "simple and straightforward" nature of the work, and the "unmonitored" nature of the work are unjustified and, more importantly, cannot be the basis for the radically disparate treatment of cutting Michael Bradley's rate in half.

The nature of contract or temporary case-by-case document review is such that lawyers performing document review will seldom see the same fact patterns or underlying issues in their work as they move from one case to the next. While some staff attorneys in this case had previously worked on a similar case involving another bank, BNY Mellon, not all did. Indeed, *none* of the 35 Labaton staff attorneys worked on the *BNY Mellon* case, as Labaton was not counsel in that case. This is not to suggest that they were unqualified to do the work. But there is no basis, in the record or anywhere else, to suggest that such staff attorneys' rates should change from case to case based on their "relevant experience."[70]

If the Special Master's recommendations on this point were followed, every lodestar review would necessarily devolve into a detailed analysis of each staff attorney's professional biography and educational background. Michael Bradley is a gainfully employed attorney with eight years of professional experience, including extensive litigation and trial work, who was appointed to head a state fraud-detection task force. His experience justified his lodestar rate in this case. Surely, the other staff attorneys' experience was not, collectively, so much more

[70] Indeed, if a particularly knowledgeable staff attorney had a wealth of relevant experience, it might make better sense, if the firm so chose, for such an individual to be hired full-time to take on a more senior role in the case.

"relevant" that it would justify listing them at lodestar rates that are nearly *double* what the Special Master would assign to Michael Bradley's work.

Further, to characterize Michael Bradley's document review work as "simple and straightforward" is to necessarily characterize ***all*** staff attorneys' document review work in this case as simple and straightforward. There is nothing in the record to support the notion that any document review was substantively or materially different from any other. Thus, the "simple and straightforward" nature of the work, even if true, cannot be a basis for cutting only Michael Bradley's lodestar rate.

The Special Master takes particular issue with Michael Bradley's "failure to produce any substantive memoranda or other work product," calling this the "perhaps most telling" basis for distinguishing him from other staff attorneys. R&R at 192. But the Special Master cites no evidence that every other staff attorney wrote memoranda. Indeed, the evidence shows that not all staff attorneys wrote memoranda. For example, Lieff staff attorney Kelly Gralewski testified in her deposition that she did not write any. Gralewski Dep., 6/6/17, at 19:23-20:2 (SM Ex. 104) ("Q. Were you tasked with drafting any memoranda related to any specific topics in the case? A: No."). The Special Master, who does not mention Ms. Gralewski's testimony in the Report, proposes no reduction to Ms. Gralewski's rate of $415 per hour, while urging that Michael Bradley's rate be reduced to $250 per hour for the same work. Moreover, Ms. Gralewski—like Michael Bradley—performed all of her work remotely. Gralewski Dep., 6/6/17, at 13:13-15 (SM Ex. 104); Lieff's Resp. to Interrog. 24, 7/10/17 (TLF Ex. 6). Distinguishing Michael Bradley from other staff attorneys on the basis that he did not write memoranda—the "most telling" basis, according to the Special Master— is entirely unjustified.

Also of note, the staff attorneys who did draft memoranda did so toward the end of their work on the case, having spent the bulk of their time conducting "straightforward" document review. *See* 7/14/15 Email, TLF-SST-008524 (TLF Ex. 18) (email from Mike Rogers of Labaton noting fact of settlement and that all issue memorandum drafting was completed before July 4, 2015); 6/23/15 Email, TLF-SST-034482 (TLF Ex. 19) (email from Michael Lesser of Thornton noting that reviewers have been working on issue memoranda "for the last two months"). The firms did not apply different rates for different tasks; the staff attorneys who both performed document review and drafted memoranda maintained the same lodestar hourly rates for both tasks. Appropriately, the Special Master does not propose different rates for the different tasks performed.

In asserting that Michael Bradley's work was "distinctly limited" as compared to that of other staff attorneys, the Special Master cites Michael Bradley's testimony that he recalls recording comments on a "handful" of documents in the Catalyst system. R&R at 192. Of course, the content of the review folders assigned to Michael Bradley, and how many documents they contained that were worthy of comment, is entirely arbitrary and is no basis for judging the quality of his work. On that point, the Special Master notes that there is "no clear evidence" that Michael Bradley made comments on any documents, despite Michael Bradley's testimony that he did. *Id.* The negative inference here is obvious, but patently unfair. The Catalyst system was taken off-line after the document review ended, and, as a result, there is no ability to verify *anyone's* work in Catalyst. *See* Chiplock Dep., 6/16/17, at 212:6-213:8 (SM Ex. 10) (stating that "[T]he Catalyst platform had been shut down for a year and a half at that point, and we had all of the documents and the coding on a hard drive, but there was no way to audit any individual user's work in retrospect by looking at that information," and noting that it is not possible "to do

an audit of any individual user's work from years prior, because I just don't think the system was built to capture that.").

In addition, while some staff attorneys certainly worked at a firm's brick-and-mortar location while under in-person supervision, not all did. More than a third of Lieff's staff attorneys worked remotely. *See* Lieff's Resp. to Interrog. No. 24, 7/10/17 (TLF Ex. 6) (identifying Joshua Bloomfield, Elizabeth Brehm, Kelly Gralewski, Chris Jordan, Leah Nutting, Virginia Weiss, and Jonathan Zaul as working remotely); Jordan Dep., 6/6/17, at 16:11-22 (SM Ex. 101); Zaul Dep., 6/6/17, at 15:4-10 (SM Ex. 59). While Michael Bradley did not work at the Thornton office, he did, when necessary, seek guidance from Thornton attorneys. *See* Hoffman Dep., 6/5/17, at 109:17-111:11 (SM Ex. 63). There is simply no basis for cutting only Michael Bradley's lodestar rate for working "unmonitored," when he was far from the only lawyer working remotely. Even if he were—and as the Special Master presumably recognized in not recommending any reduction to Lieff staff attorney rates based on remote work—document review technology allows for this work to be done from any computer, wherever located.

Finally, the sheer magnitude of the reduction proposed by the Special Master highlights its unfairness. The Special Master arbitrarily decides that Michael Bradley's rate should be reduced so that his rate is "more at the level of a paralegal, supplemented by the fact of his law degree and experience as a lawyer." R&R at 366. This proposed reduced rate of $250 per hour, while slightly higher than the rate for Thornton's sole paralegal in this case (Andrea Caruth, $210 per hour), is lower than the rate charged for paralegals by Labaton and Lieff in their fee declarations (Labaton listed its paralegals at rates ranging from $275 per hour to $340 per hour, with an average rate of $316 per hour; Lieff listed its paralegal at $270 per hour). Labaton Fee Decl., Ex. A, 9/15/16 (SM Ex. 88); Lieff Fee Decl., Ex. A, 9/14/16 (SM Ex. 89). Moreover, the

lowest rate for any associate in any fee petition submitted by a law firm in this case (both Customer Class Counsel and ERISA Counsel) is $325 per hour.

In light of Mr. Bradley's experience as an attorney, the rates he has recently charged other clients, and his willingness to perform the work in this case on a contingency basis, the Special Master's proposed reduction to his rate is totally unwarranted.

A. Any Reduction In Michael Bradley's Rate Is Immaterial To The Fee Award

Most importantly, even if one accepts the Special Master's recommendation that Michael Bradley's rate should be reduced by any amount, the result is entirely immaterial to the overall attorneys' fee award, regardless of the amount of reduction. At maximum, and even after the removal of all double-counted staff attorney time, Michael Bradley's work accounts for less than 0.55% of the overall lodestar.[71] Even if one were to remove all value associated with Michael Bradley's work ($203,200)—which would be wildly unfair as even the Special Master acknowledges that he performed work and that his time records support that work—it would have no material effect on Thornton's lodestar or on the overall lodestar. Indeed, the multiplier applied to the overall lodestar without *any* of Michael Bradley's time would still be 2.01, well within the range of reasonableness for a case of this size and complexity. *See supra* § I (citing and quoting portions of July 31, 2017 and June 20, 2018 Expert Declarations of Professor William B. Rubenstein, and 4/9/18 Deposition Testimony of Professor Rubenstein, stating that multiplier is "fully reasonable, indeed modest," and that "it would have been justified to see a three or four [multiplier].").

[71] The revised lodestar as stated in the November 2016 letter is $37,265,241.25. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)

As explained in the previous section regarding double counting, any discussion of lodestar must recognize its limited purpose in this case. In recommending that the difference between Michael Bradley's work at the $500 per hour rate (times 1.8 multiplier) and his work at the proposed reduced $250 per hour rate (times 1.8 multiplier) must be "returned to the class," R&R at 366, the Special Master appears to confuse the lodestar cross-check with the use of lodestar information to determine a *lodestar-based* award. On the one hand, the Special Master accurately concludes that the Court "reviewed the hours as part of a lodestar cross-check, rather than reimbursing . . . attorneys on a one-to-one basis." R&R at 206 n.106 (discussing Thornton hours specifically, but making a general point applicable to all hours).

But when it comes to Michael Bradley, the Special Master flatly contradicts himself, asserting that Thornton "sought reimbursement of fees" for Michael Bradley's work. R&R at 73, 189. This is plainly false and leads to an illogical result. The inclusion of the hours worked by Michael Bradley in the lodestar served the same purpose as the inclusion of all of the other hours in the lodestar—to demonstrate to the Court, *for purposes of the lodestar cross-check only*, the work put into the case, and the reasonableness of the percentage fee sought by counsel. Thornton neither sought nor was awarded "reimbursement" for any professional's hours (as the Special Master himself correctly states elsewhere in in the report, R&R at 206 n.106).

The Special Master compounds his error in asserting that "because of the 1.8 multiplier effect, Thornton received almost an additional $500 per hour on Michael Bradley's time, resulting in an additional almost $200,000 to the Thornton law firm. . . . Thornton's award must be reduced by the amount earned by applying this inflated hourly rate at an almost two-times multiplier." R&R at 197. The Special Master asserts that these ostensible 'earnings' should be returned to the class. R&R at 366. But Thornton clearly did not receive "an additional almost

$200,000" because of Michael Bradley's time. It did not "earn[]" any amount as a result of Michael Bradley's rate.[72] The lodestar containing Michael Bradley's hours was submitted only to help the Court verify that the percentage of the settlement fund it was awarding to counsel was reasonably supported by the work done on the case.[73] And as demonstrated above, the value of Michael Bradley's hours—regardless of hourly rate—had a *de minimis* effect on Thornton's lodestar, an infinitesimal effect on the overall lodestar, and no effect whatsoever on the multiplier applied to the lodestar to verify the 25% percentage of fund award. *See, e.g.*, *In re: Cathode Ray Tube (CRT) Antitrust Litig.,* No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("A lodestar reduction is unnecessary when the effect on the multiplier is not material.").

The Special Master wrongly asserts (without acknowledging the other part of his report in which he concludes the opposite) that the rate charged for Michael Bradley's services has a one-to-one correspondence to the attorneys' fee awarded to Thornton, and that Thornton received an "additional benefit" based on Michael Bradley's rate. R&R at 366. The Special Master then uses this flawed logic as the basis to demand that Thornton disgorge this supposed "additional benefit" it received to the class. *Id.* Neither reason, nor math, nor precedent support such a demand. As Professor Rubenstein states in his June 20, 2018 declaration:

> In a case where a court employs the percentage method to determine class counsel's fee, and uses the lodestar only for cross-check purposes, **the reduction of an hour**

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[72] Harvard Professor Rubenstein explains this concept in his June 20, 2018 Declaration (submitted by Lieff), in the context of contract attorney work: "The Court in this case awarded class counsel 25% of the common fund; counsel's lodestar was submitted solely for cross-check, or verification purposes, and showed that the 25% award was about twice counsel's lodestar. This enabled the Court to ascertain whether a 1.8 multiplier was appropriate given the risks counsel took and the rewards it obtained for the class. The Court's conclusion that the 1.8 multiplier was justified did not mean that class counsel received $800/hour for contract attorneys. It meant that the 25% fee was justified." Rubenstein Decl., 6/20/18, at ¶ 15 (fifth bullet).

[73] *See* Rubenstein Decl., 6/20/18, at ¶¶ 18-20 (explaining that the purpose in a lodestar cross-check is to enable courts to ensure that the percentage awarded was reasonable when compared to the time counsel have worked on the case).

> **of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the "repayment" of that hour of time since counsel was never "paid" for that hour of time; counsel were paid a percentage of the recovery**. Numerous legal decisions have understood this distinction and, after adjusting a lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable.[78]

Rubenstein Decl., 6/20/18, at ¶ 20 n.80 (emphasis added) (citations omitted).

The Special Master's untenable (and internally inconsistent) position and related recommendation with respect to Michael Bradley's work, like his position and recommendation on the issue of the double counting mistake, contravene the purpose and function of the lodestar cross-check in this case.

VIII. The Recommended Payment Of $3.4 Million To ERISA Counsel Is Unjustified And Based On Erroneous Findings

Yet another blunder is the Special Master's conclusion that ERISA Counsel did not receive a fair amount of attorneys' fees in the case. The Special Master calls for a "reallocation remedy" to ERISA Counsel in the amount of $3.4 million. R&R at 369. This recommended remedy is based on three findings made by the Special Master:

1. That, in December 2013, ERISA Counsel agreed to a 9%[74] fee based on the ERISA trading volume of 5-9% that was known at the time, but that "it was later learned" that the trading volume attributable to ERISA plans "was actually about 12-15% of the total trading volume." R&R at 46;
2. That, per the Plan of Allocation and the Stipulated Settlement Agreement, ERISA Counsel were entitled to up to $10.9 million in fees, but received only $7.5 million pursuant to the fee agreement—thereby creating a delta of $3.4 million that was earmarked for ERISA Counsel, but that ERISA Counsel did not receive, Exec. Summ. at 51; R&R at 368-69;[75] and
3. That, owing to "internal tension" between Customer Class Counsel and ERISA Counsel, Customer Class Counsel restricted ERISA Counsel's access to documents,

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[74] As the Special Master found, this amount was later increased to 10% at the suggestion of Customer Class Counsel, and ERISA Counsel received 10% of the overall fees. R&R at 48, 85.

[75] These findings are repeated verbatim in the Supplemental Ethical Report submitted to the Special Master by Professor Stephen Gillers. Gillers Supp. Report, 5/8/18, at 31, 100 n.91 (SM Ex. 233).

> to wit, "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class," and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34.

All three of these findings are wrong. None is a factually or legally supportable basis for the "reallocation" of fees to ERISA Counsel that the Special Master recommends.

A. The Special Master's Conclusion That The ERISA Trading Volume Was "Actually 12-15%" Is Wrong

The Special Master finds, accurately, that the fee agreement between ERISA Counsel and Customer Class Counsel, signed in 2013, was based on the known ERISA **trading volume** percentage at that time. R&R at 46 ("Th[e] agreement—to allocate 9% of the total fee awarded (if successful) to ERISA Counsel—was based largely on the premise that the total ERISA case volume **comprised five to nine percent of the total FX trading volume**.") (emphasis added). This "five to nine percent" trading volume figure came from State Street, which supplied the trading data, and which conferred directly with ERISA Counsel about it.[76]

The ERISA trading volume percentage—meaning, the volume of affected ERISA FX transactions, expressed as a percentage of the total affected FX transactions—is fundamentally different from the ERISA *settlement* percentage, which is the amount of the settlement allocated

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[76] *See* Sarko Dep., 7/6/17, at 58:18-59:22 (SM Ex. 28) (emphasis added):

> "And then in 2013, over the course of time I had had some discussions with Bob Lieff that, you know, it might make sense for us to try to see if we can come up with some tentative agreement on how to divide the fee between the ERISA case and the customer class case. And I guess it was more—in my view it was important not to have the lawyers fight with each other, or at least be a greater chance of getting them to cooperate if they didn't think if affected what fees they received.
>
> Q. **Did trading volume play any role in that second discussion**?
>
> A. [redacted] And, therefore, he was constantly harping back to me that it was a small piece. And we tried to quantify that. **And my recollection was that he thought it was 9 percent—between 5 and 9 percent, something like that. And the discussions with the customer counsel was that we would receive 9 percent, which, at least my understanding, is what the ERISA portion of the case was**."

to ERISA funds, expressed as a percentage of the total settlement amount. The ERISA settlement percentage was never the basis of any agreement among counsel.

As support for the conclusion that the ERISA trading volume was "actually about 12-15% of the total trading volume," the Special Master cites **only** to the deposition testimony of ERISA lawyers, who, naturally, stand to gain from the Special Master's faulty recommendation to reallocate funds to them. R&R at 46 (citing testimony of ERISA attorneys Lynn Sarko and Carl Kravitz). Notably, and as discussed further below, the Special Master does *not* mention other deposition testimony, given by the lawyer actually assisting with the claims administration process, that the volume is, in fact, approximately 9%. Nor does he credit (or even mention in the body of his Report) counsel's statements that verifiable data from the claims administrator shows the volume to be approximately 9%, pending final resolution of the administration process. But even the deposition testimony on which the Special Master does rely—though, of note, not the lines cited in the Report—illustrates that there is no certainty about the "12-15%" number the Special Master adopts:

> The settlement, if you look at it, has a process for determining exactly what that percentage is because, at the end of the day, you need to know whether the group trust assets that are ERISA are going to take from the ERISA pile or the non-ERISA pile. **And if you ask me do I know what that process has revealed in terms of what the actual percentage is, the answer is I don't know.** So I wish I could answer that question. But definitely at the end of the day, if you even **assumed** that it was half ERISA and—half ERISA, you'd be up at 12 percent. **Could have been a little higher, could have been a little lower**.

Kravitz Dep., 7/6/17, at 54:12-25 (SM Ex. 21) (emphasis added).

When, in the course of the investigation, it became clear that the Special Master had adopted the belief that the ERISA portion of the overall trading volume was "actually about 12-15%," lawyers for Customer Class Counsel attempted to set this straight, both during the deposition of Nicole Zeiss (the Labaton partner with responsibility for the claims administration

process) and during oral argument before the Special Master on April 13, 2018. *See* Zeiss Dep., 9/14/17, at 163:20-165:1 (SM Ex. 115); *see also* 4/13/18 Hr'g Tr. at 104:22-105:7 (SM Ex. 162) ([MS. LUKEY, Counsel for Labaton]: "Right now, as we have in the record, it appears it's going to come out at 9 to 9.5 percent. A.B. Data is trying to finish, but it needs to be able to get the last data from the group trust which are a mixture of customer class and ERISA investors. And it's been unable to collect some of that. But there is nothing to indicate, at least at this point, that it's going to exceed the estimated 10 percent. Looks like it'll come in a little under that.")

In the Report, the Special Master acknowledges counsel's statements at oral argument in a single-sentence footnote, but makes no mention of Nicole Zeiss's testimony there, or anywhere else in the Report. R&R at 46 n.28 ("During oral argument, counsel for Labaton indicated that the trading volume for the ERISA funds was in a range of 9% to 10%. However, the record evidence on this point is incomplete."). The omission of Ms. Zeiss's testimony is particularly troubling, given that the Special Master questioned her himself about her knowledge of the ERISA trading volume, eliciting testimony that she understood the percentage to be "around 9 percent." Zeiss Dep., 9/14/17, at 164:16-165:1 (SM Ex. 115).

Presumably, the Special Master makes no mention of this testimony because it contradicts his conclusion that ERISA Counsel got a raw deal in this case. The Special Master's selective reliance on deposition testimony is unjustifiable and, to use a phrase employed by the Special Master elsewhere in the Report, "perhaps telling." Setting aside the issue of selectively quoting deposition testimony, relying on testimony as the sole support for a conclusion about volume is unnecessary and inappropriate. Determining the portion of the total trading volume attributable to ERISA plans is an objective process that results in a definite number, and therefore data, not personal recollection, is the best and most reliable evidence.

But the Special Master did not seek documents regarding the ERISA trading volume. Although the Special Master's first requests for documents, served in May 2017, may have been read to call for such documents, the Special Master's counsel revised the requests six days after serving them, in the process striking numerous requests pertinent to this issue.[77] Even after counsel specifically mentioned the claims administration process resulting in the actual ERISA trading volume at oral argument on April 13, 2018, the Special Master did not pursue it. Nor did he seek further information after Nicole Zeiss testified that she knew the trading volume to be around 9 percent. Zeiss Dep., 9/14/17, at 164:16-165:1 (SM Ex. 115).

State Street—not Customer Class Counsel—supplied the FX trading volume data used in this case. *See* Omnibus Decl., 9/15/16, at ¶ 131 (SM Ex. 3) ("A.B. Data will calculate each Settlement Class Member's Recognized Claim using information ***supplied by State Street***") (emphasis added), ¶ 132 ("The Plan is based on transaction data ***maintained by State Street***") (emphasis added), ¶ 133 ("The parties have relied on Indirect FX Trading Volume information ***provided by State Street*** to develop this Plan of Allocation") (emphasis added); *see also* Zeiss

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[77] The document requests stricken by the Special Master's counsel included, *inter alia,* the following requests:

> "2. …any other documents or information identified during the SST litigation bearing on the material issues in the Litigation, including but not limited to liability and damages.
>
> 23. All documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms, and/or ERISA counsel regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award.
>
> 29. All communications between the Law Firm and counsel for State Street relating to the SST Litigation, including but not limited to document productions, mediations, and settlement.
>
> 39. All communications between and among the Law Firm, the Plaintiffs' Law Firms, and the ERISA firms, relating to preparation of the Motion for Attorneys' Fees and/or the Fee Petitions filed in the SST Litigation."

The Special Master's catch-all request ("53. All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far") did not require the production of these materials, including because it pertained to documents supporting "your Fee Petition," meaning Thornton's individual fee petition. Thornton could not have reasonably anticipated at the time that the Special Master would seek to invalidate the agreement between Customer Class Counsel and ERISA Counsel, or would question the trading volume numbers.

Dep., 9/14/17, at 164:10-12 (SM Ex. 115) ("WilmerHale [State Street's counsel] produced the volume to us in connection with developing the plan of allocation"). Over the course of the mediation process, State Street provided updated versions of their FX trading data to all parties. As State Street refined its process, the data reflected incremental changes.

During the spring of 2015, while the parties were engaged in mediation and closing in on settlement, State Street informed Customer Class Counsel and ERISA Counsel that the estimated ERISA volume was approximately $79.8 billion—or approximately **9.11** % of the total trading volume of $875.7 billion. Specifically, in email correspondence in March 2015, counsel for State Street informed Michael Lesser (Customer Class Counsel) and Lynn Sarko (ERISA Counsel) that the total ERISA volume was $79,898,954,988. *See* 6/11/15 Email (TLF Ex. 20).[78] On June 11, 2015, just weeks before the parties reached an agreement in principle on June 30, State Street's counsel confirmed this number in a chart it sent to customer class attorney Michael Lesser, who in turn shared it with ERISA attorneys Lynn Sarko, Brian McTigue, Regina Markey. *Id.*[79] Accordingly, when the parties reached an agreement in principle to settle this case at the end of June 2015, ERISA Counsel knew that the ERISA trading volume was estimated to be approximately **9.11**%. With the data supplied by State Street in hand, ERISA Counsel made an informed decision to enter into a settlement in principle.

At that time, the ERISA trading volume was still an estimate—albeit an estimate based on hard data analyzed and supplied by State Street—because, as Labaton stated in the Omnibus

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[78] The email thread extends to June but the cited email was sent in March. The term "SSH" used in this email stands for "Securities Settlement and Handling," and refers to Indirect FX transactions relating to purchases and sales of foreign securities. "AIR" stands for "Automated Income Repatriation," and refers to Indirect FX Transactions to repatriate dividend and income payments. Omnibus Decl., 9/15/16, at ¶ 20 (SM Ex. 3).

[79] As noted above, the Special Master did not request documents concerning the ERISA trading volume during the investigation. Thornton attaches exhibits here to clarify misinformation in the record. Thornton provides these documents pursuant to all protective orders and confidentiality agreements applicable to the Special Master's investigation and to the underlying litigation.

Declaration filed with the fee petition, the Group Trusts' transaction volume attributable to ERISA funds had yet to be determined. *See* Omnibus Decl., 9/15/16, at ¶ 135 (SM Ex. 3) ("ERISA Plans and eligible Group Trusts represent approximately 9%-15% of the total Indirect FX Trading Volume, **depending on what portion of the Group Trusts' volume actually falls under ERISA**.") (emphasis added).[80] The Omnibus Declaration explained the process by which Labaton and third-party settlement administrator A.B. Data would seek this information about the Group Trusts and make the final calculations. *Id.* at ¶¶ 137-50. This process included: (1) requiring the Group Trusts to submit certifications detailing their ERISA fund percentages; and (2) working with the Department of Labor, which has independent knowledge of certain Group Trusts with ERISA volume, to ensure that Group Trusts that failed to provide certifications would be included. *Id.* at ¶¶147-49.

As of June 2018, this two-step process of determining the absolute final ERISA trading volume is nearly complete. The first step (obtaining certifications) was completed last year. A.B. Data's spreadsheet capturing this information—which Labaton's counsel referenced during the oral argument before the Special Master—shows that the ERISA volume increased only a *de minimis* amount as a result of the certification process.[81]

The remaining work (obtaining confirmatory volume information from the Department of Labor for Group Trusts that failed to submit mandatory certifications) is still ongoing. While this cleanup effort with the Department of Labor could cause an adjustment to the ERISA trading volume, it is unlikely to have a significant effect, and certainly nowhere in the range of 3% to

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[80] *See also* Kravitz Dep., 7/6/17, at 54:12-25 (SM Ex. 21) (explaining that the percentage depended on the outcome of the Group Trusts process).

[81] The A.B. Data spreadsheet containing this information is subject to a non-disclosure agreement between A.B. Data and State Street, which the Court may order State Street to disclose.

5%—the increase that would be necessary to bring the trading volume within the "actually 12-15%" figure on which the Special Master relies. Contrary to the Special Master's assertion that the ERISA trading volume is between 12-15% of the overall trading volume, the volume is "actually" between 9% and 10%, which, if one compares percentage of volume to percentage of fees,[82] is ***less than,*** or at least very closely commensurate with, the percentage of attorneys' fees that ERISA Counsel received. Accordingly, a "reallocation remedy" is not needed to bridge any gap between ERISA Counsel's fees and the ERISA trading volume, and such reallocation would be unjustified.

Finally, it is worth noting that the suggestion that ERISA Counsel would have agreed to (and agreed not to revisit) a 9% fee agreement when they believed the ERISA trading volume to be approximately 12-15% is difficult to square with their obligations to their clients. ERISA Counsel's fees were derivative, directly or indirectly, of the result they helped achieve for their clients. The $60 million share of the settlement recovery for ERISA plaintiffs was based on the ERISA trading volume. The fact that the Department of Labor insisted on a premium that caused ERISA's share of the *settlement* to be 20% would not excuse ERISA Counsel's acceptance of a $60 million share if they truly thought the ERISA volume was higher. If ERISA Counsel believed that the ERISA trading volume had increased over time by 33 to 60 percent (*i.e.,* from approximately 9% to 12-15%), surely they would have been obligated to demand additional settlement funds for the ERISA plaintiffs, even setting aside the issue of their own fees.

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[82] This is in and of itself a problematic comparison, as it presumes that ERISA Counsel was solely responsible for the ERISA funds' recovery, and therefore entitled to attorneys' fees on a one-to-one basis. To the contrary, the Customer Class Counsel's work on the case—including, of particular note, its development of the damages theory—contributed significantly to the result for the ERISA plans. This also wrongly presumes that the Customer Class's claims did not cover ERISA funds, a question never resolved because the court never ruled on State Street's motions to dismiss the ERISA complaints.

B. The Special Master's Finding That The $10.9 Million "Fee Cap" Applied To ERISA Counsel's Fees Only Is Wrong

In quantifying the "reallocation remedy" he asserts ERISA Counsel deserves, the Special Master references the $10.9 million "fee cap" imposed by the Department of Labor. R&R at 85. In recommending that ERISA Counsel receive reallocated attorneys' fees, the Special Master concludes that those fees should be in the amount of $3.4 million because that number "reflects the difference between the $10.9 million that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received." Exec. Summ. at 51; R&R at 368-69. This is a faulty conclusion based on the Special Master's incorrect and unsupportable finding that "$10.9 million [] was allocated as a cap for ERISA attorneys in the Settlement Agreement." *Id.*

Contrary to the Special Master's assertion, the purpose of the cap was to limit the amount that could be deducted from the ERISA portion of the settlement for attorneys' fees of any kind, not only ERISA Counsel's fees (the Department of Labor's intention being to limit deductions from the ERISA class's share of the recovery).[83] As with the trading volume issue, discussed

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[83] The Special Master's and his counsel's confusion on this point is well illustrated by this exchange with ERISA attorney Carl Kravitz:

> "Q [MR. SINNOTT]. So is it fair to say that that 10.9 million is a cap of sorts? **That's the outer limit that the Department of Labor has set for ERISA fees?**
>
> A. I—I—ERISA fees. I would—**I always thought of it a tiny bit differently. I always thought of it as the cap of the amount of the fee award that could be deducted from the ERISA share**.
>
> Q. Okay.
>
> THE SPECIAL MASTER: **The cap on the amount -- the cap on the amount of the fee award that could be deducted from the ERISA share?**
>
> THE WITNESS: **That is exactly what I was trying to say.**
>
> THE SPECIAL MASTER: Okay. So – and **was DOL's objective in wanting this cap to ensure that at the very least—to ensure a minimum recovery for the—what we'll refer to as the ERISA class**?
>
> THE WITNESS: Right. Yes, that was my understanding of at least part or—or the major part of their motivation. **They were trying to protect what the ERISA part would get on a net basis as in addition to on a gross basis**."

above, attorneys for the Customer Class Counsel attempted to clear up the Special Master's misunderstanding when it became clear during the investigation that the Special Master thought ERISA Counsel received $7.5 million pursuant to the parties' agreement, but was entitled to up to $10.9 million. The Special Master's findings in the Report show that this misunderstanding persists, and it now underpins the Special Master's conclusion that ERISA Counsel is entitled to an additional $3.4 million in fees.

Documents filed with the Court both pre-and post-settlement confirm that the $10.9 million cap applied to *all plaintiffs' counsel's* fees, not just ERISA Counsel's fees. The issue was how much in attorneys' fees could be paid out of the **ERISA portion of the settlement**—not how much money was going to Customer Class Counsel versus ERISA Counsel.[84] Of note:

- The Stipulation and Agreement of Settlement filed with the Court on July 26, 2016 ("Settlement Stipulation"), which the Special Master includes as exhibit 75 to his Report makes this even more clear. The Settlement Stipulation states: "Except with respect to the amount of **Plaintiffs' counsel's attorneys' fees chargeable to the ERISA Plans**,…." Settlement Stipulation, 7/26/16, at ¶ 24 (SM Ex. 75) (emphasis added).

- The Plan of Allocation, which is set forth in full in the Notice to the Class dated August 10, 2016, states that "[N]o more than $10,900,000 in fees can be paid out from the ERISA Settlement Allocation[.]" Notice to Class, 8/10/16, at 11 (SM Ex. 81). In the Report, the Special Master characterizes this portion of the Notice as follows: "**Recipients were also told that attorneys' fees for ERISA counsel would not exceed $10.9 million**, and they were told how fees for the other counsel would be computed 'if the Court awards the total amount of fees that Lead Counsel intends to request.'" R&R at 277 (emphasis added). This is plainly untrue; nowhere does the Notice inform recipients that attorneys' fees for ERISA Counsel would not exceed $10.9 million.

- The Omnibus Declaration filed by Labaton in support of the attorneys' fees motion on September 15, 2016 states that ERISA Plan and eligible Group Trusts class members will be allocated $60 million "minus," *inter alia,* "attorney's fees, if awarded by the Court, in

Kravitz Dep., 9/11/17, at 39:15-40:13 (SM Ex. 117) (emphasis added).

[84] On that point, emails produced to the Special Master show that ERISA Counsel did not disclose the details of its fee agreement to the DOL. *See* 8/28/15 Email, TLF-SST-052975 (SM Ex. 35); 8/9/15 Email, TLF-SST-043022 (TLF Ex. 21).

> an amount not to exceed $10,900,000." *See* Omnibus Decl., 9/15/16, at ¶ 134 (SM Ex. 3).

If the above documents leave any room for confusion about which "attorneys' fees" the cap pertains to, the Term Sheet, executed by all counsel in September 2015, makes clear that the function of the cap is to limit the amount of fees incurred by any plaintiffs' counsel that can be deducted from the ERISA portion of the settlement:

> "**Plaintiffs' Counsel** may apply for their fees and expenses and any service awards for Plaintiffs against the entire Class Settlement Amount, but in no event shall more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in fees be paid out of the $60 million portion of the Class Settlement Amount allocated to ERISA Plans, as referenced in paragraph 8(n) above."

Term Sheet, 9/11/15, TLF-SST-050929-050944, at ¶ 12 (TLF Ex. 22) (emphasis added). "Plaintiffs" is defined in the Term Sheet as including both ATRS and the individual ERISA class representatives. *Id.* at ¶ 1. Therefore, "Plaintiffs' Counsel" logically means both Customer Class Counsel and ERISA Counsel and, indeed, is used in that context elsewhere in the Term Sheet. *See id.* at ¶ 8(n) (definition of Plan of Allocation).

During his deposition, David Goldsmith, the Labaton attorney who presented the settlement plan and request for attorneys' award to the Court, stated that the cap applied to "all counsel's fees":

> Q [MR. HEIMANN]: The Department of Labor also negotiated a cap of some 10.9 million dollars on the fees to be charged against the 60-million-dollar amount that they had negotiated for the ERISA class members, correct?
>
> A [MR. GOLDSMITH]: Correct.
>
> Q. And did that negotiated fee apply only to the settlement being allocated to the ERISA plan -- excuse me. Let me begin again. **Did that cap on the fee apply only to the ERISA counsel's fees?**
>
> A. **No.**
>
> Q. **Did it apply to all counsel's fees?**

A. **Yes.**

Goldsmith Dep., 9/20/17, at 254:13-255:2 (SM Ex. 42) (emphasis added).

ERISA attorney Carl Kravitz also tried to clear up the Special Master's and his counsel's misunderstanding on this point:

> "Q [MR. SINNOTT]. So is it fair to say that that 10.9 million is a cap of sorts? That's the outer limit that the Department of Labor has set for ERISA fees?
>
> A. I—I—ERISA fees. I would—I always thought of it a tiny bit differently. I always thought of it as the cap of the amount of the fee award that could be deducted from the ERISA share.
>
> Q. Okay.
>
> THE SPECIAL MASTER: The cap on the amount—the cap on the amount of the fee award that could be deducted from the ERISA share?
>
> THE WITNESS: That is exactly what I was trying to say.

Kravitz Dep., 9/11/17, at 39:15-40:3 (SM Ex. 117).

There is no support for the Special Master's conclusion that the $10.9 million cap on "attorneys' fees" meant that ERISA Counsel had been "allocated" $10.9 million in fees, but was constrained by its agreement with Customer Class Counsel and had to accept a lesser amount ($7.5 million). Exec. Summ. at 51; R&R at 368. To the contrary, the key settlement and fee documents—including the Plan of Allocation, Term Sheet, Notice, and Omnibus Declaration—all confirm that the cap applied to fees sought by plaintiffs' counsel generally, not only ERISA Counsel. The Special Master's recommendation that a $3.4 million "reallocation remedy" be given to ERISA Counsel is based on his fundamental misunderstanding of the cap, and is wholly unjustified.

C. The Special Master Wrongly Concludes That Customer Class Counsel Sought To Prevent ERISA Counsel From Reviewing Documents And Omits

Testimony From ERISA Counsel That Directly Contradicts This Erroneous Finding

To buttress his ultimate conclusion that ERISA Counsel was treated unfairly, and to further justify his suggested award of an additional $3.4 million to ERISA Counsel, the Special Master erroneously concludes that Customer Class Counsel somehow prevented ERISA Counsel from accessing documents produced by State Street in the litigation. The Special Master's reason for drawing this conclusion is obvious—it is further "evidence" of his belief that Customer Class Counsel sought to put ERISA Counsel at a disadvantage. It is also summarily contradicted, however, by testimony taken by the Special Master that is conveniently ignored in the Report.

Specifically, the Special Master finds that "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class" and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34. The Special Master finds that this lack of access was a "manifest[ation]" of "internal tension" between the Customer Class Counsel and ERISA Counsel, for which proposition he cites the testimony of ERISA attorney Carl Kravitz. R&R at 34, 46 n.29. Notably, the discussion makes no reference to testimony from numerous other attorneys, including ERISA attorney Lynn Sarko, [redacted].[85] Ignoring contradictory

[85] *See, e.g.*, Sarko Dep., 7/6/17, at 43:17-44:1; 75:20-76:1 (SM Ex. 28) (emphasis added):

> Q: Describe, Lynn, if you would the coordination between ERISA Counsel and customer class, or the big three. Was there any tension involved in the relationship? A: Well, **I don't think there was any tension**, at least from my viewpoint, with any of the ERISA [sic] on the customer class side. I thought they were all perfectly professional. There was a difference, and I think this has to back up to the way State Street viewed it.
>
> …
>
> [redacted]

testimony about the relationships of Customer Class Counsel and ERISA Counsel that does not fit his desired narrative, the Special Master concludes that ERISA Counsel did not have access to documents produced by State Street because Customer Class Counsel did not want ERISA Counsel to have access.

As with numerous other conclusions the Special Master makes in the Report, this is flatly contradicted by other deposition testimony taken by the Special Master during the investigation. The testimony of ERISA attorney Lynn Sarko dispels the Special Master's conclusion that Customer Class Counsel prohibited ERISA Counsel from accessing documents. First, as to the Special Master's finding that "[n]or were ERISA Counsel allowed access to the Customer Class's database"—the obvious inference being that Customer Class Counsel *denied* ERISA Counsel access to its database—Mr. Sarko testified that sharing a document database would have been "totally unrealistic" for confidentiality, workflow, and other reasons. Sarko Dep., 7/6/17, at 65:10-19 (SM Ex 28). He further testified that it is common in large cases consisting of groups with differing interests, where one group might settle while another does not, for those groups to have separate databases so they can preserve their ability to access documents regardless of another group's actions. *Id.* at 65:5-66:7. On that point, Mr. Sarko explained that, in this case, ERISA Counsel's having a separate database, and thus having the ability to pursue the case even if the Customer Class settled, was an important consideration weighed by the Department of Labor during settlement negotiations. *Id.* at 66:8-18 ("[T]hat was a selling point to them for them to settle the case, thinking that we were not just, you know, trailing along."). Thus, the Special Master's strange finding that ERISA Counsel was not "allowed" access to the database maintained by Customer Class Counsel is squarely contradicted by Mr. Sarko's testimony, which the Report does not cite.

Lynn Sarko's deposition testimony also squarely negates any finding, conclusion, or inference that Customer Counsel inhibited ERISA Counsel's access to documents produced by State Street. *See* R&R at 34. Mr. Sarko explained in his deposition that, to the extent ERISA Counsel did not have access to the same universe of documents as Customer Class Counsel, it was because ***State Street***—not Customer Class Counsel—did not allow ERISA Counsel to have such access. Sarko Dep., 7/6/17, at 44:2-5, 64:13-65:4 (SM Ex. 28). [redacted] Contemporaneous correspondence between ERISA Counsel and State Street's counsel confirms that ERISA Counsel was communicating directly with State Street's counsel regarding documents, and receiving documents from State Street as a result. For example, a February 1, 2013 letter accompanying a production of documents by State Street's counsel to ERISA Counsel shows that (1) ERISA Counsel received the voluminous California production; and (2) ERISA Counsel issued discovery requests to State Street, negotiated with State Street regarding those requests, and received documents in return. *See* 2/1/13 Email (TLF Ex. 23).[86] ERISA Counsel also received other documents and information from State Street's counsel, including trading volume data and analysis.

[86] Nor did the Special Master request documents from Thornton concerning ERISA Counsel's discovery negotiations with State Street.

As Mr. Sarko further explained in his deposition, [redacted] Sarko Dep., 7/16/17, at 44:24-25; 46:4-6.

The Report entirely ignores the following testimony by Mr. Sarko:

> When we agreed to go into the mediation, the understanding was that they [State Street's counsel] would provide certain documents to customer class, and we would not have access to those. **And we were provided certain documents on the ERISA side that I don't know whether the class received.** The reason being that we, of course, think about it, had not survived a motion to dismiss. We're in the process of amending our complaint. And, therefore, we got—**we negotiated with State Street to get the documents we got that we needed for—you know, for settlement purposes.**
>
> On the other hand, the customer class received all kinds of documents; for example, class certification was an issue for them. **And in our discussions with State Street, they said,** [redacted] **So we had separate confidentiality agreements at the beginning. We did not have access to those documents.** [redacted] So we started by taking the documents that we received from State Street. And we had our own separate database.
>
> **
>
> And I think that was the history of why there was no—you know, we didn't receive write-ups of documents for any work they had done because we couldn't see those documents at State Street. **And even though they produced to us the—some of the same stuff, I mean, we did receive the documents from California. We received, for example, all the documents produced to the Department of Labor. I don't know if Arkansas got those documents or not. But it was State Street kept those two silos separate so that they could settle with one and not the other**.

Sarko Dep., 7/6/17, at 44:2-45:7; 45:19-46:6 (SM Ex. 28) (emphasis added).

In addition to ERISA Counsel's own dealings with State Street and their own analysis of State Street's documents, Customer Class Counsel also shared work product with ERISA Counsel and participated in joint collaborative discussions. *See, e.g.*, Sarko Dep., 7/6/17, at 114:15-25 (SM Ex. 28) (recalling "all counsel" meeting at which counsel came together to share

views of the case, and at which Michael Lesser of Thornton presented a PowerPoint presentation); Kravitz Dep., 9/11/17, at 11:7-8 (SM Ex. 117) ("As the case wore on, we did work closely with the customer class"); Kravitz Dep., 7/6/17, at 78:4-23, 95:13-96:20 (SM Ex. 21) (recalling presentation and substantive discussions among counsel).

The Special Master's findings regarding ERISA Counsel's access to documents, and the accompanying inference against Customer Class Counsel, are plainly contradicted by record evidence. There is no factual basis for the Special Master to conclude that Customer Class Counsel was trying to inhibit ERISA Counsel's ability to obtain or review documents. This is an important correction not only because the Special Master saw fit to make this finding in his Report, but also because it underpins his broader conclusion that ERISA Counsel got a raw deal at the hands of Customer Class Counsel, and therefore should receive $3.4 million in "reallocat[ed]" fees—a figure that, for the reasons explained above, is based on a fundamental misunderstanding of the fee cap imposed by the Department of Labor.

IX. The Recommendation That A Monitor Be Appointed Is Baseless

As a final salvo, the Special Master recommends that an ethical monitor be imposed on the Thornton Law Firm "to consult with them on professional conduct norms and to ensure that they comply with those norms." R&R at 373. This recommendation is absurd. What could a consultant do to ensure "consistent ethical compliance" when there have been only unintentional mistakes? The answer is: nothing.

The recommendation that Thornton engage a monitor—no doubt at its own cost— is primarily premised upon the Special Master's conclusion that "[a]s to its **business development**, Thornton lawyers appear to be largely unsupervised and unconstrained by the professional conduct norms" and that such conduct is "**endemic** to the way [the Thornton Law Firm does] business with their hyper-focus on business development and fee generation." *See* R&R at 372-

73 (emphasis added). There is no significant discussion of the Thornton Law Firm's "business development practices" anywhere in the Report. This is simply another instance where the Special Master or his counsel, for whatever reason, impugn the reputation of an entire law firm with no apparent reason.[87]

Ultimately, the only conduct that the Special Master has "uncovered" with respect to the Thornton Law Firm is: (1) immaterial misstatements in a boilerplate affidavit used as a cross-check for an aggregate fee award; and (2) a potential lack of contemporaneous time records of two attorneys where the Special Master found that the time recorded was nonetheless "reasonable and sufficiently reliable." R&R at 216.[88] This sixteen-month, $3.8 million investigation (with its attendant reputational effect and the additional significant cost to the firm of defending itself) has no doubt reminded all attorneys of their responsibility to scrupulously avoid inadvertent errors in submissions to the Court. While the Special Master's recommendations that the Thornton Law Firm establish more consistent procedures for recording

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[87] Of course, this is not the only place where the Report and Recommendations unfairly impugns the reputation of the Thornton Law Firm and its attorneys. As an additional example, page 54 of the Report quotes a lengthy email from co-counsel which the Special Master characterizes as "warning Bradley not to include unwarranted hours in Thornton's fee petition." The underlying email states, "I heard third-hand that Mike [Thornton] recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million . . . . I am hopeful that Mike T simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf." In the response, which does not appear in the Report, Michael Thornton replies, "I did say something like that on the call, but preceded it by saying **it was a guess** and that I would have to ask Mike Lesser for the actual figure at that point which of course is not complete as with the other firms." 8/30/15 Email, TLF-SST-031166 (SM Ex. 87) (emphasis added). Nor does the Special Master include a subsequent email, which clarified that the mistake was the result of a simple transposing of concepts, in which Michael Lesser writes, "**I think that 14 would have been our share of the fee, making some assumptions, and not the actual size of our lodestar.**" 8/30/15 Email, TLF-SST-038587 (TLF Ex. 24) (emphasis added). This later email was identified for the Special Master, *see* Thornton's Resp. to Request for Add'l. Submission, 4/12/18, at 11-12 (TLF Ex. 3), as was deposition testimony from co-counsel that "I think Mike Thornton may have simply been mistaken because that's not the number they ultimately reported." *Id.* (citing Chiplock Dep., 9/8/17, at 64:16-18 (SM Ex. 41)). The Special Master was either recklessly inattentive or chose to ignore this evidence, publishing innuendo with a complete disregard for injuring the reputation of a highly respected member of the bar.

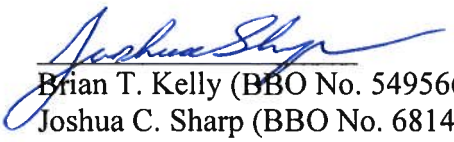
[88] As additional evidence of the Special Master or his counsel's inattention, in one section of the Report, the Special Master finds that he cannot say whether or not the time records were contemporaneous and in another section states that the time records were not contemporaneous. *See supra* § III(B)(ii).

time and setting billing rates are not in and of themselves unreasonable, they certainly do not justify "on-going ethics supervision," R&R at 373, and in fact do not even concern legal ethics. Imposing an ethics monitor on the Thornton Law Firm is a draconian recommendation that should be rejected because it is unfair, unjustified, and needlessly punitive.

CONCLUSION

For the foregoing reasons, the Thornton Law Firm objects to the Special Master's factual and legal findings identified above.

Respectfully submitted,



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Dated: June 28, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document and its exhibits will be filed conventionally on June 29, 2018 when the Clerk's office opens, as the Clerk's office will be closed by the time we are able to file the foregoing document and its exhibits tonight. The foregoing document and its exhibits will be served on all counsel by electronic means on June 28, 2018. A redacted version will be filed on ECF on June 28, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

Joshua C. Sharp

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third*, the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier.*** (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

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[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
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> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
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> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.

- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.

- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc.*, No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc.*, No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

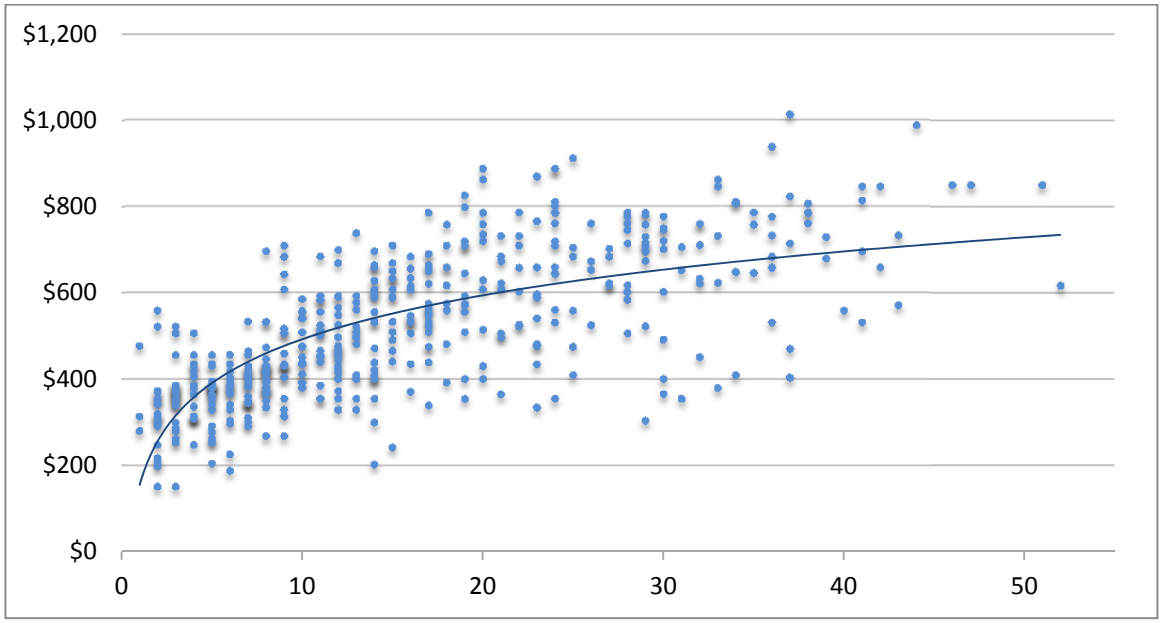
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



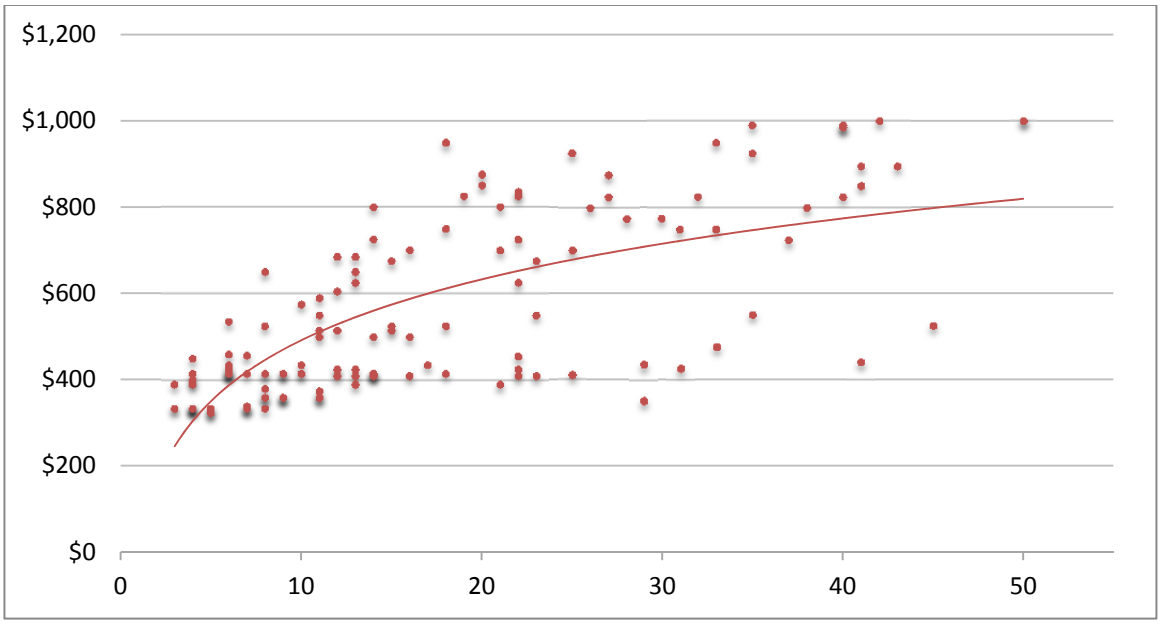
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

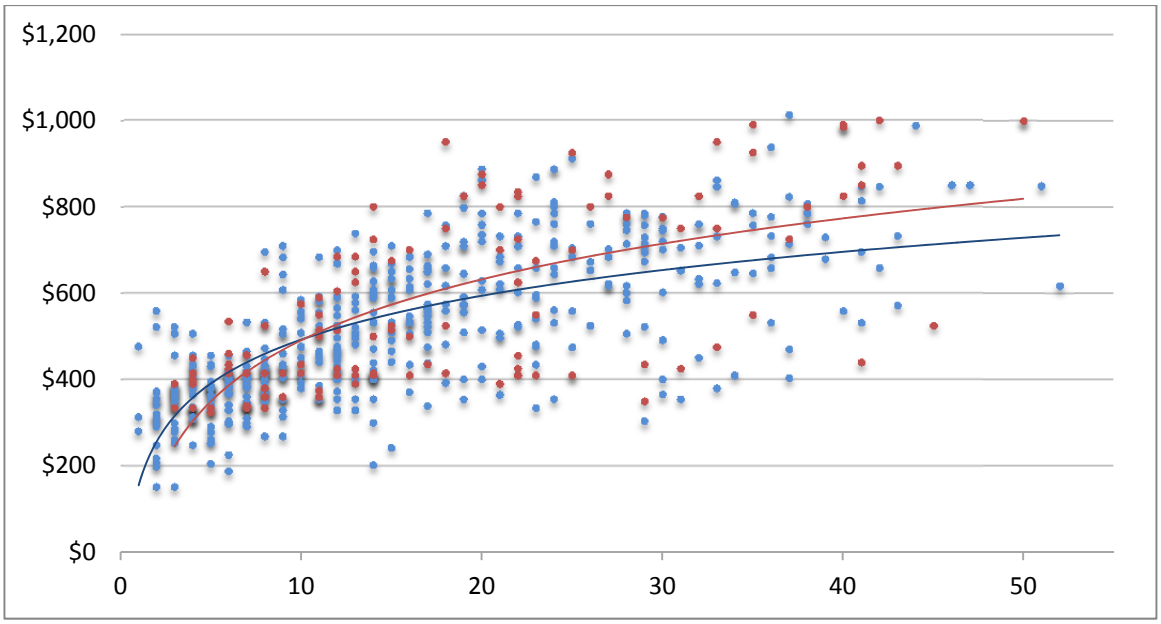
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

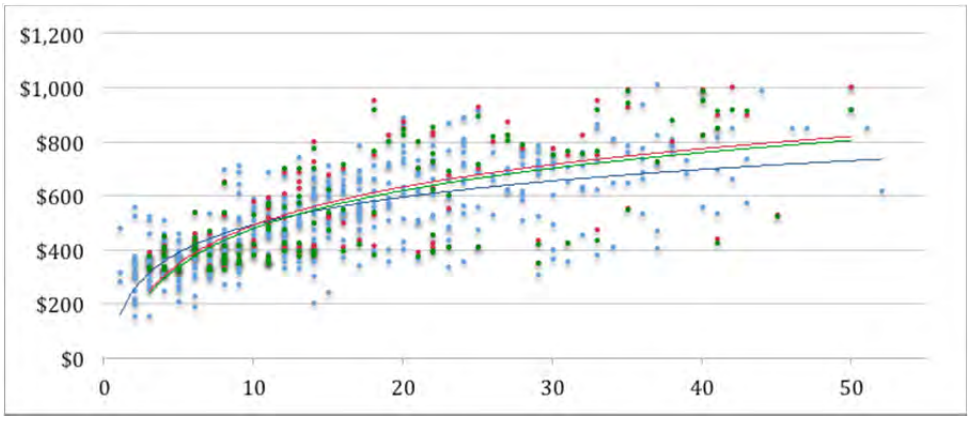
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

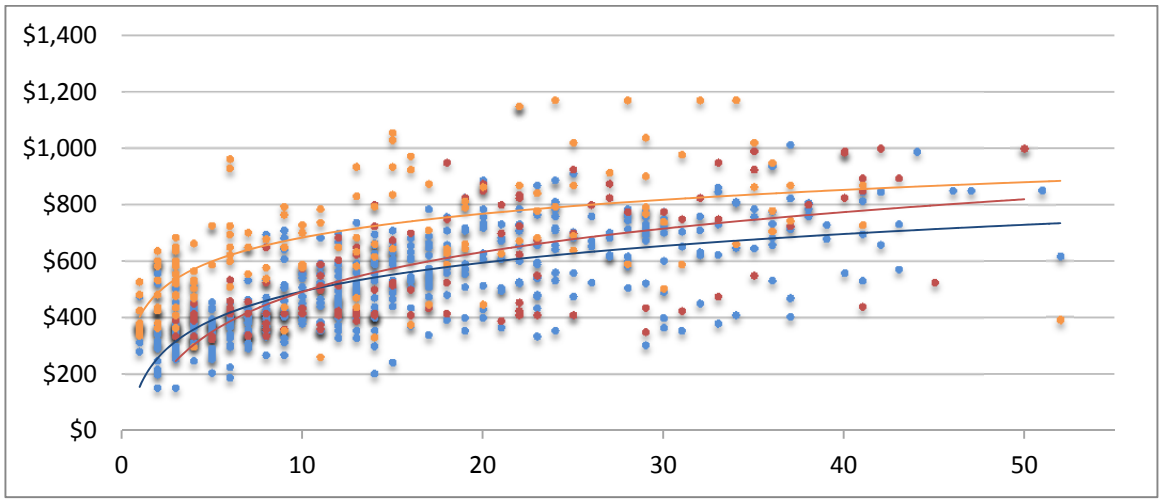
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

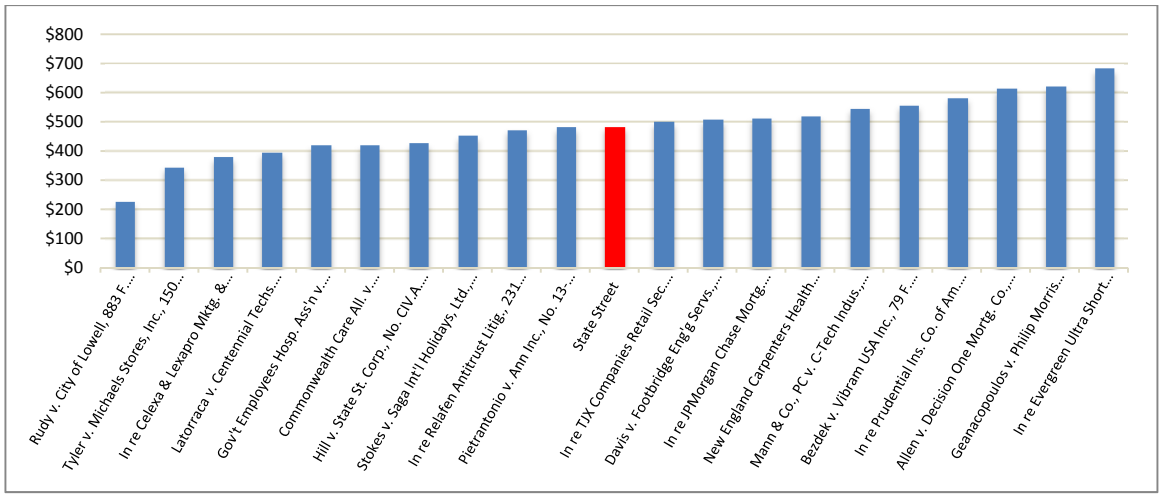
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

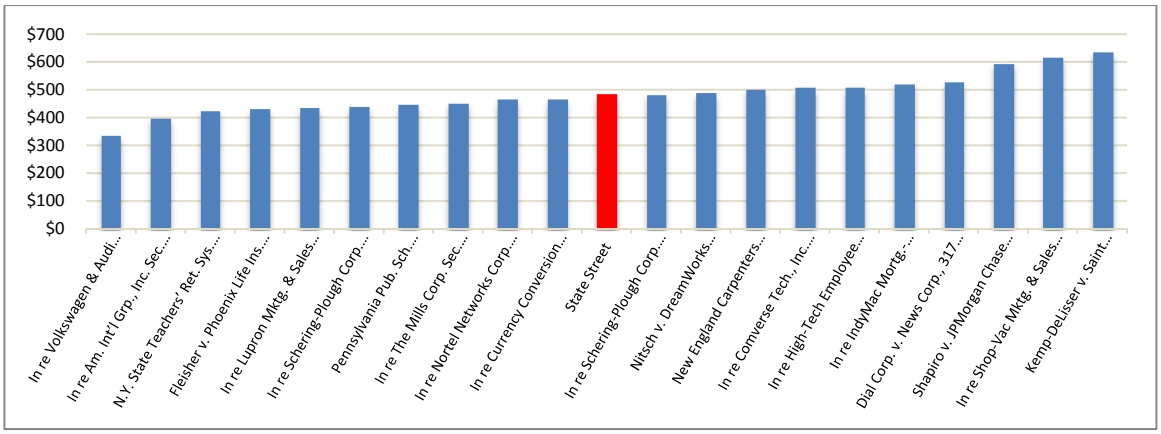
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

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[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

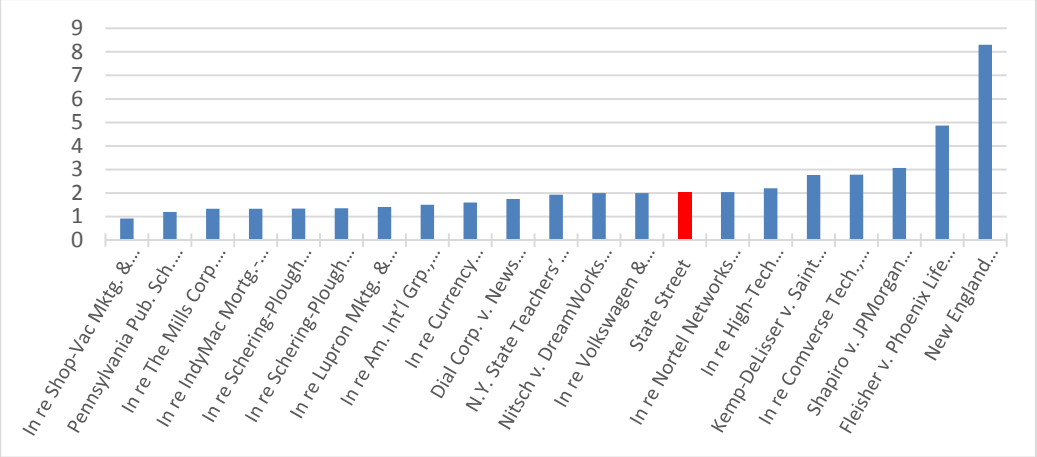
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

EXHIBIT A

PROFESSOR WILLIAM B. RUBENSTEIN

Harvard Law School - AR323
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Cambridge, MA 02138

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rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-present
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

♢ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

♢ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016))

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

♢ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

♢ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

♢ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

♢ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1368741 (N.D. Ill., April 10, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

♢ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

♢ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

♢ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

♢ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

♢ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

♢ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

♢ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

♢ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

♢ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

♢ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

♢ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

♢ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

♢ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

♢ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

♢ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

♢ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

♢ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

♢ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

♢ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

♢ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

♢ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

♢ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

♢ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

♢ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

- ♢ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

- ♢ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

- ♢ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

- ♢ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

- ♢ Retained by a Fortune 100 Company as an expert consultant on class certification issues

- ♢ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

- ♢ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

- ♢ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

- ♢ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

- ♢ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

- ♢ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

- ♢ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

- ♢ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

- ♢ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

♢ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

♢ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

♢ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

♢ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

♢ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

♢ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

♢ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

♢ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

♢ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

♢ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

♢ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

♢ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

♢ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

♢ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

♢ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

♢ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

♢ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

♢ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

♢ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

♢ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

♢ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

♢ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

♢ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

♢ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

♢ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

♢ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

♢ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

♢ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

♢ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

♢ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

♢ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

♢ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

♢ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

♢ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

♢ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

♢ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

♢ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (***Rosebrock v. Hoffman***, 135 S. Ct.1893 (2015))

♢ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (***AT&T Mobility v. Concepcion,*** No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (***Salazar v. Buono***, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (***Lawrence v. Texas***, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (***Illinois v. Perkins***, 496 U.S. 292 (1990))

Attorney's Fees

♢ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in *Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (***Dydyk v. Apple Inc.,*** 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (***In re Google Buzz Privacy Litigation,*** 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

♢ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

♢ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

♢ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

♢ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

♢ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
♢ *Play It Straight*, NEW YORK TIMES, October 16, 2004
♢ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
♢ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
♢ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
♢ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

♢ Massachusetts (2008)
♢ California (2004)
♢ District of Columbia (1987) (inactive)
♢ Pennsylvania (1986) (inactive)

♢ U.S. Supreme Court (1993)

♢ U.S. Court of Appeals for the First Circuit (2010)
♢ U.S. Court of Appeals for the Second Circuit (2015)
♢ U.S. Court of Appeals for the Fifth Circuit (1989)
♢ U.S. Court of Appeals for the Ninth Circuit (2004)
♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
♢ U.S. Court of Appeals for the D.C. Circuit (1993)

♢ U.S. District Courts for the Central District of California (2004)
♢ U.S. District Court for the District of the District of Columbia (1989)
♢ U.S. District Court for the District of Massachusetts (2010)
♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT B

Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

1. Class Action Complaint, ECF No. 1
2. Amended Class Action Complaint, ECF No. 10
3. Memorandum of Law in Support of Plaintiff's Assented-to Motion for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, ECF No. 8
4. Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 19
5. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 22
6. Reply Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 29
7. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, ECF No. 33
8. Stipulation and Joint Motion to Continue Stay, ECF No. 66
9. Stipulation and Joint Motion to Continue Stay, ECF No. 71
10. Stipulation and Joint Motion to Continue Stay, ECF No. 75
11. Stipulation and Agreement of Settlement, ECF No. 89
12. Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 91
13. Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 92
14. Exhibit A: Letter Dated March 18, 2011, ECF No. 92-1
15. Exhibit B: Labaton Sucharow Firm Resume, ECF No. 92-2
16. Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, ECF No. 97
17. Defendants' Memorandum in Support of Class Action Settlement, ECF No. 99
18. Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, ECF No. 100
19. Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses of Service Awards to Plaintiffs, ECF No. 102
20. [Proposed] Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 103-1
21. Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of

Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 104

22. Exhibit 1: Declaration of George Hopkins in Support of Final Approval of Class Settlement, Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Award to ARTRS, ECF No. 104-1
23. Exhibit 2: Letter Dates March 18, 2011, ECF No. 104-2
24. Exhibit 3: Motion to Dismiss, ECF No. 104-3
25. Exhibit 4: Lobby Conference Before Chief Judge Mark L. Wolf, ECF No. 104-4
26. Exhibit 5: Declaration of Jonathan B. Marks, ECF No. 104-5
27. Exhibit 15: Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15
28. Exhibit 16: Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-16
29. Exhibit 17: Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-17
30. Exhibit 18: Declaration of Lynn Sarko on Behalf of The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Strangeland in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-18
31. Exhibit 19: Declaration of J. Brian McTigue in Support of Motion for Attorneys' fees, Reimbursement of Expenses, and Incentive Awards to Certain Class Representatives, ECF No. 104-19
32. Exhibit 20: Declaration of Carl S. Kravitz in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-20
33. Exhibit 21: Declaration of Catherine M. Campbell on Behalf of Feinberg, Campbell & Zack, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-21
34. Exhibit 22: Declaration of Jonathan G. Axelrod on Behalf of Beins, Axelrod, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-22
35. Exhibit 23: Declaration of Kimberly Keevers Palmer on Behalf of Richardson, Patrick, Westbrook & Brickman, LLC in Support of Lead Counsel's Motion for an Award of Attorneys' fees and Payment of Expenses, ECF No. 104-23
36. Exhibit 24: Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, ECF No. 104-24
37. Exhibit 25: Rate Tables, ECF No. 104-25
38. Defendant's Statement of Reporting Status of Class Action Settlement, ECF No. 106
39. Reply Memorandum of Law in Further Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 108

40. Supplemental Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion, ECF No. 109
41. Order and Final Judgment, ECF No. 110
42. Order Awarding Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 111
43. Order Approving Plan of Allocation, ECF No. 112
44. Hearing Transcript, ECF No. 114
45. Letter Dated November 10, 2016, ECF No. 116
46. Memorandum and Order, ECF No. 117
47. The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master, ECF No. 127
48. Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master, ECF No. 128
49. Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master, ECF No. 129
50. Order Regarding Class Notice, ECF No. 172
51. Memorandum and Order Regarding Appointment of Judge Rosen as Special Master, ECF No. 173
52. The Competitive Enterprise Institute's Center for Class Action Fairness's *Amicus* Response to Court's Order of February 6 – Leave to File granted March 8, 2017 (Dkt. 172), ECF No. 174
53. Memorandum and Order Regarding Class Notice, ECF No. 187
54. Memorandum and Order Regarding Motion for Relief from Fee Order, ECF No. 192
55. Special Master's Order Regarding the Law Firms' Objection to Retention of John W. Toothman as Advisor to Counsel to the Special Master, ECF No. 193
56. Objection of Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceeding Before the Special Master, ECF No. 194
57. Objection Plaintiffs' Law Firms' Objection to Special Master's Order Regarding Retention of John W. Toothman, ECF No. 199
58. Memorandum and Order Regarding Emergency Motion, ECF No. 200
59. Exhibit A: Notice of Proceedings that Could Result in an Additional Award to Class Members Who Have Claims, ECF No. 200-1
60. Exhibit B: Notice of Proceedings that Could Result in an Additional award to Class Members Who Have Claims, ECF No. 200-2
61. Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel, ECF No. 202
62. Order Regarding Email Addresses, ECF No. 203
63. Memorandum and Order – Toothman Order, ECF No. 204
64. Labaton Sucharow's Response to the Court's April 26, 2017 Order, ECF No. 205
65. Exhibit A: Declaration of Nicole M. Zeiss in Response to the Court's April 26, 2017 Order, ECF No. 205-1

66. Exhibit B: Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Response to the Court's April 26, 2017 Order, ECF No. 205-2
67. Memorandum and Order Regarding Special Master Billing Rate, ECF No. 206
68. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 1 Response
69. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017
70. Thornton Law Firm, LLP's June 1, 2017 Responses to Special master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
71. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 9 Response
72. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 9, 2017
73. Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
74. Lieff Cabraser Heimann & Bernstein LLP's Corrected Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Interrogatories Nos. 43 and 44
75. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response
76. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017
77. Thronton Law Firm, LLP's July 10, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories

EXHIBIT C

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT C
Massachusetts Cases Affirming Class Action Fee Awards

1. *Allen v. Decision One Mortg. Co., LLC*, No. CIV.A. 07-11669-GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
2. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324 (D. Mass.), aff'd, 809 F.3d 78 (1st Cir. 2015)
3. *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
4. *Davis v. Footbridge Eng'g Servs., LLC*, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
5. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536 (Mass. Super. Feb. 24, 2016)
6. *Gov't Employees Hosp. Ass'n v. Serono Int'l, S.A.*, 246 F.R.D. 93 (D. Mass. 2007)
7. *Hill v. State St. Corp.*, No. CIV.A. 09-12146-GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015), appeal dismissed, 794 F.3d 227 (1st Cir. 2015)
8. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
9. *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
10. *In re JPMorgan Chase Mortg. Modification Litig.*, 18 F. Supp. 3d 62 (D. Mass. 2014)
11. *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
12. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005)
13. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass. 2008)
14. *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25 (D. Mass. 2011)
15. *Mann & Co., PC v. C-Tech Indus., Inc.*, No. CIV.A.08-11312-RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
16. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
17. *Pietrantonio v. Ann Inc.*, No. 13-CV-12721-RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
18. *Rudy v. City of Lowell*, 883 F. Supp. 2d 324 (D. Mass. 2012)
19. *Stokes v. Saga Int'l Holidays, Ltd.*, 376 F. Supp. 2d 86 (D. Mass. 2005)
20. *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015)

EXHIBIT D

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT D

Massachusetts Bankruptcy Cases Containing Corporate Firm Billing Rates

1. *In re Houghton Mifflin Harcourt Publishing Company*, 12-BK-15610 (Bankr. D. Mass. 2012), ECF. No. 168
2. *In re Lexington Jewelers Exch., Inc.*, No. 08-10042-WCH, 2013 WL 2338243 (Bankr. D. Mass. May 29, 2013), ECF No. 439-1
3. *In re McCabe Grp.*, 424 B.R. 1 (Bankr. D. Mass.), *aff'd in part, rev'd in part sub nom. McCabe v. Braunstein*, 439 B.R. 1 (D. Mass. 2010), ECF No. 404-8
4. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 485
5. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 487-6
6. *In re The Educ. Res. Inst., Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010), ECF No. 1196-1

EXHIBIT E

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT E
Class Actions Settlements with Funds of $100-$500 Million

1. *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016)
2. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), ECF No. 310
3. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013), ECF No. 634-23
4. *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
5. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009)
6. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)
7. *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015)
8. *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833 (D. Mass. Aug. 17, 2005)
9. *In re Nortel Networks Corp.*, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), ECF No. 194
10. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Schering" settlement]
11. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Merck" settlement]
12. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
13. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155 (D. Mass. 2015)
15. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016)
16. *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226 (E.D. Mich. 2016)
17. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009), ECF No. 769
18. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161 (N.D. Cal. June 5, 2017)
19. *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 23 (S.D.N.Y. 2016)
20. *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

EXHIBIT F

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT F
Reported Class Action Fee Decisions
Containing Billing Rates for Contract or Staff Attorneys

1. *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), ECF No. 218-8
2. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015), ECF No. 61-4
3. *In re Am. Apparel, Inc. S'holder Litig.*., No. CV1006352MMMJCGX, 2014 WL 10212865 (C.D. Cal. July 28, 2014), ECF No. 188-3
4. *In re Animation Workers Antitrust Litig.*, No. 14-CV-4062-LHK, 2016 WL 6663005 (N.D. Cal. Nov. 11, 2016), ECF Nos. 331-2, 331-3, 331-4
5. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), ECF No. 1083-20
6. *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016), ECF No. 1963-1
7. *Long v. HSBC USA INC.*, No. 14 CIV. 6233 (HBP), 2016 WL 4764939 (S.D.N.Y. Sept. 13, 2016)
8. *McGreevy v. Life Alert Emergency Response, Inc.*, No. 14 CIV. 7457 (LGS), 2017 WL 1534452 (S.D.N.Y. Apr. 28, 2017)
9. *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008 (S.D.N.Y. Sept. 30, 2015), ECF No. 52
10. *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289 (M.D.N.C. May 9, 2016), ECF No. 145-1
11. *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
12. *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086 YGR, 2014 WL 3945655 (N.D. Cal. Aug. 11, 2014)

EXHIBIT G

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT G
List of Exemplary Cases With Multipliers Over 3.5

1. In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000) (19.6 multiplier)

2. Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., NO. CIV.A. 03-457, 2005 WL 1213926, at *17-18 (E.D. Pa. May 19, 2005) (15.6 multiplier)

3. Kuhnlein v. Department of Revenue, 662 So.2d 309, 315 (Fla. 1995) (15 multiplier reduced to 5)

4. In re Doral Fin. Corp. Sec. Litig., No. 05-md-1706 (S. D. N.Y. July 17, 2007) (10.26 multiplier)

5. Weiss v. Mercedes-Benz, 899 F. Supp. 1297 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier)

6. Doty v. Costco Wholesale Corp., No. 05-3241 (C. D. Cal. May 14, 2007) (9 multiplier)

7. Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998) (8.9 multiplier)

8. Cosgrove v. Sullivan, 759 F. Supp. 1667, 167 n.1 (S. D. N.Y. 1991) (8.74 multiplier)

9. New England Carpenters Health Benefits Fund v. First Databank, Inc., Civil Action No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3 multiplier)

10. Newman v. Caribiner Int'l, Inc., No. 99 Civ. 2271 (S.D. N.Y. Oct. 19, 2001) (7.7 multiplier)

11. Hainey v. Parrott, No. 02-733 (S. D. Ohio Nov. 6, 2007) (7.47 effective multiplier)

12. In re Rite Aid Corp. Sec. Litigation, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier)

13. Steiner v. Amer. Broadcasting Co., Inc., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier)

14. In re UnitedHealth Group, Inc. PSLRA Litig., No. 06-1691 (D. Minn. Aug. 10, 2009) (6.49 multiplier)

15. The Music Force, LLC v. Viacom, Inc., No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier)

16. In re Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890 (1st Cir. 1985) (6 multiplier)

17. In re Cardinal Health Inc. Securities Litigations, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier)

18. In re Krispy Kreme Doughnuts, Inc. Sec. Litig., No. 04-416 (M.D. N.C. Feb. 15, 2007) (6 multiplier)

19. In re RJR Nabisco, Inc. Securities Litigation, No. 88 Civ. 7905(MBM), 1992 WL 210138, at *5-6 (S.D. N.Y. Aug. 14, 1992) (6 multiplier)

20. Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141 (D. S.C. Aug. 15, 2006) (6 multiplier)

21. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S. D. Ohio Dec. 31, 2007) (5.85 multiplier)

22. Dutton v. D&K Healthcare Res., Inc., No. 04-147 (E. D. Mo. June 5, 2007) (5.6 multiplier)

23. In re Charter Communications, Inc., Securities Litigation, No. MDL 1506, 2005 WL 4045741, at * 22 (E.D. Mo. June 30, 2005) (5.6 multiplier)

24. Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D. N.Y. 1997) (5.5 multiplier)

25. Warner v. Experian Info. Solutions, Inc., No. BC362599 (Cal. Super. Ct. Los Angeles Co. Feb. 26, 2009) (5.48 multiplier)

26. Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier)

27. Di Giacomo v. Plains All American Pipeline, No. Civ.A.H-99-4137, 2001 WL 34633373, * at 11-12 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier)

28. Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1123-25 (C.D. Cal. 2008) (5.2 multiplier)

29. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (5.2 multiplier)

30. In re Beverly Hills Fire Litig., 639 F. Supp. 915, 924 (E. D. Ky. 1986) (5 multiplier to attorney who performed the bulk of work on the case)

31. In re Fernald Litigation, No. C-1-85-149, 1989 WL 267038, at *4-5 (S.D. Ohio Sept. 29, 1989) (5 multiplier)

32. In re Cendant Corp. Securities Litigation, 404 F.3d 173, 183 (3d Cir. 2005) (multiplier in "mid-single digits")

33. In re United Rentals, Inc. Sec. Litig., No. 04-1615 (D. Conn. May 26, 2009) (4.79 multiplier)

34. Castillo v. General Motors Corp., No. 07-2142 (E. D. Cal. April 19, 2009) (4.77 multiplier)

35. Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 (E. D. Pa. Aug. 14, 2006) (4.77 multiplier)

36. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (4.7 multiplier)

37. Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier)

38. Teeter v. NCR Corp., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier)

39. Holleran v. Rita Medical Sys., Inc., No. RG06302394 (Cal. Super. Ct. Alameda Co. Aug. 1, 2007) (4.57 multiplier)

40. Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1991 WL 275757 (S.D. N.Y. Dec. 19, 1991) (4.4 multiplier)

41. Agofonova v. Nobu Corp., No. 07-6926 (S. D. N.Y. Feb. 6, 2009) (4.34 multiplier)

42. Buccellato v. AT & T Operations, Inc., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (4.3 multiplier)

43. In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier)

44. Shannon v. Hidalgo County Board of Comm'r, No. 08-369 (D. N.M. June 4, 2009) (4.2 multiplier)

45. Simmons v. Andarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct. Caddo Co. Dec. 23, 2008) (4.17 multiplier)

46. In re OSI Pharm., Inc. Sec. Litig., No. 04-5505 (E.D. N.Y. Aug. 22, 2008) (4.11 multiplier)

47. Blackmoss Inv., Inc. v. Gravity Co., No. 05-4804 (S. D. N.Y. Nov. 20, 2007) (4.0 multiplier)

48. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2003) (4.0 multiplier)

49. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (3.97 multiplier)

50. Karpus v. Borelli (In re Interpublic Secs. Litig.), No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D. N.Y. Oct. 26, 2004 (3.96 multiplier)

51. Vizcaino v. Microsoft Corp., 290 F.3d 1045, 1050-51 (9th Cir. 2002) (3.65 multiplier)

52. Donkerbrook v. Title Guar. Escrow Servs., Inc., No. 10-00616 LEK-RLP, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011) (3.6 multiplier)

53. Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869 (E.D. La. 2007) (3.5 multiplier)

54. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (3.5 multiplier)

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

THORNTON LAW FIRM, LLP'S RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) SEPTEMBER 7, 2017 REQUEST FOR ADDITIONAL SUBMISSION

In a letter dated September 7, 2017, Special Master Gerald E. Rosen (Ret)., through counsel, invited Labaton Sucharow ("Labaton"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and Thornton Law Firm, LLP ("Thornton") (collectively, the "Consumer Class Firms") to submit an additional supplemental submission addressing the payment to Attorney Damon Chargois, as well as any other topics raised in the Special Master's July 5, 2017 letter.

Preliminary Statement

On August 7, 2017, the Special Master sent supplemental interrogatories and supplemental requests for production of documents to the Consumer Class Firms. These discovery requests concerned the payment of a portion of the Consumer Class Firms' fee in this case to Attorney Damon Chargois, as well the Consumer Class Firms' relationship with Mr. Chargois generally. Thornton responded to the supplemental discovery requests in full and produced two witnesses for depositions in September 2017.

Thornton respectfully submits this response to the Special Master's September 7, 2017 letter to address certain facts that Thornton believes are relevant and helpful to the Special Master's assessment of issues raised in this matter. In addition to responding to the Special Master's request concerning Mr. Chargois, Thornton addresses below a topic revisited during this supplemental discovery phase, namely, Thornton's listing of the Staff Attorneys assigned to it in its individual fee declaration.

Damon Chargois

As concerns the primary topic of the Special Master's September 7, 2017 letter – the payment to Mr. Chargois in the State Street matter – Thornton respectfully submits that the

factual record developed by the Special Master demonstrates that Thornton believed that Mr. Chargois facilitated Labaton's introduction to the Arkansas Teacher Retirement System ("ARTRS") and that Mr. Chargois was acting as a liaison to ARTRS, including in the State Street litigation. Thornton further understood that Labaton had a financial obligation to Mr. Chargois in matters involving ARTRS. The factual record demonstrates that Thornton, along with Lieff Cabraser, agreed to share in Labaton's financial obligation to Mr. Chargois in the State Street case, and that Thornton partner Garrett Bradley helped negotiate down the percentage of the Consumer Class Firms' fee that would be paid to Mr. Chargois.

With respect to questions concerning ARTRS's awareness of Mr. Chargois's involvement, and what work Mr. Chargois performed or did not perform on the State Street litigation, the factual record developed in this investigation demonstrates that Thornton lacked full knowledge regarding these issues. Thornton therefore defers to Labaton on those questions.

Staff Attorney Sharing and Thornton's Fee Declaration

During this investigation, the Special Master has questioned the arrangement among the Consumer Class Firms to share the cost and risk associated with Staff Attorneys who performed document review work on the case. As set out in documents and deposition testimony, and as set forth in the Consumer Class Firms' submission to the Special Master dated August 1, 2017, Thornton, Labaton, and Lieff Cabraser entered into a cost- and risk-sharing agreement as part of which Thornton paid for the services of certain Staff Attorneys who performed document review work. Because Labaton and Lieff Cabraser already had Staff Attorneys with available time, as well as experience with employing Staff Attorneys on large document review matters, the firms deemed it most efficient to share the cost and risk of Staff Attorneys housed at (or working remotely for) those two firms. Accordingly, certain of the Staff Attorneys working at Labaton

and Lieff Cabraser were assigned to Thornton. In turn, Thornton paid their hourly rate of compensation, plus, as to Staff Attorneys assigned by Labaton, an additional amount for overhead expenses.[1] *See* TLF-SST-000400, TLF-SST-000395; TLF-SST-000154; *see also* Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission ("Consolidated Response") at 8-9. All three of the Consumer Class Firms attested to this arrangement in the Consolidated Response. *See* Consolidated Response at 19-20 (citing deposition testimony of Eric Belfi of Labaton ("Belfi Dep.") (June 14, 2017) at 50:19 – 51:16; Garrett Bradley of Thornton ("G. Bradley Dep.") (June 19, 2017) at 43:4-13; and Dan Chiplock of Lieff Cabraser ("Chiplock Dep.") (June 16, 2017) at 127:11 – 128:16).

In the latest round of depositions, the Special Master has revisited the issue of whether the Consumer Class Firms had an agreement that Thornton would list the hours associated with the Staff Attorneys assigned to it on its individual fee declaration. The Special Master specifically has questioned whether Thornton was "authorized" to list Staff Attorneys in its fee declaration. M. Thornton Dep. (Sept. 1, 2017) at 50:1-7 & 53:15-20; Chiplock Dep. (Sept. 8, 2017) at 48:2-7; deposition testimony of David Goldsmith ("Goldsmith Dep.") (Sept. 20, 2017) at 217:11-17. As the Consumer Class Firms have explained, there was no formal written

[1] As previously stated in the Consolidated Response, in the case of Staff Attorneys housed by Labaton, Labaton invoiced Thornton using a rate that consisted of both cost and overhead. *Compare* TLF-SST-000415 (Ray Politano of Labaton stating the $50 hourly rate Labaton was charging to Thornton) *and* TLF-SST-000403 to TLF-SST-000414 (Labaton invoices paid by Thornton showing $50 per hour rate) *with* deposition testimony of Ray Politano ("Politano Dep.") (June 14, 2017) at 18:3-9 (Politano stating that Staff Attorneys were paid between $32 and $40 per hour). *See also* G. Bradley Dep. (June 19, 2017) at 93:23 – 95:5, deposition testimony of Michael Thornton ("Thornton Dep.") (Sept. 1, 2017) at 52:9-17.

In the case of Staff Attorneys housed (or working remotely) at Lieff Cabraser, there was a brief period of review (approximately nine weeks) for which Thornton paid Lieff Cabraser for two Staff Attorneys' work. For the remainder of the project, Thornton paid two third-party staffing agencies directly. Chiplock Dep. (June 6, 2017) at 156:7-15; deposition testimony of Evan Hoffman ("Hoffman Dep.") (June 5, 2017) at 61:17 – 62:10.

agreement setting out the terms of the sharing arrangement. However, contemporaneous e-mail correspondence and/or deposition testimony taken in this matter establish that Thornton listed the hours of the Staff Attorneys assigned to it on its lodestar because it reasonably believed, as did others at Labaton and Lieff Cabraser, that doing so was part of the agreement. After all, Thornton also bore the risk with respect to these hours; if the case did not result in a settlement for the plaintiffs, or if the Court, for whatever reason, disallowed those hours, Thornton – not Labaton or Lieff Cabraser – would have been out the funds it paid for these attorneys' work. Indeed, as the record demonstrates, risk sharing was a key consideration for Labaton in entering into the document review work arrangement. *See* Belfi Dep. (June 14, 2017) at 51:8-16 ("…I was concerned about the status of where the case was, and the risk to our firm, so I wanted to make sure that this review was shared equally among the three firms and that we weren't going to just bear all the heavy lifting. So there was a process that was started to try to figure out a way for us to have these documents reviewed between our firm, the Lieff firm and the Thornton firm.").

The sharing of the costs and risk associated with the document review was consistent with the Consumer Class Firms' effort to share equally in the cost and risk of the litigation overall. In addition to splitting the Staff Attorneys' work, and dividing the substantive work among lawyers in the three firms, the three firms also each paid into a litigation fund and shared other costs associated with the litigation, including the costs associated with experts and with mediation. *See, e.g.*, Lesser Dep. (June 19, 2017) at 54:9-20. As Dan Chiplock of Lieff Cabraser testified, this was the firms' intent from the beginning: "From the get-go, the understanding always was that the firms would try to share equally in the risk, the three firms would try to share equally in the risk of the case. And by sharing in the risk, that means trying to

equally bear the costs, and equally investing time and resources in the success of the litigation." Chiplock Dep. (June 16, 2017) at 127:22 – 128:5; *see id.* at 129:6-13 (stating that the desire to bear cost and risk equally was "the overarching understanding that animated the case throughout"); *see also* Consolidated Response at 19 (noting that law firms in multi-firm class action cases make various arrangements, including but not limited to document review sharing, in the name of splitting the work, costs, and risk of the case equitably).

As previously discussed, none of the firms recall explicitly discussing how the hours of Thornton-assigned Staff Attorneys would be accounted for on eventual fee declarations. *See* Consolidated Response at 19. But even in the absence of an explicit agreement, there is ample evidence demonstrating that Thornton contemporaneously understood that it would include the Staff Attorneys in its fee declaration, as well as testimony confirming that both Labaton and Lieff Cabraser assumed that Thornton would list the Staff Attorneys. *See, e.g.*, deposition testimony of Michael Rogers ("Rogers Dep.") (June 16, 2017) at 91:18 – 92:16 and Chiplock Dep. (June 16, 2017) at, e.g., 143:13-23 and 145:13-25. Thornton's belief was a good-faith assumption that was reasonable from a cost- and risk-sharing perspective.

(A) Contemporaneous E-mails

The following e-mails previously produced to the Special Master, listed in chronological order, demonstrate Thornton's understanding. These e-mails make clear (i) that Thornton communicated to Labaton, both before and after the document review work was completed, that it was seeking detailed information regarding Staff Attorneys for purposes of tabulating its (Thornton's) lodestar; (ii) that Labaton assured Thornton that, with respect to the adjustments to overlapping Staff Attorney time set out in the November 10, 2016 letter to the Court, "the intent is not to suggest that Thornton time is less legitimate"; and (iii) that Thornton, in providing a

lodestar estimate to Lieff Cabraser, identified two types of reviewers – "internal" and "external (Thornton reviewers working Lieff + Labaton paid by Thornton)" – in its lodestar calculation.

- On **March 6, 2015** – three months before the Staff Attorneys completed their work in July 2015 – Evan Hoffman of Thornton e-mailed Mike Rogers, a partner at Labaton, and asked: "Mike, can you put me in touch with someone over there who can get me a total number of hours and number of documents reviewed to date by the Labaton reviewers hired by Thornton?" Mike Rogers responded the same day, including in his e-mail a list of "reviewers [] assigned to Thornton's payroll" and attaching "[t]heir total hours to date." The report attached by Mr. Rogers was titled "Timekeeper Worked Detail Report" and listed the hours worked by each Thornton-assigned Staff Attorney to date, by name. **TLF-SST-001943 to TLF-SST-001946.** Mr. Hoffman testified that when he received this information concerning reviewers who were assigned to Thornton but working at Labaton, he kept it in mind so that he could seek the information from Labaton "when it ultimately came time to prepare the hours." Hoffman Dep. (June 5, 2017) at 62:21 – 63:7.

- On **June 29, 2015**, Michael Lesser of Thornton sent an e-mail to Dan Chiplock of Lieff Cabraser in which he provided Mr. Chiplock with an estimate of Thornton's lodestar in the case, "to give [Mr. Chiplock] the flavor" of Thornton's lodestar number. **TLF-SST-011206.** For context, at this time, the parties were reaching an agreement in principle to settle the case, which was finalized on June 30, 2015. *See* Doc. 89, *Stipulation and Agreement of Settlement*, at p. 6, ¶ R ("On June 30, 2015, after additional extensive arm's-length negotiations, on multiple occasions, in person and by exchange of proposals, Plaintiffs and SSBT reached an agreement in principle to settle the Class Actions, which was memorialized in a Term Sheet dated September 11, 2015"). Thus, although it took more than a year for the parties to finalize the settlement and appear before the Court, the agreement in principle – and thus the conclusion of substantive work on the matter, including the document review – was reached long before that. *See* Belfi Dep. (June 14, 2017) at 61:5-10 ("[T]he case settled in the summer of 2015, and, you know, the final -- the papers were submitted, I believe, in September of 2016, so there's a 13-month period that we went through a lot of issues with State Street dealing with regulatory agencies.")

- In his **June 29, 2015** e-mail estimating Thornton's lodestar, Mr. Lesser broke the document review hours contributing to Thornton's lodestar into two categories: "Thornton doc review external (Thornton reviewers working Lieff + Labaton paid by Thornton)" and "Thornton doc review internal." With the caveat that Thornton was still reviewing its time records, Mr. Lesser commented to Mr. Chiplock that "this is mostly it for us [Thornton]." Mr. Lesser's e-mail clearly informed Mr. Chiplock that Thornton was including the Thornton-assigned reviewers working at Lieff and at Labaton in its lodestar calculation. **TLF-SST-011206**.

- On **August 24, 2015** – approximately two months after the Staff Attorneys had completed their work – Evan Hoffman of Thornton again e-mailed Mike Rogers of Labaton, this time copying Todd Kussin of Labaton, regarding Staff Attorney hours. Referencing the March 2015 e-mails they exchanged and seeking "a more detailed (i.e. daily) breakdown of those reviewers' hours from when they first started being on Thornton's payroll until we let everyone go early this summer," Mr. Hoffman informed Mr. Rogers and Mr. Kussin that he was seeking this information because he was "trying to compile in to one nice detailed document all of the document review hours for us [Thornton] in STT." **TLF-SST-031155 to TLF-SST-031157.** Mr. Kussin and Mr. Rogers responded to Mr. Hoffman's request, seeking clarification about what Mr. Hoffman needed. Mr. Hoffman responded that he needed "[W]hatever you have so I can gather all the hours info on a daily basis of Thornton-payroll reviewers, from when we hired them until they were terminated." **TLF-SST-031155**. Mr. Kussin responded to Mr. Hoffman and noted that Labaton's accountants would be pulling the information, and that he would be able to provide it to him the following day. *Id.* Later in the evening on August 24, 2015, Mr. Kussin replied to Mr. Hoffman's e-mail with a list of Thornton-assigned reviewers, "according to our accounting." **TLF-SST-001947 to TLF-SST-001949**.

- The following day, **August 25, 2015,** Todd Kussin followed up on the prior day's e-mails by sending Evan Hoffman "a spreadsheet containing a breakdown of the hours worked daily by each of the Labaton reviewers on Thornton's payroll." The attached spreadsheet detailed the time worked by each of the Thornton-assigned reviewers by name and date.[2] **TLF-SST-031158 to TLF-SST-031159**. This spreadsheet was the basis of Thornton's lodestar chart in its fee declaration ultimately filed in September

[2] Of note, the title of the report states that it covers "STA" (Staff Attorney) hours "from 01/01/2015 thru 02/28/2015," but this title was in error, as the content of the report goes through 07/02/15.

2016. Because the Staff Attorneys had completed their work on the project nearly two months before this spreadsheet was provided to Thornton, and because the spreadsheet captured the Staff Attorneys' time through the end of the project, Thornton reasonably assumed that these were static numbers on which it could rely.

- Other e-mails from this time period show that all three firms were making efforts to gather their lodestar reports during this time, which places important context around these e-mails between Thornton, Labaton, and Lieff Cabraser.

  For example, in an e-mail chain dated **August 28-30, 2015** initiated by Mike Rogers of Labaton to Michael Lesser of Thornton and Dan Chiplock of Lieff Cabraser (with others added along the chain), the firms agreed to "gather time and daily backup" "in anticipation of making a formal fee request." They also discussed the need to "pick consistent rates" for document reviewers, and whether to "cap" rates. **TLF-SST-011289 to TLF-SST-011292**.

  As the thread continued into mid-September 2015, Mr. Chiplock, Mr. Rogers, and Mr. Lesser all noted that they had gathered or nearly gathered their firms' respective lodestar and expenses, and would soon exchange them. Thus, as the e-mails show, Mr. Hoffman – whom Mr. Lesser informed Labaton and Lieff was "the captain" of Thornton's lodestar assembly project – was requesting detailed information concerning Staff Attorney hours from Labaton in the very days leading up to discussions among the three firms about exchanging their lodestar numbers. *Compare* **TLF-SST-001947, TLF-SST-031155**, and **TLF-SST-011289**.

  As concerns Lieff Cabraser, Thornton has not identified any e-mail correspondence with that firm requesting detailed Staff Attorney hours reports. This is explained by the fact that Thornton already had this information. As it was paying two third-party staffing agencies directly for the Staff Attorneys housed at Lieff Cabraser, Thornton approved their timesheets. Hoffman Dep. (June 5, 2017) at 69:15-25. Thornton received contemporaneous records for those Staff Attorneys from the staffing agencies, which Evan Hoffman referenced in aggregating the number of hours attributable to work by Thornton-assigned reviewers at Lieff Cabraser -- just as he

used the reports Labaton supplied to him to calculate the number of hours attributed to work by Thornton-assigned reviewers at Labaton.[3]

- Additionally, the firms' communications regarding the November 10, 2016 letter to the Court support Thornton's understanding that it properly accounted for Thornton-assigned Staff Attorneys in its fee declaration. In an e-mail chain dated **November 9, 2016**, Dan Chiplock of Lieff Cabraser wrote to Labaton partner David Goldsmith, copying Michael Lesser and Evan Hoffman of Thornton, that time for two Staff Attorneys "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015" who worked on Lieff Cabraser's premises. Mr. Chiplock went on to note that Lieff Cabraser had inadvertently included their time because of a lack of description in the time entries on Lieff Cabraser's end. With regard to two other Thornton-assigned reviewers at Lieff Cabraser, Mr. Chiplock explained that they did work for both Thornton and for Lieff Cabraser at different times, and that Lieff Cabraser had "neglected to exclude" the time entries that related to Thornton-assigned work. **TLF-SST-012138 to TLF-SST-012140**. Thus, Mr. Chiplock clearly understood and thought it proper for Thornton to have listed Thornton-assigned reviewers in its fee declaration. Mr. Chiplock confirmed this in both of his depositions, and Lieff Cabraser's interrogatory responses also confirm this belief. *See* Chiplock Dep. (June 16, 2017) at 135:20 – 137:11; 145:12 – 146:7 & 228:19 – 229:16; Chiplock Dep. (Sept. 8, 2017) at 49:3-12; LCHB Interrog. Resp. 23, 32 ("With respect to Staff Attorneys, [LCHB's] understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment"), 34 ("[I]t was [LCHB's] understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne financial responsibility"), & 65.

  Evan Hoffman recalls hearing this sentiment from Lieff Cabraser, as well as a similar explanation concerning inadvertent mistakes from Labaton. Hoffman Dep. (June 5, 2017) at 102:4-21. Indeed, in the process of putting together the November 10 letter,

[3] For the initial period for which Thornton was paying Lieff Cabraser for two Staff Attorneys' work – before the direct payments to the staffing agencies were put into place – Thornton received invoices from Lieff that stated the hours worked by those two Staff Attorneys. *See* TLF-SST-000400, TLF-SST-000395; *see also* TLF-SST-000154. (*See also* Thornton's Interrogatory Response 75, in which Thornton noted the discovery of an eight-hour transcription error relevant to one of these two attorneys' hours in the lodestar.)

> David Goldsmith of Labaton assured Thornton in an e-mail that the removal of any overlapping Staff Attorney hours from Thornton's lodestar was the result of a conservative, lowest-rate approach only, and that "the intent is not to suggest that Thornton time is less legitimate[.]" **TLF-SST-012191.**

(B) Deposition Testimony

In addition to the e-mails described above, deposition testimony and discovery responses from numerous attorneys among the three firms confirm that Thornton reasonably assumed, based on the financial responsibility it had and the risk it was assuming, that it should list the Staff Attorneys assigned to it in its fee declaration.

1. Labaton Sucharow

Labaton partner Michael Rogers testified that although he does not recall there being an explicit discussion concerning how Staff Attorneys would be listed on the firms' fee declarations – a point with which Thornton concurs – he assumed that Thornton would list the Staff Attorneys for whose services it was paying on its own fee declaration. *See* Rogers Dep. (June 16, 2017) at 91:18 – 92:16 ("Q: And did you have an understanding during this time period about what the implications were of that cost sharing? In other words, whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up-front, I assume they wanted to get paid on the back end"); Labaton Interrogatory Resp. 33 ("Michael Rogers does not recall a specific discussion, at the time it was agreed that the cost of some Staff Attorneys would be paid by Thornton, regarding how their hours would be reported. He assumed, however, that Thornton would take credit for the hours spent by the Staff Attorneys for which it paid on its own lodestar").

Eric Belfi, the Labaton partner who had the original discussions about a cost- and risk-sharing agreement with Thornton partner Garrett Bradley, testified that he was not involved in

the mechanics of the cost splitting; rather, Mr. Rogers handled that aspect of the arrangement. Belfi Dep., June 14, 2017, at 63:17 – 64:22. However, in Labaton's responses to the Special Master's interrogatories, Mr. Belfi confirmed that, had he been asked at the time, he "likely would have assumed that Thornton would report the time spent by Staff Attorneys for whom it was paying on a Thornton lodestar" – just as Mr. Rogers assumed. *See* Labaton Interrog. Resp. 33.

Only one Labaton deponent, partner David Goldsmith, has challenged the notion that Thornton was "authorized" (implicitly or explicitly) to list the Staff Attorneys in its lodestar. Mr. Goldsmith testified that he believes "the Thornton firm assumed that that is what they were supposed to do because they were paying or reimbursing the costs of those attorneys," but that he "personally" does not think there is evidence that Thornton was "authorized" to list the Staff Attorneys for whom it was paying. Goldsmith Dep. (Sept. 20, 2017) at 225:24 – 226:12. Thornton respectfully submits that when Mr. Goldsmith's opinion is weighed against that of his colleagues Mr. Belfi and Mr. Rogers (one of whom struck the cost-sharing agreement, and the other of whom corresponded contemporaneously with the Thornton firm about Staff Attorney time – including to send Thornton a detailed time report in response to a request from Evan Hoffman), the Special Master must also acknowledge Mr. Goldsmith's testimony that he thought Thornton believed it should do so <u>because it (Thornton) was paying the costs of those attorneys</u> – *i.e.*, for a good-faith, fact-based reason. Moreover, Thornton notes that when Mr. Goldsmith was drafting the November 10, 2016 letter to the Court disclosing the inadvertent billing errors, he did not suggest to Thornton, or tell the Court, that Thornton's inclusion of the Staff Attorneys assigned to it was unauthorized. To the contrary, the letter to the Court attributed the overlap in hours to the firms' efforts to share financial responsibility generally, and specifically attributed

the overlap involving Labaton-housed Staff Attorneys to Labaton's "mistakenly" reporting the hours of certain Staff Attorneys in its own lodestar report. Dkt. 116-2. Furthermore, during the drafting process, Mr. Goldsmith explained to Mr. Lesser that Labaton was taking a lowest-rate approach to reducing the overlapping time as a conservative measure, and assured Mr. Lesser that "the intent is not to suggest that Thornton time is less legitimate[.]" TLF-SST-012191.

Thornton's listing of the Staff Attorneys assigned to it was reasonable based on the risk and financial responsibility borne by Thornton for those attorneys' work. Moreover, contemporaneous documents demonstrate that Thornton requested information concerning the time spent by the Staff Attorneys assigned to it both before and after the completion of the document review work in July 2015. The fact that the partner tasked with preparing the fee declaration at Labaton, who was not otherwise involved in the case, was unaware of the sharing arrangement between the firms should not be construed against Thornton. Thornton believed in good faith that because it bore the cost for certain Staff Attorneys' work (as well as the attendant risk of non-payment for that work), it was proper for Thornton to include that work in its lodestar. To the extent Labaton compartmentalized different case functions within the firm, as has been discussed during depositions in this matter, that should not reflect negatively on Thornton, which made a reasonable assumption, and communicated with Labaton consistent with that assumption.

2. Lieff, Cabraser, Heimann & Bernstein

For its part, Lieff Cabraser has confirmed its understanding that Thornton would claim the Staff Attorneys assigned to it. Lieff Cabraser partner Dan Chiplock testified that, in light of the risk Thornton was assuming, it was "obvious" that Thornton would include the Staff Attorneys for whom it was bearing financial responsibility in its own lodestar, even if the firms

did not reduce that understanding to writing. *See* Chiplock Dep. (June 16, 2017) at 135:20 – 137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."). Mr. Chiplock testified that he had a general understanding with Thornton partner Garrett Bradley that it would be done this way, and that it seemed to him "common sense that if a firm is paying for labor, they can get credit for that labor in their fee petition." *Id.* at 228:18 – 229:16 & 136:10-22 ("I would say it was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done, then, just as with any other employee when you're paying them, that you include their hours in your lodestar when you report it at the end of the day. I don't think that needed to be spelled out for me or for Garrett; it was just obvious.") Lieff Cabraser's responses to the Special Master's interrogatories confirm this. *See* LCHB Interrogatory Resp. 34, 39, 40.

Lieff Cabraser understood that Thornton's motivation for sharing the cost and risk associated with the document review work was so that its contribution to that piece of the case would be equal, or close to equal, to what Labaton and Lieff Cabraser were contributing. Dan Chiplock testified that he understood this and had no issue with it. *See* Chiplock Dep. (June 16, 2017) at 131:15 – 132:13 ("Because we knew we had to staff up the review to get it done, Thornton wished to contribute to that effort on equal terms, or on as equal terms as it could with the other firms, understanding that it did not have the facilities to host a dozen -- or however many -- attorneys who were strictly doing document review. And so they asked -- and I think it was a telephone conversation I had with Garrett Bradley, who asked me whether we at Lieff Cabraser would be willing to house some staff attorney document reviewers that Thornton would

pay for, so that Thornton could be making its equal contribution to bearing the risk in the litigation. And I agreed to that. I had no problem with that." Q "And were you aware as to whether there was a parallel agreement with Labaton? A: "I was aware at that time that the same ask or arrangement was being requested of Labaton."); 143:13-23 ("The reason why Thornton included these people in their lodestar was simply to recognize, I think, that apart from that distinction, their physical location, Thornton was not making any less of a contribution to this document review effort than the other two firms were. That was my belief. And that's what we were trying to implement by keeping the numbers equitable as much as we could."); & 145:13-25 ("I viewed Thornton as a co-equal partner in the venture in getting the job done and in bearing the risk of the case. And as part of that I viewed it as fair that they would contribute the overall -- they would contribute to the overall burden of making sure that document review was staffed and completed appropriately. And they did that. And I had no issue with them seeking to be treated on an equitable basis for purposes of their fee petitions from us."); *see generally* Chiplock Dep. (Sept. 8, 2017) at 48:2 – 63:6 (noting Lieff Cabraser's understanding that Thornton would list the Staff Attorneys assigned to it on its own fee petition).

3. Thornton Law Firm

Mike Thornton, Garrett Bradley, and Evan Hoffman of Thornton all testified that they believed or assumed that Thornton should list the Staff Attorneys assigned to it, for whose services it was paying, on its individual lodestar. M. Thornton Dep. (June 19, 2017) at 81:3-5 ("I mean, it was my understanding that if you paid for it, if you paid for the staff attorney, you'd get the hours"); G. Bradley Dep. (June 19, 2017) at 76:6 – 77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily

breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application"); Hoffman Dep. (June 5, 2017) at 58:12-16 ("My understanding was that for attorneys who Thornton was financially responsible for, they would be included on whatever the ultimate fee petition [was] that Thornton would submit").

During the investigation, the Special Master has questioned why the three law firms entered into a cost- and risk-sharing arrangement that involved the assignment of individual Staff Attorneys to Thornton – in other words, why Thornton did not simply pay a general amount, possibly into the litigation fund, instead of being assigned particular attorneys. *See* Lesser Dep. (June 19, 2017) at 54:9-10; Heimann Dep. (June 17, 2017) at 79:7-15; Goldsmith Dep. (July 17, 2017) at 92:21-24. As Thornton has explained in depositions, and as has been confirmed in other counsel's testimony (see section B.2 above), Thornton wanted to share equally because it wanted its cost and risk, and accordingly its *individual* lodestar, to place it on equal footing when it came to dividing the unallocated percentage of the Consumer Class Firms' portion of the fee (meaning, the fee remaining after the ERISA counsel's payment, and after the payment to Mr. Chargois).

While entering into an arrangement that spread cost and risk but did not involve the assignment of Staff Attorneys may have avoided the inadvertent double counting errors that were made, the amount of lodestar (without the double counting) would have been exactly the same had Thornton listed the Staff Attorneys, or had Lieff and Labaton listed them instead. In other words, the firms' *aggregate* lodestar submitted to the Court would have been the same.

Thornton believed in good faith that entering into this cost- and risk-sharing staffing agreement was a means of achieving parity among the firms that would translate into parity in the division of the unallocated portion of the fee. On the State Street matter, Thornton was thus aware of the need to share both cost and risk with co-counsel. As Garrett Bradley testified in this

matter, "If you're not sharing in the risk as you go along, you're not going to have a very strong or any argument" when it comes to division of the fee. G. Bradley Dep. (June 19, 2017) at 46:4-6. *See also* G. Bradley Dep. (June 19, 2017) at 50:22 – 51:8 ("Clearly, I had a concern about our load star…I wanted to make sure we were keeping pace with the other two firms who were bigger than us and doing more of these type of cases. But I most definitely had a concern that we were doing, taking our fair share of the risk so that we could get our fair share of the reward"); G. Bradley Dep. (June 19, 2017) at 67:2-13 (testifying that Thornton did not want to take the risk, do the work, and not have evidence of such work in the form of lodestar). Mike Lesser also recalled the firms' efforts to make things equal. Lesser Dep. (June 19, 2017) at 54:18-20 ("[T]he division of the staff attorneys was a logical progression of that kind of parity between the firms") *and* Lesser Dep. (June 19, 2017) at 54:9-20 ("[E]verything we'd done through the discovery process with Lieff and Labaton had been a joint effort and we had achieved some level of parity. And we had started with contributions to the litigation fund. Every time Catalyst needed more money or Jonathan Marks needed more money, which was a few times because of all the mediation sessions, we contributed equally. And the division of the staff attorneys was a logical progression of that kind of parity between the firms").

The other firms understood this concern as well. Dan Chiplock of Lieff Cabraser testified that the Consumer Class Firms' desire to bear cost and risk equally was "the overarching understanding that animated the case throughout," and that the firms were concerned about making equal contributions "so at the end of the day we wouldn't have one firm saying, "Well, we did everything," or, "We did all this stuff and you didn't take on any of the risk, therefore you don't get your fair share of the fee." Chiplock Dep. (June 16, 2017) at 129:6-13; *see also* Chiplock Dep. (Sept. 8, 2017) at 49:6-12 (reiterating that although there was no written

agreement, "[i]t seemed understood to me, and I believe the reason for Garrett's request, that they be allowed to contribute financially to the document review process would be for them to be able to say that they were contributing to the document -- to document review in the case and credit that in their lodestar"). Others from Lieff Cabraser shared this understanding. Partner Steve Fineman testified that, to his knowledge, the cost-sharing agreement with respect to the Staff Attorneys was part of "was an effort to balance out the lodestar[.]" Deposition testimony of Steve Fineman ("Fineman Dep.") (June 6, 2017) at 80:8-11. Labaton likewise viewed the cost-sharing agreement as a hedge against some of the risk inherent in a large contingent litigation. *See* Belfi Dep. (June 14, 2017) at 51:8-16 ("I was concerned about the status of where the case was, and the risk to or firm, so I wanted to make sure that this review was shared equally among the three firms[.]")

Staff Attorney Rates

A matter intertwined with the above issue, which the Special Master also has raised, is whether Thornton was "authorized" to include the Staff Attorneys in its lodestar at higher rates than what Thornton was paying Labaton, Lieff Cabraser, or the third-party staffing agencies for those attorneys' work. *See* M. Thornton Dep. (Sept. 1, 2017) at 55:18-2; G. Bradley Dep. (Sept. 14, 2017) at 166:14-17; *see also* Chiplock Dep. (Sept. 8, 2017) at 49:21 – 50:1. E-mails produced to the Special Master make clear that all three firms discussed billing Staff Attorneys at higher rates than what those Staff Attorneys were being paid (which all firms ultimately did). Dan Chiplock confirmed these discussions in his deposition testimony. *See* LCHB-0052627, TLF-SST-011289-011292, and Chiplock Dep. (Sept. 8, 2017) at 52:2-15 ("It was my expectation that the three firms would be billing their document reviewers at comparable rates. And perhaps the same rate as I'm suggesting here" [referring to August 30, 2016 e-mail chain cited above]).

As Steve Fineman, the managing partner of Lieff Cabraser, testified, the billing rates of lawyers who perform work for the firm are not determined by the hourly rate paid to those lawyers, but rather by the market rate for those services. *See* Fineman Dep. (June 6, 2017) at 48:3-17 ("[T]he amount we pay the lawyers is not relevant to our discussion about how much we're going to peg their hourly rate at. That's a function of what the market in our view pays for those people and how much we pay them is insignificant. It is like an associate…the hourly rate for an associate is set based on what we understand to be the market rate for legal services provided by that person, not based on how much we pay that person."). The billing of Staff Attorney work at market rates instead of cost is a commonly accepted practice in the legal industry that is supported by public policy. This is equally true of how firms bill work by partners, associates, and paralegals. *See* Declaration of Professor William Rubenstein submitted with the Consumer Class Firms' August 1, 2017 Consolidated Response ("Rubenstein Decl.") at 27-30. The analysis performed by Professor Rubenstein confirms that the rates used by the three firms in this litigation were reasonable. *See* Rubenstein Decl. at 2, 27-30.

How Thornton paid for the Staff Attorneys' work – whether by paying invoices from Labaton or Lieff Cabraser, or by paying a third-party staffing agency directly – does not change this conclusion. Both agency and non-agency attorneys performed document review and drafted topical issue memoranda, both groups were barred attorneys who were well qualified for their roles, and both groups were supervised in the same manner. *See* Consolidated Response at 4-5. Accordingly, the firm claiming the attorneys' hours was entitled to use a reasonable market rate, instead of the cost rate, for the two groups alike. *See* Chiplock Dep. (Sept. 8, 2017) at 53:13 – 54:9 ("Now I don't know if you're suggesting that Lieff Cabraser ought to get to bill them at 415 or whatever we bill, but Thornton only gets to bill them at 40. That doesn't seem fair to me

because we're taking turns paying the agency . . . the agency lawyers [] were doing the same work as everybody else"); *see also* Fineman Dep. (June 6, 2017) at 41:4-8. While all three firms have readily admitted their inadvertent errors in listing the same Staff Attorney time on more than one fee application, no firm has argued that it was an error for any firm to include the Staff Attorneys' hours at market rates instead of cost. The Staff Attorneys on this case provided legal services that, under other circumstances, could have been performed by associates at the various firms. The services they provided on this case were not akin to expenses, such as copying, that would be charged at cost. *See* Fineman Dep. (June 6, 2017) at 53:15-24 ("[I]f I send documents out for copying charges and a copying charge is an acceptable expense in the jurisdiction which we're submitting a fee application, we will include that expense. But I don't equate the work being done for us by the lawyers with somebody running a copying machine, it is not a legal service"). There is no legal basis for distinguishing Thornton's use of market rates for Staff Attorneys from Lieff Cabraser's or Labaton's use of market rates. All three firms paid for work performed by Staff Attorneys that was essential to the case, and all three firms charged reasonable market rates for that work, a commonly accepted and supportable industry practice. *See* Rubenstein Decl. at 2, 27-30.

The Consumer Class Firms' Use of Current Rates

To the extent there is any remaining question about Thornton's use of current billing rates for the individuals listed in its fee declaration, Thornton submits that using current rates for this six-year-plus litigation, instead of using historical rates, comported with law and with typical industry practice. *See* Rubenstein Decl. at 16, fn. 26. Thornton understood from lead counsel that current rates were to be used, as demonstrated in a September 8, 2016 e-mail chain between Nicole Zeiss and Evan Hoffman previously produced to the Special Master. In this e-mail

exchange, Mr. Hoffman asked Ms. Zeiss: "[A]re we using historical billing rates or current rates for calculating lodestar? The language in your fee sample seems to indicate we're using current rates. Just want to make sure, thanks[.]" Ms. Zeiss responded to Mr. Hoffman: "Current." TLF-SST-013739 – TLF-SST-013741.

Dated: November 3, 2017

Respectfully submitted,

/s/ Brian T. Kelly

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EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

THORNTON LAW FIRM LLP'S APRIL 12, 2018 RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) REQUEST FOR ADDITIONAL SUBMISSION

On February 23, 2018, Special Master Gerald E. Rosen, through counsel, provided the parties to this investigation with a report by the Special Master's expert, Professor Stephen Gillers, titled "Ethical Report for Special Master Gerald E. Rosen" (hereinafter, "Gillers Report" or "Report"). The Special Master then invited Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton Law Firm") (collectively, the "Law Firms") to submit additional supplemental submissions addressing issues raised in the Gillers Report and Professor Gillers' deposition testimony, and the declarations and deposition testimony of the rebuttal experts designated by the Law Firms. The Thornton Law Firm submits this response to the Special Master's request.

In making this submission, the Thornton Law Firm incorporates by reference its prior submissions to the Special Master, namely: (1) the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission, dated August 1, 2017, and (2) Thornton Law Firm LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) September 7, 2017 Request for Additional Submission, dated November 3, 2017.

Procedural Background

On November 30, 2017, the Law Firms were notified that the Special Master had retained an expert, Professor Stephen Gillers of the New York University School of Law, to address issues relating to the portion of the fee paid to attorney Damon Chargois.[1] With the Law Firms' agreement, the Special Master sought an extension of the December 15, 2017 deadline for his Report and Recommendation. In a letter to the Court seeking the extension, the Special Master

[1] Professor Gillers testified that he was first contacted by the Special Master in October 2017. 3/20/18 Gillers Dep. at 16:17-21.

informed the Court that he and his counsel had retained the expert to opine on "additional issues" raised by the discovery in the case, specifically in response to a "second, more narrowly focused expert" retained by the Law Firms.[2] The letter further provided that the Special Master's expert hoped to have his report completed by the end of January 2018. On December 14, 2017, the Court issued an order granting the request for an extension to March 15, 2018, and attaching the Special Master's letter to the Court. Dkt. 214.

The Law Firms received Professor Gillers' Report on the evening of Friday, February 23, 2018. In his 85-page report, Professor Gillers opined not only on legal issues concerning the fee paid to attorney Damon Chargois (*i.e.*, the "additional issues" mentioned in the Special Master's letter to the Court), but also addressed other issues that did not concern Mr. Chargois, namely, whether the use of inaccurate, boilerplate language in the fee declaration filed by Garrett Bradley constituted sanctionable conduct.[3] Notably, the Gillers Report did not mention the fact that Labaton and Lieff Cabraser used some of the exact same boilerplate language in their declarations.[4]

When the Report was issued to the Law Firms on February 23, 2018, it was immediately clear that depositions of Professor Gillers and other (to-be-designated) rebuttal experts could not be completed in any meaningful fashion before the March 15, 2018 deadline for the Special

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[2] The expert referenced is Camille Sarrouf, who was retained by Labaton, and whose declaration was included with Labaton's November 3, 2017 submission to the Special Master.

[3] "[E]xpert testimony proffered solely to establish the meaning of a law is presumptively improper." *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001). Here, where Professor Gillers opines on questions of law, or applies the law to a statement of facts—particularly where the statement of facts was not subject to scrutiny by the adversarial process—his expert testimony is improper. *See Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code.").

[4] For example, while all three Law Firms generally work on a contingency basis, *see* 3/17/17 Hearing at 79:9-80:3; 88:8-13; 93:11-21, all three Law Firms asserted in their Declarations that the rates listed "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions" and are "based on my firm's current billing rates." *Compare* Declaration of Lawrence Sucharow (Dkt. 104-15) and Declaration of Dan Chiplock (Dkt. 104-17) *with* Declaration of Garrett Bradley (Dkt. 104-16).

Master's Report and Recommendation. Accordingly, the Special Master sought another extension for his Report and Recommendation—this time to April 23, 2018—in a letter to the Court dated February 28, 2018. This detailed letter recounted the discussions between the Special Master, his counsel, and the Law Firms regarding the issues raised by the February 23, 2018 issuance of Professor Gillers' Report. On March 1, 2018, the Court issued an order on the docket granting the Special Master a final extension to April 23, 2018, and attaching the Special Master's February 28, 2018 letter.

Following the issuance of the Gillers Report, expert discovery proceeded swiftly. The Law Firms were required to identify and designate any rebuttal experts by March 10; submit the expert reports by March 26; and participate in expert depositions held on March 20, 21, 24, and April 3, 4, 9, and 10. Professor Gillers was deposed on March 20 and 21, and Labaton's previously designated expert Camille Sarrouf was deposed on March 21 and 24. In response to the scope and substance of Professor Gillers' Report, the Law Firms designated a total of seven rebuttal experts (four by Labaton, one by the Thornton Law Firm, and two by Lieff Cabraser, one of whom is Professor William Rubenstein, who submitted an expert declaration in support of the Law Firms' consolidated submission dated August 1, 2017). These experts' reports were due and submitted on March 26, 2018 (16 days after the March 10 deadline for expert designations). The Special Master deposed the Law Firms' experts on April 3, 4, 9, and 10. Per the schedule mandated by the Special Master and his counsel, written submissions by the Law Firms, including this submission, were submitted on April 12, 2018 in advance of oral argument on April 13, 2018.

Preliminary Statement

As Professor Gillers' Report states, and as he confirmed in his deposition testimony, he incorporated and relied on a detailed statement of facts prepared by counsel for the Special Master in reaching the conclusions in his Report. This statement of facts (titled "Factual Background") comprises 53 pages of the 85-page Gillers Report. The statement of facts – which Professor Gillers "assume[d] is true for purposes of [his] opinion," Gillers Rep. at 2 – is riddled with blatant errors and repeated mischaracterizations of the record evidence. When confronted with a sampling of these issues at his deposition, Professor Gillers conceded that he did not do any investigation into the facts beyond relying on the statement provided, and acknowledged that he did not know why other directly pertinent evidence had not been provided to him. *See, e.g.*, 3/20/18 Gillers Dep. at 262:12-263:6; 290:6-292:1; 302:18-303:3; 308:3-308:5.

Where conclusions are based on misstated, incomplete, or misleading facts, their reliability is inherently questionable and should be rejected. *See United States v. Rubashkin*, No. 08-CR-1324-LRR, 2010 WL 4362455, at *6 n.7 (N.D. Iowa Oct. 27, 2010) (rejecting, in another matter, Prof. Gillers' testimony and noting, "Given these experts' proclivity to rely on defense counsel's mischaracterization of the facts, the court declines to credit their affidavits."). And where, as here, the drafters of the facts clearly ignored evidence that would make the statement of facts more accurate, more complete, and more fair, it appears that the drafters are intent on proving a preconceived narrative and are not engaged in a neutral fact-finding process. Indeed, the Special Master's insistence that Professor Gillers participate in all of the other experts' depositions, over the objections of the Law Firms, undermines the appearance of a neutral fact-finding process. Accordingly, and for reasons set forth more fully below, the

Thornton Law Firm objects to the Special Master's use of, reliance on, and/or incorporation of the Gillers Report.

I. BECAUSE "FACTS MATTER," THE GILLERS REPORT IS NOT RELIABLE.

As Professor Gillers testified at his deposition, "facts matter." 3/20/18 Gillers Dep. at 155:11. Here, the facts supplied to Professor Gillers, which he expressly assumed to be true, are riddled with errors, omissions, and material mischaracterizations. As Professor Gillers conceded, his opinion would be worthless if it were found to be based on inaccurate, misleading, or incomplete facts. *Id*. at 265:11-15.

In his deposition, after being shown multiple examples of record evidence that had been ignored, misquoted, or taken out of context, Professor Gillers attempted to explain away at least some of these deficiencies by immediately asserting that he did not rely on the erroneous facts for his opinions. *See, e.g.*, *id*. at 289:21-290:9; 360:3-11. For at least two reasons, this tactic must be rejected. First, where so many of the facts provided to Professor Gillers were erroneous, incomplete, or mischaracterized—in contrast to a situation in which only a few facts are wrong—it becomes clear that the entire Report is infected with those deficiencies. Second, whether or not he expressly ties each fact to a particular conclusion, Professor Gillers assumed the facts in the statement are true, *see* Gillers Rep. at 2, and all of his conclusions derive in some fashion from his overall understanding of the facts.

The 53-page statement of facts is replete with erroneous and incomplete facts. For example:

Page 16 of the Gillers Report states that "No explicit or implicit agreement to allow TLF to claim the Labaton and Lieff SAs on TLF's lodestar has been disclosed during the Special Master's investigation." This assertion bears directly on Professor Gillers' conclusions regarding

misstatements in Garrett Bradley's declaration (and, as is clear from other depositions, the Special Master's view of motive). Yet this "fact" is clearly contradicted by testimony and other record evidence from members of all three Law Firms showing the existence of an agreement.[5]

The Thornton Law Firm addressed this issue at length in its November 3, 2017 submission to the Special Master, citing deposition testimony, interrogatory answers, and contemporaneous emails evidencing the existence of an agreement. *See* Thornton Law Firm's November 3, 2017 submission at pp. 3-18 (which the Thornton Law Firm incorporates here by reference). For unknown reasons, Professor Gillers apparently did not have or take the opportunity to review that submission. As that submission details, Dan Chiplock of Lieff Cabraser testified at length in his two depositions that he understood there was an agreement: "It was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done…that you include their hours in your lodestar when you report it at the end of the day…it was just obvious." 6/16/17 Chiplock Dep. at 136:10-22.[6] Both Michael Rogers and Eric Belfi, partners at Labaton, assumed (or, if they had been asked at the time, would have assumed) that the Thornton Law Firm was going to claim the staff attorneys in its (Thornton's) fee declaration. *See, e.g.*, 6/16/17 Rogers Dep. at 91:18-23. Much for the same reasons cited by Dan Chiplock, Michael Rogers surmised that the Thornton Law Firm would include them: "They were paying for it up-front, I assume they wanted to get paid on the back end." *Id*. at 92:14-16. *See also* Labaton Response to Interrogatory No. 33. And, naturally, the Thornton Law Firm believed in good faith—and based on its understanding with Labaton and Lieff Cabraser—"that for attorneys for who Thornton was

[5] At a minimum, there was an implicit agreement. *See* Implicit, *American Heritage Dictionary* (5th ed. 2018) ("Implied or understood though not directly expressed.").

[6] Additional relevant citations from Mr. Chiplock's testimony are listed on pages 3 to 18 of the Thornton Law Firm's November 3, 2017 submission.

financially responsible for, they would be included on whatever the ultimate fee petition [was] that Thornton would submit." 6/5/17 Hoffman Dep. at 58:12-16.

The Gillers Report does not cite any of this testimony. In fact, on page 15, the Report entirely omits Dan Chiplock's testimony in providing support for the assertion that Lieff Cabraser and Labaton were focused on the cost-spreading aspect of the arrangement, and not on what information would be reported on a fee petition. The negative and unfair inference, of course—which is clear because this sentence is followed by one stating that the Thornton Law Firm claimed the staff attorneys allocated to it—is that no one from Lieff Cabraser or Labaton thought about this, and therefore the Thornton Law Firm took advantage. This flies in the face of the testimony Professor Gillers failed to review.

Even if the Special Master has determined (without offering any basis for so concluding) that he does not credit the testimony of Dan Chiplock, Michael Rogers, or Evan Hoffman on this issue, the November 10, 2016 letter to the Court plainly states the Law Firms' view that the overlap in the listing of Staff Attorneys was the result of mistakes in Labaton's and Lieff Cabraser's lodestars, not in the Thornton Law Firm's. *See* 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf at 2 (Dkt. 116). Contemporaneous emails sent during the drafting of the November 10, 2016 letter support this as well. *See* TLF-SST-012138 (11/9/2016, 7:01 PM email from Dan Chiplock to David Goldsmith, Michael Lesser, and Evan Hoffman stating that two Staff Attorneys appearing on both TLF and Lieff Cabraser petitions "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015," and remarking that he "failed to catch that after our accounting department ran everyone's lodestar, and apologize"). *See also* TLF-SST-012191 (11/10/2016 email from David Goldsmith of Labaton to Mike Lesser of the Thornton Law Firm, copying

entire counsel group, assuring Mr. Lesser that removal of any overlapping Staff Attorney hours from the Thornton Law Firm's lodestar for the November 10, 2016 letter was the result of a conservative, lowest-rate approach only, and stating that "the intent is not to suggest that Thornton time is less legitimate"). The Gillers Report ignores these emails and the other record evidence that substantiate the agreement between the Thornton Law Firm, Lieff Cabraser, and Labaton that the Thornton Law Firm would include the Staff Attorneys for whose work it paid in its lodestar chart.

Pages 15-16 and 50 of the Gillers Report discuss the Thornton Law Firm's use of a rate of $425 per hour for work by the Staff Attorneys assigned to the Thornton Law Firm. On pages 15-16, the Gillers Report states: "In its fee petition, TLF billed all SA time at an hourly rate of $425 (a rate approved by the Court for Lieff SAs in BONY Mellon). Except for three SAs, the $425 per hour rate charged by TLF was greater than the rates requested by Lieff or Labaton for the same individuals in their lodestar petitions." And on page 50, the Gillers Report states that the cross-allocation of the Staff Attorney time "dramatically inflated the lodestar of TLF."

As to the first issue, the $425 per hour rate, the Gillers Report makes no mention of contemporaneous emails produced to the Special Master that make clear that the Thornton Law Firm used the $425 per hour rate because Lieff Cabraser suggested it, and because it had been accepted in BONY Mellon. *See* TLF-SST-011263. Nor does the Report mention Dan Chiplock's testimony on this issue, namely: "And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425." 6/16/17 Chiplock Dep. at 184:20-25. The result is that the Gillers Report

provides no context for the Thornton Law Firm's use of this hourly rate even when context plainly exists in the record.

Further, this section of the Gillers Report tellingly does not address the declaration of Professor William Rubenstein that the Law Firms submitted to the Special Master on August 1, 2017. In his declaration, which dealt squarely with rates, Professor Rubenstein concluded, based on empirical research, that an hourly rate of $425 was within the range of reasonableness for this work. *See* 7/31/17 Declaration of William B. Rubenstein at 27-30. Yet Professor Gillers testified that he was not provided with this declaration by Professor Rubenstein, and does not know why. 3/20/18 Gillers Dep. at 299:2-16.

As to the second issue, the effect of a $425 per hour rate on the Thornton Law Firm's lodestar, the Gillers Report asserts on page 50 that the cross-allocation of Staff Attorney time "dramatically inflated the lodestar of TLF." This statement wrongfully suggests that the duplication errors acknowledged by the Law Firms were the Thornton Law Firm's errors, and had the effect of "inflat[ing]" the Thornton Law Firm's lodestar number beyond what it should have reported. This prejudicial statement ignores contemporaneous emails in which lawyers from both Labaton and Lieff Cabraser acknowledged that the errors were theirs and/or that "the intent is not to suggest that Thornton time is less legitimate[.]" *See* TLF-SST-012138 (11/9/2016, 7:01 PM email from Dan Chiplock to David Goldsmith, Michael Lesser, and Evan Hoffman stating that two Staff Attorneys appearing on both Thornton Law Firm and Lieff Cabraser petitions "should not have been included in LCHB's lodestar at all" because the two "were Thornton contract reviewers throughout 2015," and remarking that he "failed to catch that after our accounting department ran everyone's lodestar, and apologize"). *See also* TLF-SST-012191 (11/10/2016 email from David Goldsmith of Labaton to Mike Lesser of the Thornton

Law Firm, copying counsel group, assuring the Thornton Law Firm that removal of any overlapping Staff Attorney hours from the Thornton Law Firm's lodestar for the November 10, 2016 letter was the result of a conservative, lowest-rate approach only, and assuring Mr. Lesser that "the intent is not to suggest that Thornton time is less legitimate"). Neither of these emails is referenced anywhere in the Gillers Report.

Furthermore, the description of the Thornton Law Firm's lodestar in the Gillers Report as having been "dramatically inflated" echoes statements the Special Master and his counsel have made about the Thornton Law Firm's supposed motive for listing Staff Attorneys in its fee petition, for charging them at a rate of $425, and for failing to clarify template language concerning the Staff Attorneys. Specifically, the Special Master and counsel have asserted in front of numerous witnesses that this was an effort on the Thornton Law Firm's part to "jack up" the firm's lodestar. *See, e.g.*, 4/10/18 Vairo Dep., *passim*. As with numerous other "facts" in the Gillers Report, however, there is evidence flatly contradicting the Special Master's theory, which apparently was not provided to Professor Gillers. Specifically, the evidence shows that the Law Firms reached an agreement among themselves as to how to split their *entire* portion of the fee—including how to divvy up the previously unallocated 40%—in August 2016, *i.e.*, **before any fee declarations were filed with the Court**. *See* TLF-SST-056305 (signed fee agreement); 6/19/17 G. Bradley Dep. at 46:24-47:3 ("[W]e had a fee agreement in place in August of '16 before we filed the fee application. We knew at the time what our fee was going to be"); *id*. at 62:9-63:8; 9/8/17 Chiplock Dep. at 135:6-9 (stating that "the fee agreement, the fee allocation agreement was reached in late August of 2016"). It therefore makes no sense to suggest, where the Court had already indicated its approval of a 25% fee based on the common fund approach, and the fee split among the Law Firms had been agreed to in August 2016, that the Thornton Law Firm

would have had any motive to "dramatically inflate[]" the lodestar in its September 2016 fee declaration in an attempt to mislead the Court.

Pages 20 to 21 of the Gillers Report quote a portion of an August 30, 2015 email from Dan Chiplock (TLF-SST-031166) and characterize it as follows: "The discussion turned to lodestar reporting in State Street with Chiplock warning Bradley not to include unwarranted hours in TLF's fee petition."

In this email, which was read and discussed at length in numerous depositions, Mr. Chiplock comments on information he heard regarding the Thornton Law Firm's expected total lodestar number. The quoted portion of this email itself has clear indicia of uncertainty: Mr. Chiplock notes that he heard the information "third-hand" and that it occurred on a call in which he did not participate. TLF-SST-031166. The Gillers Report cites the email to support the wholly unsubstantiated notion that there was concern among the Law Firms about the Thornton Law Firm inflating its lodestar. Indeed, the conclusion here previews another faulty portion of the Gillers Report, on page 50, where the Report states that the cross-allocation of the Staff Attorney time "dramatically inflated the lodestar of TLF."

As with other record evidence cited in the Report, the Gillers Report selectively quotes this email and omits other pertinent portions of the chain. The Report ignores a later email in this very chain in which Mike Thornton clarifies that his estimate was a guess. Nor does the Report mention an internal Thornton Law Firm email, sent a half hour after Mike Thornton's email, in which Mike Lesser remarks that the number estimated by Mike Thornton would represent the Thornton Law Firm's share of the fee, not the size of its lodestar (and thus suggests that Mike Thornton had, indeed, mistakenly transposed terms earlier). TLF-SST-038587.

In quoting only the email from Dan Chiplock, the Gillers Report entirely ignores other record evidence specifically regarding it, including deposition testimony of Mr. Chiplock directly addressing what he meant in this email. When asked about this email during his deposition, Mr. Chiplock testified: "Probably I am frustrated at this point given the dialogue that's led up to that e-mail, but I think Mike Thornton may have simply been mistaken because that's not the number they ultimately reported. What they ultimately reported was a number closer to what I had been informed of on June 29th." 9/8/17 Chiplock Dep. at 64:14-20.

The Special Master and his counsel focused on this email in multiple depositions, quoting it at length to multiple witnesses. Yet not a single interpretation of this email that contravenes the Special Master's interpretation—including the one in Mr. Chiplock's own testimony—is cited in the Report, demonstrating that the effort here was to fit the facts to a particular theory rather than to conduct a neutral search for the truth.

Moreover, the portion of this email that *is* cited in the Gillers Report supports another key point that the Report otherwise ignores. Specifically, in this email, Mr. Chiplock states that Mike Lesser provided him with an estimate of the Thornton Law Firm's hours as of June 29, 2015, which were "around 12,750." TLF-SST-031166. Indeed, the Thornton Law Firm has identified this June 29, 2015 email from Mr. Lesser to Mr. Chiplock in this submission and in its previous submission to the Special Master. In that email, numbered TLF-SST-011206, Mr. Lesser estimated the hours in the Thornton Law Firm's lodestar. Mr. Lesser broke down the document review hours contributing to the Thornton Law Firm's lodestar into two categories: "Thornton doc review external (Thornton reviewers working Lieff + Labaton paid by Thornton)" and "Thornton doc review internal." Mr. Lesser's e-mail clearly informed Mr. Chiplock that the Thornton Law Firm was including the Thornton-assigned reviewers working at Lieff and at

Labaton in its lodestar calculation. Mr. Chiplock then referred to this estimate of 12,750 hours in his email dated August 30, 2015, which was sent to lawyers from all three Law Firms. There can be no question than an estimate of more than 12,000 hours was clearly understood to include document review hours, based on the relative hours of the other firms. *See* Gillers Rep. at 25 (chart showing time spent by Law Firms' "Partners and Associates" versus "Staff Attorneys"). Mr. Chiplock, at least, knew this explicitly, and in fact references the Staff Attorneys in his email.[7]

In sum, as these examples demonstrate, it is unfair and misleading for Professor Gillers to fail to reference these pieces of pertinent record evidence, and many others, in the statement of facts underpinning his Report. Indeed, the value of his opinion depends on the completeness and truthfulness of the facts. *See, e.g.*, 3/20/18 Gillers Dep. at 265:11-15.

II. SANCTIONS AGAINST THORNTON LAW FIRM PARTNER GARRETT BRADLEY ARE NOT JUSTIFIED.

Page 24 of the Gillers Report states: "There is ample evidence in the record that Garrett Bradley actually knew the Declaration contained inaccurate information but signed it anyway." In support of this broad and false assertion, the Gillers Report cites only to the transcript of the Court's March 7, 2017 hearing. Conspicuously absent is citation to any statement, in that hearing or otherwise, demonstrating that Garrett Bradley knew or realized, when he signed the boilerplate declaration, that it contained inaccurate statements. At his deposition, when asked about this statement, Professor Gillers acknowledged that he did not have any basis to know

[7] With regard to this final sentence in the quoted email, the Gillers Report fails to mention the testimony of Labaton's Ray Politano, which confirmed that the Thornton Law Firm paid the overhead for the Staff Attorneys housed at Labaton. *Compare* TLF-SST-000415 (Ray Politano of Labaton stating the $50 hourly rate Labaton was charging to Thornton) and TLF-SST-000403 to TLF-SST-000414 (Labaton invoices paid by Thornton showing $50 per hour rate) *with* 6/14/17 Politano Dep. at 18:3-9 (Politano stating that Staff Attorneys were paid between $32 and $40 per hour). *See also* 7/19/17 G. Bradley Dep. at 93:23-95:5; 9/1/17 Thornton Dep. at 52:9-17.

whether or not Garrett Bradley knew he submitted a false statement to the Court. 3/20/18 Gillers Dep. at 315:12-317:1. Professor Gillers also acknowledged that he had no basis for making any conclusion as to Garrett Bradley's mental state and was simply assuming the facts provided to him were true. *Id.* at 269:1-4, 19-23; 270:15-24:

> Q: You yourself don't personally know whether or not Garrett Bradley knowingly made any false misrepresentation, do you?
> A: That's correct.
>
> ***
>
> Q: So you have not concluded anything about Garrett Bradley's mental state. You're relying on an assumption that was provided to you?
> A: Correct.
>
> ***
>
> Q: Well you don't, as you said, know what he was thinking when he signed this, do you?
> A: No.
> Q: You don't know how careless he may have been in scrutinizing the boilerplate template that he signed, right?
> A: I do not know.
> Q: So you're not in a position to testify that he knowingly submitted anything, are you?
> A: Correct.

A. Garrett Bradley Did Not Violate Massachusetts Rule of Professional Conduct 3.3(a)(1).

As Professor Gillers himself acknowledged, the test for whether an attorney violated Rule 3.3(a)(1) is subjective. 3/20/18 Gillers Dep. at 272:4-21. That is, in determining whether there has been a violation, the tribunal must ask not what the reasonable attorney would have known, but what the attorney actually knew when he presented facts to the Court. The Rules define "knowingly" as "actual knowledge of the fact in question." Mass. Rule of Prof. Conduct 1.0(g). This intent standard does not reach negligent misrepresentations. *See* Gillers Dep. at 316:13-16 ("Q: And would you agree that not every careless mistake an attorney makes amounts to an ethical violation? A: Yes.").

Here, as Professor Gillers stated in his Report, his conclusions with regard to Garrett Bradley depend on the crucial factual assumption that "Garrett Bradley knew these statements were false **when he submitted his Declaration**." Gillers Rep. at 81 (emphasis added). Of note, there is a difference between knowing the underlying factual matters (*e.g.,* that the Staff Attorneys were not "employees of [the Thornton Law] firm") and knowing that **at the time the declaration was being submitted to the Court, it contained inaccuracies**.

Here, there is no evidence that Garrett Bradley had "actual knowledge" that the declaration submitted on September 14, 2016 contained "false" information. On the contrary, the record is consistent with the fact that Garrett Bradley relied on Labaton's boilerplate fee petition and assumed it was correct rather than engaging in a careful review of the language prior to submitting the fee petition to the Court. The "ample evidence" cited in Professor Gillers' statement of facts for the proposition that Garrett Bradley "knew" his declaration contained false information is nothing more than a collection of cites to the March 7, 2017 hearing before Judge Wolf. At that hearing, Garrett Bradley was forthcoming about the mistakes in the declaration and noted that "we should have been clearer in this and that fault lies with me." 3/7/17 Hearing at 91:4-7. Garrett Bradley's admission of an inadvertent mistake does not lead to the conclusion that he knowingly submitted false statements to the Court. As Professor Gillers admitted in his deposition, a careless mistake is not equivalent to a knowing misrepresentation. 3/20/18 Gillers Dep. at 269:5-7 ("Q: And a careless mistake does not equal a knowing misrepresentation to a Court, does it? A: It does not."). This is a critically important distinction yet—to date—one that is being clearly ignored.

B. Garrett Bradley Did Not Violate Massachusetts Rule of Professional Conduct 8.4(c).

For the same reasons Garrett Bradley did not violate Massachusetts Rule of Professional Conduct 3.3(a), he also did not violate Rule 8.4(c). Rule 8.4(c) requires intentionality and does not reach negligence. *See In re Royal C. Thurston, III*, 13 Mass. Att'y Disc. R. 776 (Board Memorandum, May 12, 1997) (striking hearing committee's finding that attorney violated DR 1-102(A)(4) [predecessor to 8.4(c)] and noting, "As Bar Counsel concedes, a negligent misrepresentation does not violate DR 1-102(A)(4) because the rule prohibits only intentional conduct."). Professor Gillers agrees that the mental state required for a Rule 8.4 violation should not be lower than the mental state required for a Rule 3.3 violation. 3/20/18 Gillers Dep. at 275:9-21. *See also id.* at 316:17-20 ("Q: And not every careless mistake an attorney makes is willful misconduct designed to mislead a federal judge? A: Yes, I agree.").

As set forth above, Garrett Bradley did not have "actual knowledge" of any false statements to the Court and did not intend to make any false statements to the Court. Any inaccuracies contained in his declaration were the result of mistakes or inadvertent errors—not knowing and intentional false submissions to the Court.

C. Garrett Bradley Did Not Violate Rule 11.

As Rule 11 expert Professor Georgene Vairo testified, sanctioning a lawyer pursuant to Rule 11 is a severe penalty that should not be imposed broadly. 4/10/18 Vairo Dep. at 77:1-8. *See also McGee v. Town of Rockland*, No. 11-CV-10523-RGS, 2012 WL 6644781, at *1 (D. Mass. Dec. 20, 2012) ("Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps."). *See also* 3/20/18 Gillers Dep. at 276:10-13 ("Q: So now you'd agree, sir, that not every mistake a lawyer makes should be subject to a Rule 11 sanction, correct? A: Yes, I agree. Yes."). As the First Circuit noted in reversing a district court's imposition of sanctions,

"Courts ought not to invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39-40 (1st Cir. 2005).

In this proceeding, it is vital to heed the First Circuit's warning that "Civil Rule 11 is not a strict liability provision." *Eldridge v. Gordon Bros. Grp.*, 863 F.3d 66, 88 (1st Cir. 2017) (internal quotation marks omitted). Statements that are "literally inaccurate" may not be sanctionable because "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993). Here, although certain statements in the declaration were "inaccurate or overstated, … further inquiry would not have shown the motion's requests to have been baseless." *Id.*

The case at bar is on all fours with *Navarro-Ayala*. There, the First Circuit reversed the District Court's finding of sanctions because "the motion, **read fairly and as a whole**, contain[ed] **no significant false statement** that **significantly harmed** the other side." *Id.* (emphasis added). In so holding, the First Circuit noted that "We emphasize the word 'significant' because the district court found one sentence literally false," and further explained that, "the district court, at most, could have found a few isolated instances of noncritical statements that further inquiry might have shown to be inaccurate or overstated. That further inquiry would not have shown the motion's requests to have been baseless." *Id.* at 467-468. *See also Obert v. Republic W. Ins. Co*, 398 F.3d 138, 143-144 (1st Cir. 2005) (reversing Rule 11 sanctions where "the affidavit was not knowingly false as to any material fact, although one of the statements may well have been factually inaccurate and another was a dubious and

unattractive piece of lawyer characterization" and describing the affidavit as "an unsound piece of lawyer advocacy rather than a lie about a fact.").

Viewed fairly and in context, Garrett Bradley's declaration was an isolated instance of inattentiveness due to reliance on boilerplate language that he knew had been prepared by experienced counsel. Much of this boilerplate language was used by all three Law Firms. Once the errors were brought to Garrett Bradley's attention, he took corrective action. With respect to the double counting, he immediately contacted co-counsel and ensured that within two days the Court was informed of the errors. 6/19/17 G. Bradley Dep. at 85:23-86:11; 6/5/17 Hoffman Dep. at 99:7-102:24; 6/14/17 Zeiss Dep. at 18:13-19:9; 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf (Dkt. 116). With respect to the template language issues in the declaration, which, unlike the "double counting," Garrett Bradley only realized later, Mr. Bradley took responsibility and acknowledged, during the March 2017 hearing, that certain aspects of his declaration were factually incorrect. *See, e.g.*, 3/7/17 Hearing at 91:4-7. There is simply no evidence that Garrett Bradley had any intention to mislead the Court. *Cf. United States v. Jones*, 686 F. Supp. 2d 147, 150 (D. Mass. 2010) (Wolf, J.) (imposing no sanctions against prosecutor who, due to "inexplicable and inexcusable" errors, inadvertently neglected to disclose important exculpatory material to defendant).

III. CONCLUSION

For the reasons expressed in this submission and in the record evidence, the Thornton Law Firm submits that reliance on the Gillers Report is unsound, and accordingly objects to the Special Master's use of, reliance on, and/or incorporation of the Report. Additionally, no sanction in this case is justified.

Dated: April 12, 2018

Respectfully submitted,

*/s/ Brian T. Kelly*_____

Brian T. Kelly (BBO No. 549566)
Emily C. Harlan (D.C. Bar No. 989267)
Joshua C. Sharp (BBO No. 681439)
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
Telephone: (617) 345-1000
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E-mail: bkelly@nixonpeabody.com

Attorneys for the THORNTON LAW FIRM LLP

EXHIBIT 4

NIXON PEABODY LLP
ATTORNEYS AT LAW

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Brian T. Kelly
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100 Summer Street
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April 17, 2018

BY ELECTRONIC MAIL

William Sinnott, Esq.
Donoghue Barrett & Singal, P.C.
One Beacon Street, Suite 1320
Boston, MA 02108-3106

RE: *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, No. 11-cv-10230-MLW

Dear Bill:

During last Friday's oral argument, it appeared that Special Master Rosen has reached the erroneous conclusion that the Thornton Law Firm bears more responsibility than Labaton Sucharow ("Labaton") and Lieff Cabraser Heimann & Bernstein ("Lieff") for the inadvertent double counting errors identified in the November 10, 2016 letter to the Court. This conclusion, if one the Special Master is inclined to reach, is clearly contradicted by the evidence.

As I noted during the oral argument, the November 10, 2016 letter itself states that the inadvertent double counting occurred in the Labaton and Lieff lodestars. This letter was the product of drafting and close review by all three firms. In the bullet point list on page two of that letter, the word "mistakenly" clearly modifies the references to the Labaton and Lieff lodestar reports:

" • The hours of the Alper SAs reported in the Thornton lodestar report **mistakenly were also reported in the Labaton Sucharow lodestar report.**

• Certain hours reported by one of the Alper SAs (S. Dolben) in the Thornton lodestar report mistakenly duplicated certain hours of another Alper SA (D. Fouchong).

• A portion of the hours of two of the Jordan SAs reported in the Thornton lodestar report (C. Jordan and J. Zaul) **mistakenly were also reported in the Lieff Cabraser lodestar report.**

- The hours of two other Jordan SAs (A. Ten Eyck and R. Wintterle) **mistakenly were included in the Lieff Cabraser lodestar report**."

See Exhibit A, Dkt. 116 at 2 (emphasis added).

In addition to the language in the November 10, 2016 letter, an email sent by Dan Chiplock of Lieff during the letter drafting process leaves no doubt that Lieff accepted responsibility for the double counting in the Lieff and Thornton lodestars. As Mr. Chiplock very clearly laid out in the following email to David Goldsmith (Labaton), Michael Lesser (Thornton), and Evan Hoffman (Thornton), dated November 9, 2016:

"Here is what I've been able to determine, in order of most to least significant:

(1) Rachel Wintterle and Ann Ten Eyck **should not have been included in LCHB's lodestar at all.** They were Thornton contract reviewers throughout 2015, but worked on our premises. Many if not most of **their detailed time entries did not specifically indicate that the work was being done on Thornton assignments in the "narrative" field, which resulted in their time inadvertently being included with other LCHB reviewers they were working with when our accounting department ran lodestar reports. I failed to catch that after our accounting department ran everyone's lodestar, and apologize.** These two reviewers account for $551,719.50 in total lodestar from LCHB **that should be removed from LCHB's total. Thornton's lodestar attributable to these two reviewers should not change.**

(2) Chris Jordan and Jonathan Zaul each did work for both LCHB and Thornton. **Again, we neglected to exclude time entries specifically relating to "Thornton" assignments, which took place between 2/9/15 and 4/14/15 only, from LCHB's lodestar.** Once that time is removed, their respective hours and lodestar attributable to LCHB should be as follows:

Christopher Jordan: 540 hours, for $224,100
Jonathan Zaul: 503 hours, for $208,745

Which results in an additional net reduction from LCHB lodestar of $281,619. Add this to the reduction for Ten Eyck and Wintterle, and you get a total reduction of $833,338 from LCHB's reported lodestar.

Thornton's adjusted total hours/lodestar for Jordan and Zaul (using Thornton rates), based on the hours invoices to Thornton, should be:

Christopher Jordan: 359.50 hours, for $152,787.50
Jonathan Zaul: 319 hours, for $135,575.00

This results in a net lodestar *increase* of $26,987.50 for these two attorneys for Thornton Law. This should be noted as at least a modest net offset against the lodestar that needs to be cut elsewhere."

See Exhibit B, TLF-SST-033277 (emphasis added).

Furthermore, during their depositions in this investigation, both Mr. Chiplock and Lieff's staff attorney supervisor, Kirti Dugar, explained the circumstances that led Lieff to mistakenly include these Staff Attorneys' time in its lodestar. *See* 6/16/2017 Chiplock Dep. at 154:18 – 160:8 (attached as Exhibit C); 6/16/2017 Dugar Dep. at 114:9 – 115:22 (attached as Exhibit D).

As these documents and testimony make clear, a conclusion that the lodestar errors are solely or primarily attributable to the Thornton Law Firm is contradicted by the record evidence. As representatives of all three firms have repeatedly testified, and as the documents bear out, the double counting errors that occurred here were certainly unfortunate, but also entirely inadvertent.[1] When the firms learned of the double counting errors, they quickly acted to identify, quantify, and disclose them.

Copies of the documents referenced herein are attached.

Sincerely,

Brian T. Kelly

cc: Joan A. Lukey, Esq.
Richard M. Heimann, Esq.

[1] I do not repeat here Thornton's previous submissions addressing the record evidence that demonstrates the implicit agreement between the three firms regarding to staff attorneys, but rather incorporate those submissions by reference. *See* Thornton's Nov. 3, 2017 submission at pp. 3-18 and Thornton's April 12, 2018 submission at pp. 5-8.

EXHIBIT A

Labaton Sucharow

David J. Goldsmith
Partner
212 907 0879 direct
212 883 7079 fax
dgoldsmith@labaton.com

November 10, 2016

By ECF

Hon. Mark L. Wolf
United States District Judge
United States District Court
District of Massachusetts
John Joseph Moakley
United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Re: Arkansas Teacher Retirement System v. State Street Bank & Trust Co.,
No. 11-CV-10230 MLW

Dear Judge Wolf:

We are writing respectfully to advise the Court of inadvertent errors just discovered in certain written submissions from Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees, which the Court granted following the fairness hearing held on November 2, 2016. *See* Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Order," ECF No. 111).

These mistakes came to our attention during internal reviews that were conducted in response to an inquiry from the media received after the hearing. The purpose of this letter is to disclose the error and provide a corrected lodestar and multiplier. We respectfully submit that the error should have no impact on the Court's ruling on attorneys' fees.

As the Court is aware, the submissions supporting Lead Counsel's fee application included individual declarations submitted on behalf of Labaton Sucharow, Thornton, and Lieff Cabraser, reporting each firm's lodestar and number of hours billed. *See* ECF Nos. 104-15, at 7-9; 104-16, at 7-8; 104-17, at 8-9; *see also* ECF No. 104-24 (Master Chart).

The professionals and paraprofessionals listed in these firms' respective lodestar reports include persons denoted as Staff Attorneys, or "SAs." SAs are bar-admitted, experienced attorneys hired on a temporary, though generally long-term, basis, and are paid by the hour. The SAs in this action

Labaton Sucharow

were tasked principally with reviewing and analyzing the millions of pages of documents produced by State Street.

Seventeen (17) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Labaton Sucharow lodestar report.[1] Six (6) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Lieff Cabraser lodestar report.[2] Both sets of overlap reflect the fact that as the litigation proceeded, efforts were made to share costs among counsel, such that financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices was borne by Thornton.

We have now determined that:

- The hours of the Alper SAs reported in the Thornton lodestar report mistakenly were also reported in the Labaton Sucharow lodestar report.
- Certain hours reported by one of the Alper SAs (S. Dolben) in the Thornton lodestar report mistakenly duplicated certain hours of another Alper SA (D. Fouchong).
- A portion of the hours of two of the Jordan SAs reported in the Thornton lodestar report (C. Jordan and J. Zaul) mistakenly were also reported in the Lieff Cabraser lodestar report.
- The hours of two other Jordan SAs (A. Ten Eyck and R. Wintterle) mistakenly were included in the Lieff Cabraser lodestar report.[3]

Because of these inadvertent errors, Plaintiffs' Counsel's reported combined lodestar of $41,323,895.75, and reported combined time of 86,113.7 hours, were overstated. *See* ECF No. 104-24 (Master Chart).

---

[1] These SAs, listed alphabetically, are D. Alper, E. Bishop, N. Cameron, M. Daniels, S. Dolben, D. Fouchong, J. Grant, I. Herrick, D. Hong, C. Orji, D. Packman, A. Powell, A. Rosenbaum, J. Saad, B. Schulman, A. Vaidya, and R. Yamada (collectively, the "Alper SAs"). *Compare* ECF No. 104-16, at 7-8 (Thornton lodestar report) *with* ECF No. 104-15, at 7-8 (Labaton Sucharow lodestar report).

[2] These SAs, listed alphabetically, are C. Jordan, A. McClelland, A. Ten Eyck, V. Weiss, R. Wintterle, and J. Zaul (collectively, the "Jordan SAs"). *Compare* ECF No. 104-16, at 7 (Thornton lodestar report) *with* ECF No. 104-17, at 8 (Lieff Cabraser lodestar report).

[3] The lodestar reports in the individual firm declarations submitted by ERISA counsel (ECF Nos. 104-18 to 104-23) are unaffected.

Labaton Sucharow

We have corrected these errors by removing the duplicative time. When a given SA had different hourly billing rates, we removed the time billed at the higher rate. Deducting the duplicative time from the $41.32 million reported combined lodestar results in a reduced combined lodestar of **$37,265,241.25**, and a reduced combined time of 76,790.8 hours.

Cross-checking the $37.27 million reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of **2.00**.[4] This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing.

Plaintiffs' counsel respectfully submits that a 2.00 multiplier remains reasonable and well-within the range of multipliers found reasonable for cross-check purposes in common fund cases within the First Circuit, and that such an enhancement of the reduced lodestar represented by the 24.85% fee awarded by the Court remains well-supported by the $300 million Settlement obtained and fees awarded in comparable cases. *See* Fee Brief, ECF No. 103-1, at 24-25.

Accordingly, Plaintiffs' counsel respectfully submits that the Court should adhere to its ruling on attorneys' fees. *See* Fee Order ¶¶ 4, 6 (ECF No. 111)[5]; Nov. 2, 2016 Hrg. Tr. at 36:1-2 (finding 1.8 multiplier "reasonable").

We sincerely apologize to the Court for the inadvertent errors in our written submissions and presentation during the hearing. We are available to respond to any questions or concerns the Court may have.

Respectfully submitted,

David J. Goldsmith

---

[4] The Court found it "appropriate in this case to use the percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded." Nov. 2, 2016 Hrg. Tr. at 22:25-23:2; *see also id.* at 35:12-13 ("I have used the percentage of common fund method. I've used the reasonable lodestar to check on that.").

[5] The Fee Order, at Paragraph 6(d), references the approximately 86,000 combined hours and $41.32 million combined lodestar reported in our written submissions.

Labaton Sucharow

DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

I certify that on November 10, 2016, I caused the foregoing Letter to be filed through the ECF system in the above-captioned action, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ David J. Goldsmith
David J. Goldsmith

EXHIBIT B

From: Chiplock, Daniel P. <DCHIPLOCK@lchb.com>
Sent: Wednesday, November 9, 2016 7:01 PM
To: 'Goldsmith, David'
Cc: Hoffman, Evan (ehoffman@tenlaw.com); Michael Lesser
Subject: RE: State Street

Importance: High

Here is what I've been able to determine, in order of most to least significant:

(1) Rachel Wintterle and Ann Ten Eyck should not have been included in LCHB's lodestar at all. They were Thornton contract reviewers throughout 2015, but worked on our premises. Many if not most of their detailed time entries did not specifically indicate that the work was being done on Thornton assignments in the "narrative" field, which resulted in their time inadvertently being included with other LCHB reviewers they were working with when our accounting department ran lodestar reports. I failed to catch that after our accounting department ran everyone's lodestar, and apologize. These two reviewers account for $551,719.50 in total lodestar from LCHB that should be removed from LCHB's total. Thornton's lodestar attributable to these two reviewers should not change.

(2) Chris Jordan and Jonathan Zaul each did work for both LCHB and Thornton. Again, we neglected to exclude time entries specifically relating to "Thornton" assignments, which took place between 2/9/15 and 4/14/15 only, from LCHB's lodestar. Once that time is removed, their respective hours and lodestar attributable to LCHB should be as follows:

Christopher Jordan: 540 hours, for $224,100
Jonathan Zaul: 503 hours, for $208,745

Which results in an additional net reduction from LCHB lodestar of $281,619. Add this to the reduction for Ten Eyck and Wintterle, and you get a total reduction of $833,338 from LCHB's reported lodestar.

Thornton's adjusted total hours/lodestar for Jordan and Zaul (using Thornton rates), based on the hours invoices to Thornton, should be:

Christopher Jordan: 359.50 hours, for $152,787.50
Jonathan Zaul: 319 hours, for $135,575.00

This results in a net lodestar *increase* of $26,987.50 for these two attorneys for Thornton Law. This should be noted as at least a modest net offset against the lodestar that needs to be cut elsewhere.

(3) Andrew McClelland's and Virginia Weiss's lodestar checks out OK on our end - everything we reported for them was specific to LCHB, even if they may also have done work for Thornton, which Thornton appears to have accounted for separately on their report. I do not see duplication based on my review of our records. I can't speak to the accuracy of their hours for Thornton on Thornton's end.

Evan/Mike, please feel free to check my math on your end. I tried to double-check but am also in grief over the election so my mind's a little hazy.

Dan

-----Original Message-----
From: Goldsmith, David [mailto:dgoldsmith@labaton.com]
Sent: Wednesday, November 09, 2016 3:38 PM
To: Chiplock, Daniel P.
Subject: RE: State Street

Appreciate your input

-----Original Message-----
From: Chiplock, Daniel P. [mailto:DCHIPLOCK@lchb.com]
Sent: Wednesday, November 09, 2016 2:55 PM
To: Goldsmith, David
Subject: Re: State Street

For what it's worth I strongly agree with just one fulsome letter on this issue.

Sent from my iPhone

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 11-cv-10230 MLW

- -x

ARKANSAS TEACHER RETIREMENT SYSTEM, et al.,

Plaintiffs,

-against-

STATE STREET BANK AND TRUST COMPANY,

Defendant.

- -x

JAMS
Reference No. 1345000011

- -x

In Re: STATE STREET ATTORNEYS' FEES

- -x

June 16, 2017
8:14 a.m.

B e f o r e :

SPECIAL MASTER HON. GERALD ROSEN
United States District Court, Retired

Deposition of DANIEL P. CHIPLOCK, taken by Counsel to the Special Master, held at the offices of JAMS, 620 Eighth Avenue, New York, New York, before Helen Mitchell, a Registered Professional Reporter and Notary Public.

These new agency attorneys, when they came on in March, were trained to do what every other staff attorney is trained to do when they do work in our office, which is religiously send your time to our internal time keeping department, keep careful record of your time. Which they did. Religiously so.

We did not know, because we didn't have reason to believe that they were doing that, and that's why the time for those two individuals -- even though they're constantly sending their time to their agency and they're constantly letting the Thornton lawyers know what they're doing, they're also inputting their time into our system, which they should not have been doing.

So that -- the process broke down. And from my vantage point, it was sort of an anomaly created by the absence of some key people, as evidenced to me by the fact that we got

it right earlier that year when one of our key people was around.

So that's not an excuse --

JUDGE ROSEN: So earlier in the year the time was not double counted?

THE WITNESS: Correct, yes.

So it's just for those two individuals for the three or so months that they worked on the case, because at the get-go they were trained by somebody, I think in our IT department, who didn't know who from who, that this is how we keep track of our time at Lieff Cabraser; you need to be careful, you need to send it to our timekeeper, and that's what they did.

So that's why the time for those two individuals was included in our system and it was never caught. And that falls on me. When I'm reviewing our time in September of 2016, which is more than a -- almost a year and a half later, you know, the passage of time and my ignorance that

these people were not trained in the way they should have been trained with respect to their time keeping -- I'm paying attention to their work product, to everybody's work product, and I'm assuming that they were trained correctly, but when I'm reviewing time in September of 2016, over a year later, it's not at the forefront of my mind that there may be time in there for certain staff attorneys which shouldn't be. I think it's been taken care of.

So I've kicked myself a thousand times since this process began as to why my memory banks didn't work better in September of 2016 --

JUDGE ROSEN: You had a lot on your mind and a lot to dangle, and you didn't have a process in place to capture this at a later point.

THE WITNESS: Right.

JUDGE ROSEN: Neither firm did, neither Labaton nor Lieff.

THE WITNESS: That was a breakdown in the process, and it was made possible by the absence of some important people at the time they were trained.

With respect to Mr. Zaul and Mr. Jordan, who you met, who we shared responsibility for a time with Thornton, I think Thornton was financially responsible for about eight weeks of their time. They entered their time into our system so that we had the capacity to create an invoice that we could then send to Thornton.

I delegated that process to Nick, and to Kirti, to work out with our accounting department creating an invoice and sending it off to Thornton so that those hours are properly accounted for and paid for.

What did not happen is once we got paid for that time, once the check came in --

JUDGE ROSEN: Didn't come off

Chiplock

the rolls.

THE WITNESS: -- that time needed to be deleted from our system, and that instruction, that specific instruction, was never given to our accounting department. And, again, that ultimately falls on me.

Now, in my defense, I'm thinking I've delegated the issue of billing and accounting for time appropriately, I've delegated it elsewhere, and it's being taken care of, but I was not explicit enough with that -- with that final instruction, which is, "Once we get paid, that time has to come out of our system, because Thornton is obviously going to take credit for time that it's paid for, as it should." So that's my fault also.

And so in September of 2016, when I'm reviewing time records, I am not thinking to myself, "There's time in our system that should not be there, I should go back and check."

Chiplock

JUDGE ROSEN: So that's at the front end.

THE WITNESS: Yes.

JUDGE ROSEN: At the back end --

THE WITNESS: What would have helped me to figure it out?

JUDGE ROSEN: Yes.

THE WITNESS: It would have helped -- it probably would have helped had I seen the other firms' fee petitions before they got filed.

JUDGE ROSEN: And you didn't?

THE WITNESS: I did not.

JUDGE ROSEN: Either you or some monitor for the three firms to homogenize the petition to make sure that things like this didn't happen?

THE WITNESS: Yeah, and clearly there were overlapping names on the different fee petitions.

That was completely transparent. Nobody was hiding the fact that there was the same people on

Chiplock

different ledgers. And Judge Wolf did not comment on that fact, after -- he called the papers excellent.

So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger.

Had I seen the other two petitions and seen the overlapping names, it might have spurred me -- I can't say for certainty, but it might have spurred me to say, "I'm going to go back and -- it's okay that there are the same names here, but I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in."

JUDGE ROSEN: And that the same names and the same time was not on both petitions?

THE WITNESS: Right. Which is what I'm saying.

JUDGE ROSEN: For the same time frame?

Chiplock

THE WITNESS: For the same time -- yeah. The hours that needed to be deleted should have been deleted, and weren't. So that's...

JUDGE ROSEN: Look, we all learn from hindsight --

THE WITNESS: Correct.

JUDGE ROSEN: -- but in the benefit of hindsight, and best practices going forward, do you believe that allocating work done by staff attorneys employed by your firm, or by Labaton, for purposes of a fee petition to another firm, is a best practice in terms of transparency to the court, in terms of transparency to the public, in terms of avoiding these kinds of errors, which are human errors -- you're beating yourself up. You're a busy guy and you have substantive responsibility for the case, you're beating yourself up for that when in fact inherent in this system was a very high potential for exactly this sort of

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 11-cv-10230 MLW

- -x

ARKANSAS TEACHER RETIREMENT SYSTEM, et al.,

Plaintiffs,

-against-

STATE STREET BANK AND TRUST COMPANY,

Defendant.

- -x

JAMS
Reference No. 1345000011

- -x

In Re: STATE STREET ATTORNEYS' FEES

- -x

June 16, 2017
1:35 p.m.

B e f o r e :

SPECIAL MASTER HON. GERALD ROSEN
United States District Court, Retired

Deposition of KIRTI DUGAR, taken by Counsel to the Special Master, held at the offices of JAMS, 620 Eighth Avenue, New York, New York, before Helen Mitchell, a Registered Professional Reporter and Notary Public.

Dugar

A No. It's a -- historically, I have not. Although, now lately I have begun to implement measures to do that. In fact, I mean, we've implemented a script in our Relativity where I am now able to gather that.

In many ways it is still complicating and a lot of work to do that, but should a need like this arise again I would be able to do it now. So that is a change I've implemented, probably after the situation here.

JUDGE ROSEN: How did you learn about the double counting error?

THE WITNESS: Pardon me?

JUDGE ROSEN: How did you learn about the double counting error?

THE WITNESS: Dan Chiplock would have told me. I would have asked him -- one day he's asking, you know, "Do you have this data," I said, "Dan, what's going on? Do you want to tell me?" So he would have told me then.

JUDGE ROSEN: Were you involved in figuring out how it happened?

THE WITNESS: In a general

Dugar

sense I've been helping Dan Chiplock --

JUDGE ROSEN: I'm talking back in the November 8 through 12 time period.

THE WITNESS: I was not involved with the fee petition at all.

JUDGE ROSEN: No. No, no, no. Once the double counting error was discovered, did you work with Dan to figure out how it happened?

THE WITNESS: We were wracking our brain to figure out that answer, and I think the only thing I could come up with, it was just network oversight, there was nothing intentional about it.

It's a small amount of time -- it's not in the global scheme of things. Not to say it doesn't have value, it has value. It was just -- in fact, if you go by intention -- to my mind, I'm speaking for myself and behalf of my firm -- you know, we clearly, with Jon Zol and Chris Jordan, if you look at it, I have instructions

Dugar

to them that "Make sure in your time entry you enter for, you know, review of TNN folders." So the intention was always to transfer.

The only thing is that in this whole -- all the structures and everything we have, Chris Jordan and Jon Zol were entering time in our system, or their time was getting entered in our system. So in this particular -- and then they were getting invoiced. So the time entry would maintain there because that's the source of the generation of an invoice, but it just -- you know, when you're doing the fee petition, putting all things together, I am not involved, and usually never involved in that process. It just got lost. It is just -- what do you just call -- inadvertent honest mistake. That's really what it is.

Our intention always was -- I knew it at the time, and whether if I had been involved with the fee petition

Dugar

would I -- chances are I may have picked it up, because I generally keep these things in the back of mind.

But that's really all that happened here. From that point of view.

JUDGE ROSEN: Okay.

Elizabeth, anything else?

BY MS. MCEVOY:

Q One small point.

You mentioned there was another case other than BoNY Mellon that had ended in the beginning of 2015. Was that Schwab?

A Schwab was still continuing at that time.

Q Did that case --

A But there were a lot of reviewers in Schwab that were released. Two of the people I put onto State Street were from that group, and they were -- also had been working with me for a long time, and they had actually worked on the -- Peter Roos, one of them, he was a former partner at Baker McKenzie, and Ryan Sturtevant is the other one, who is a

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

CONSOLIDATED RESPONSE BY LABATON SUCHAROW LLP, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, AND THORNTON LAW FIRM LLP TO SPECIAL MASTER'S JULY 5, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Labaton Sucharow LLP ("Labaton Sucharow"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton," and collectively with Labaton Sucharow and Lieff Cabraser, the "Firms"), respectfully provide this consolidated response to the Special Master's July 5, 2017 Request for Supplemental Submission.

I. PRELIMINARY STATEMENT

The Special Master invites the Firms to now "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation." The Firms wish to note for the record that in the course of the Special Master's investigation, the Firms have provided an abundance of information that should inform the Special Master's findings, conclusions, and recommendations. Specifically, the Firms each participated in multi-hour informal interviews with the Special Master, his counsel, and his technical advisor on April 4 and 5, 2017; collectively responded to 193 interrogatories on June 1, June 9 and July 10, 2017; collectively responded to 104 document requests by producing more than 176,000 pages of requested documents; and produced witnesses for a total of 27 depositions between June 5 and July 17 2017.

The Firms respectfully submit that the substantial factual record developed by the Special Master during his investigation does not warrant any change in the Court's November 2, 2016 Fee Award [Dkt. No. 111] nor the imposition of sanctions on any of the Firms. The reasonableness of the Firms' Fee Petition is further supported by the accompanying declaration of William B. Rubenstein ("Rubenstein Decl."), the Sidley Austin Professor of Law at Harvard Law School, and one of the nation's leading national experts on class action law and practice.

II. RESPONSE TO AREAS OF CONCERN RAISED BY THE COURT AND ADDRESSED BY THE SPECIAL MASTER

The Firms submit that the extensive factual record, along with the declaration of Professor Rubenstein, should lead the Special Master to make the following findings:

- The Firms employed the correct legal standards in their request for an award of attorneys' fees and expenses. *See* Mem. of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Brief") [Dkt. No. 103-1] at 3-5, 24; Rubenstein Decl. at 7-12, 27-34.

- Except as stated below and previously on the record in this case, as well as in the Firms' discovery responses to the Special Master, the representations made by the Firms in the request for awards of attorneys' fees and expenses were accurate and reliable, and counsel asserted a proper factual basis for what was represented to be the lodestar for each firm. *See* LS Interrog. Resp. Nos. 17-19, 23-25, 27-29, 32, 33, 36, 37, 40, 41, 44-47, 51, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 47, 48, 53, 57, 62, 63, 64, 72, 73; Thornton Interrog. Resp. Nos. 49-51, 55, 64, 66.

- The Firms acknowledge, as they did in their November 10, 2016 letter to the Court [Dkt. No. 116], that some Staff Attorney lodestar was "double-counted" in the Firms' request for attorneys' fees. These errors were unintentional and brought to the Court's attention by the Firms promptly upon their learning of the mistakes. *See* LS Interrog. Resp. Nos. 63-66; LCHB Interrog. Resp. Nos. 39, 40, 67, 68; Thornton Interrog. Resp. Nos. 67, 69, 74, 75. The factual record submitted to the Special Master during the course of this investigation confirms the Firms' position that the errors were unintentional.

- The representations made in the November 10, 2016 letter to the Court [Dkt. No. 116] were and are materially accurate and reliable. LS Interrog. Resp. Nos. 63, 66, 67, 71; LCHB Interrog. Resp. Nos. 65, 68, 69, 72, 73; Thornton Interrog. Resp. Nos. 70, 71, 74-76.

- Labaton Sucharow submits that its representations requesting a service award to Arkansas Teacher Retirement System were accurate and reliable. *See* LS Interrog. Resp. Nos. 4, 17; Belfi Dep. at 33:23-34:9, 37:12-41:6; Goldsmith Dep. at 18:6-23:18.

- Neither Lieff Cabraser nor Thornton had clients in this matter for which they sought service awards.

- None of the Firms made representations to the Court concerning the service awards sought by counsel for the ERISA plaintiffs.

- The attorneys' fees, expenses and service award to Arkansas Teacher Retirement System were reasonable, and none should be reduced beyond the $2 million the Firms already have contributed to the cost of the Special Master's investigation. In addition to this $2 million, the Firms have incurred substantial other costs relating to this investigation, including, for Labaton Sucharow and Thornton, the costs of outside counsel; and, for all three firms, the substantial time spent by senior members of each firm participating in this investigation. The costs already associated with this investigation shall continually serve as an important reminder to the Firms to double check future fee petitions to ensure their clarity and accuracy to the court. The Firms are fully cognizant of the lessons of this investigation, as reflected in the Firms' recommendations on best practices described below. That fact notwithstanding, the net effect of the errors in reported lodestar were modest with respect to the lodestar multiplier that was used as a cross-check against the requested percentage-based fee, and still well within the bounds of what is considered acceptable in this Circuit. *See* LS Interrog. Resp. Nos. 59, 63; LCHB Interrog. Resp. Nos. 59, 61; Fee Brief at 7, 24-25; Rubenstein Decl. at 30-34.

- No misconduct occurred in connection with the attorneys' fees, expenses, or service award to Arkansas Teacher Retirement System previously ordered. The double-counting of lodestar at the center of the Special Master's inquiry, while regrettable both in terms of the initial confusion caused to the Court and the subsequent substantial time and expense devoted to explaining the matter, was an inadvertent and honest mistake. LS Interrog. Resp. Nos. 33, 36, 37, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 39, 65, 67; Thornton Interrog. Resp. Nos. 67, 69, 75.

- None of the Firms should be sanctioned in this matter.

III. SPECIAL MASTER'S REQUEST FOR INPUT ON SPECIFIC TOPICS

A. Request No. 1 – Billing Practices Relating To Staff Attorneys

For all three of the Firms, billing rates for Staff Attorneys are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of an appropriate market rate for the legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22; Politano Dep. at 35:22-37:2, 38:19-42:2, 45:6-49:4; Johnson Dep. at 12:5-16; 13:4-17. This approach is consistent with the general practice of the marketplace and applicable case authority. *See* Rubenstein Decl. at 2, 12-30. Billing Rates for Staff Attorneys are not dependent on what they are actually paid, in the

same way that billing rates for associates and partners are not dependent on what they are actually paid. Fineman Dep. at 48:3-17, 50:6-11; Rubenstein Decl. at 29-30; Johnson Dep. at 20:5-22:13, 25:7-19.

With respect to the second part of this request, Labaton Sucharow responds that all of its Staff Attorneys were Labaton Sucharow employees, and accordingly the question of whether "agency" versus non-agency Staff Attorneys should appropriately be billed at the same rate does not apply to it. *See* Johnson Dep. at 19:4-11, 22:5-13.

Lieff Cabraser responds that those of its Staff Attorneys who were paid directly by the firm (versus those paid through an agency) performed the lion's share of Lieff Cabraser's document review in the litigation. *See* LCHB Interrog. Resp. No. 24. Some Staff Attorneys actually began their work on the litigation as agency attorneys before being hired directly by Lieff Cabraser. *Id.* By the time the Staff Attorneys were working on the detailed issue memoranda discussed during discovery in this matter (which entailed a deeper analysis of the documents reviewed), only one LCHB Staff Attorney was still being paid through an agency—Virginia Weiss. *Id.* The remaining LCHB Staff Attorneys were all being paid directly by Lieff Cabraser, and their hours heavily outnumbered those contributed by agency attorneys. *Id.* Throughout the litigation, LCHB Staff Attorneys were given the same type of assignments, supervised in the same manner, and expected to produce the same quality of work regardless of whether they were paid directly by the firm or through an agency. *See, e.g.*, LCHB Interrog. Resp. Nos. 19, 22, 29-30; Chiplock Dep. at 113:14-116:10; Dugar Dep. at 95:7-99:12; Fineman Dep. at 41:4-8, 43:14-44:11; Heimann Dep. at 51:18-53:2.

For instance, while being paid through an agency in 2015, Ms. Weiss authored detailed issue memoranda just as the other Staff Attorneys did. These memoranda have been produced to

the Special Master. *See* LCHB-0028663-0028672 (and exhibits at LCHB-0028677-0029118); LCHB-0029119-0029124 (and exhibits at LCHB-0029125-LCHB-0029182). So, for that matter, did the two Staff Attorneys (Ann Ten Eyck and Rachel Wintterle) who were physically situated in LCHB's San Francisco offices for several months but contracted through an agency that was paid directly by Thornton. These memoranda have also been produced. *See* LCHB-0003314-0003319; LCHB-0029183-0029200 (and exhibits at LCHB-0029201-0031489); LCHB-0031490-0031528 (and exhibits at LCHB-0031529-0039667). The only two (2) other LCHB Staff Attorneys who were still paid by an agency in 2015 (Jade Butman and Andrew McClelland) did not produce memoranda simply because they had stopped working on the State Street Litigation well before those assignments were given. *See* LCHB Interrog. Resp. No. 24.

Billing rates for Staff Attorneys at Lieff Cabraser are not impacted by whether they are being paid directly by the firm or are being paid through an agency; they are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of appropriate market rates for similar legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22. Even so, in 2015, the amount paid by the firm to an agency for an agency attorney's work, on an hourly basis, was comparable to the hourly pay the firm would have made directly to a Staff Attorney being paid directly by the firm. *See* Fineman Dep. at 36:21-38:7.

B. Request No. 2 – The Appropriate Venue For Determining Hourly Billing Rates

The Firms set their billing rates based on what they perceive to be, as described under applicable Supreme Court and First Circuit authority, "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *See Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) (quoting *Blum v. Stenson*, 465

U.S. 886, 895 n.11 (1984)); LS Interrog. Resp. No. 51; Johnson Dep. at 12:5-14:19; LCHB Interrog. Resp. Nos. 47, 48, 53, 64; Fineman Dep. at 76:7-77:8; Thornton Interrog. Resp. Nos. 49, 50, 51, 55. Labaton Sucharow is in New York, Lieff Cabraser is principally in San Francisco, and Thornton is in Boston. *Id.* Each of the Firms, however, maintains a national class action practice and litigates in many locations other than these home bases. Given the specific role that hourly rates play in determining the reasonableness of the overall fee award in this case, the Firms' rates should not be adjusted to Boston rates for purposes of analyzing the fee petition. *See* Rubenstein Decl. at 19-20 and n.31.

As was mentioned above, the Firms' rates were not provided in the fee application as the "basis" for their requested fee, but rather simply to enable a "cross-check" of the overall time and effort expended on the case against the requested "percentage-of-fund" fee. The First Circuit, it should be noted, is predominantly a percentage-of-fund jurisdiction, and does not mandate a lodestar cross-check. *See In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting the "distinct advantages" of the percentage-of-fund method over the lodestar method of calculating fees); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005); Rubenstein Decl. at 8-9. When a lodestar cross-check is performed regardless, the focus is not on the "necessity and reasonableness of every hour" expended by counsel, but rather on whether the fee broadly reflects the degree of time and effort expended by counsel. These points were briefed before Judge Wolf in support of the Firms' fee award, and were not disputed. *See* Fee Brief at 3-4, 24. Indeed, when David Goldsmith revealed to Judge Wolf that the Firms were "contemplating [a percentage of the fund] in the 25 percent range" for the attorneys' fees, Judge Wolf responded, "That's great . . . I usually start with 25 percent in mind." Trans. of Status Conference (Dkt. No. 85), June 23, 2016, at 15:5-22.

As noted above, Labaton Sucharow, Lieff Cabraser and Thornton all maintain complex class action practices that are national in scope. Accordingly, the Firms' billing rates – which were based on rates used by national peer plaintiff and defense law firms that litigate matters of a similar magnitude – are appropriate and were set using the correct legal standard. *See* LS Interrog. Resp. Nos. 44, 51, 62; Thornton Interrog. Responses 49, 51, 55, 66; LCHB Interrog. Resp. Nos. 47, 48, 53, 64.

To the extent that rates prevailing in the Boston legal market have particular or greater relevance, Professor Rubenstein has opined that Plaintiffs' counsel's billing rates were reasonable. Professor Rubenstein forms these opinions on the basis that (a) Plaintiffs' counsel's rates are consistent with rates that courts in Massachusetts have awarded in approving class action fee petitions in recent years; (b) the rates fall far below those that have been judicially approved in the context of fee petitions submitted by defense firms in bankruptcy cases in this District; and (c) the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in the District of Massachusetts and in $100-$500 million cases throughout the country. *See* Rubenstein Decl. at 1-3, 12-27. Professor Rubenstein has also shown that if one goes to the trouble of adjusting the out-of-town rates to the Boston market, it has about a 3% effect on the total lodestar, meaning that the cross-jurisdictional rate differentials are immaterial, especially for cross-check purposes. *Id.* at 21-22. Moreover, Thornton has many years of experience in the Boston market, and its court-approved rates are comparable to those of the other firms here.

C. Request No. 3 – The Role Of Lead Counsel In Preparing And Filing Fee Petitions In Multi-Firm Class Actions

In multi-firm class action cases, lead counsel has overall responsibility for preparing and filing a fee petition. This responsibility generally includes researching and drafting the

supporting brief, drafting the principal fee declaration or portion of the omnibus settlement and fee declaration in support of the fee petition, securing individual fee and expense declarations from co-counsel (often by circulating a model declaration), and securing any client or expert declarations that may be submitted. Lead counsel may and often will delegate certain research and drafting assignments to co-counsel.

Lead counsel's responsibility with respect to the accuracy of individual fee declarations other than its own has limitations. For example, lead counsel supplies a template for such declarations, but does not require the use of any particular language. Moreover, because lead counsel does not have access to co-counsel's internal timekeeping records, lead counsel must rely on co-counsel to report their own lodestar accurately. *See* LS Interrog. Resp. No. 56; Goldsmith Dep. at 119:3-20; Chiplock Dep. at 228:7-9 ("I don't view it as Labaton's ultimate responsibility to ensure that Lieff Cabraser's lodestar was reported accurately.").

Lead counsel has a responsibility to make reasonable efforts to detect and remedy errors in co-counsel's fee declarations to the extent they may be apparent on their face. *See* Goldsmith Dep. at 119:3-120:17. Here, the existence of double-counting between the Thornton and Labaton Sucharow fee declarations, and between the Thornton and Lieff Cabraser fee declarations, was not apparent on the face of any single fee declaration, but rather would become apparent only if the fee declarations were compared with one another. *Id.*

Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys, all of whom were Labaton Sucharow employees, to Thornton and invoiced it on a monthly basis for the work those Staff Attorneys performed. *See* Goldsmith Dep. at 91:20-92:3, 95:19-22; Rogers Dep. at 70:3-73:3; Politano Dep. at 22:8-24:23, 26:11-19, 28:15-23; LS Interrog. Resp. Nos. 23, 32, 37. Labaton Sucharow

invoiced Thornton at a rate of $50 per hour for each staff attorney. *See e.g.* TLF-SST-000153; TLF-SST-003418 – TLF-SST-003420; TLF-SST-000415. The $50 hourly rate included a share of the overhead costs associated with each staff attorney. Garrett Bradley Dep. at 93:23-95:5.

In reaching and implementing this cost-sharing arrangement, Labaton Sucharow and Thornton did not discuss which firm would claim the hours expended by these Staff Attorneys in its individual fee declaration. *Cf.* Sucharow Dep. at 26:20-22, 38:20-39:4; Belfi Dep. at 59:6-15; Goldsmith Dep. at 104:12-107:5, 122:6-13; Rogers Dep. at 95:16-96:2; Zeiss Dep. at 24:19-25:4; Politano Dep. at 22:22-25; LS Interrog. Resp. No. 33. It has since become apparent that the Firms had different views as to which firm would claim which Staff Attorneys on its respective fee petitions. *See* Chiplock Dep. At 135:20-137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."); Garrett Bradley Dep., at 76:6-77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application."); Rogers Dep., at 91:18-96:2 ("Q: And did you have an understanding . . . whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up front," and later stating that he had "no knowledge" of any discussions concerning why Thornton was allocated staff attorneys, nor any discussions concerning whether or how Thornton would claim staff attorneys on its fee petition)"; Goldsmith Dep., at 105:9-106:13 (also acknowledging that there was never an agreement concerning how Labaton Sucharow and Thornton would claim

staff attorneys on their respective fee petitions, but clarifying that he "certainly never made" an assumption "that the Thornton firm would put those people on its lodestar report").

In other cases involving staff attorney cost-sharing, Labaton Sucharow's general practice has been to report all hours billed by its staff attorney employees on its own fee declaration, and to work out any associated economic issues with co-counsel separately. *See* Politano Dep. at 22:18-25 (Q: "Did you have any understanding of whether those staff attorneys would be reported on the firm's fee petition? 'The firm' being Labaton." A: "The common practice was that it would be on Labaton's fee declaration, but there was no discussion at that point as to the way it would be handled."), 23:14 (testifying that this "common practice" was followed "[n]inety percent of the time"); Rogers Dep. at 96:13-17 ("I've seen it done both ways. I think it's more common to do what Judge Rosen's referring to as the latter . . . one big omnibus fee petition and then kind of dole it out at the end."); Johnson Dep. at 32:3-4 (alternative practice of cross-reporting has been used in "very, very few cases"); Goldsmith Dep. at 97:11-99:16 (alternative practice used in two other cases); Goldberg Dep. at 46:10-11 (alternative practice used in "[o]nly one case that I remember"); LS Interrog. Resp. No. 32; *see also* Zeiss Dep. at 24:21-25:2 ("[F]rom my perspective . . . the lodestar reports are reports of each firm's personnel based on their own time records. . . . It would never occur to me that one firm could be reporting personnel from Labaton.").

Indeed, among the 16 class action matters that Labaton Sucharow has identified in discovery as involving staff attorney cost-sharing, *see* LS Interrog. Resp. No. 32, ten (10) have proceeded to a court-approved settlement to date.[1] Labaton Sucharow adhered to its general

[1] The 10 settled cases are *City of Providence v. Aeropostale*, *Broadcom*, *Celestica*, *Countrywide*, *J. Crew Group*, *Lehman Brothers*, *Massey Energy*, *Nu Skin*, *Regions Morgan Keegan*, and *Semtech*.

practice of reporting staff attorney time exclusively in its own fee declaration in at least seven (7) of the ten (10) settled cases. Still, Labaton Sucharow acknowledges that, like here, other law firms have occasionally claimed Labaton Sucharow employed staff attorneys on their fee petitions. Johnson Dep. at 28:24-29:7.

Here, the lack of discussion (both internally and externally) as to which firm would report the hours on its individual fee petition, Labaton Sucharow's familiarity with its own general practice, and Thornton's reasonable belief that it would list the Staff Attorneys for whose labor and overhead it had paid, caused a good faith error to occur: Labaton Sucharow followed its general practice, while Thornton acted in accord with its own reasonable beliefs, and a good faith mistake was made.[2]

Nicole Zeiss, Labaton Sucharow's Settlement Counsel, reviewed each fee declaration individually for form, pursuant to her usual practice at the time. *See* Zeiss Dep. at 11:15-22, 55:25-56:3; LS Interrog. Resp. No. 54. She did not compare the declarations to each other, however. It was not her usual practice to do so; there is ordinarily no reason to believe that there should be any overlap between employees of different firms; and she was not told by anyone at Labaton Sucharow that there was the potential for attorney time to be reported in more than one fee declaration. *See* Zeiss Dep. at 24:19-25:4, 56:3-10; LS Interrog. Resp. No. 56.

Additionally, the existence of double-counting between Thornton and Lieff Cabraser fee declarations was smaller in kind and less obvious on its face, and would not have been immediately clear on first comparison, particularly to a reviewing attorney from Labaton

[2] The differential in hours reported by the two firms for some Staff Attorneys appears to have occurred at least in part because the firms used different sources. Thornton used numbers that were in a report sent to Thornton by Todd Kussin in an email dated August 25, 2015 (TLF-SST-031158); Labaton Sucharow used numbers that it pulled from its system approximately a year later (LS Interrog. Resp. No. 54).

Sucharow. Although the Thornton and Lieff Cabraser fee declarations include a handful of overlapping Staff Attorney names, the numbers of hours and lodestars for such Staff Attorneys consistently differ, and Labaton Sucharow in any event was unaware of any agreement between Thornton and Lieff Cabraser regarding which of those two firm's fee declarations should reflect the time of attorneys hosted by Lieff Cabraser but paid for by Thornton. See LS Interrog. Resp. No. 36; Goldsmith Dep. at 122:8-10. Moreover, of the six (6) attorneys who reported time that was listed by both Lieff Cabraser and Thornton in their fee declarations, the hours for two (2) of them (Virginia Weiss and Andrew McClelland)[3] were ***correctly*** allocated between Lieff Cabraser and Thornton and not double-counted—meaning there actually were no errors as to these two particular attorneys for Labaton Sucharow to detect. *See* LCHB Interrog. Resp. No. 40; Chiplock Dep. at 151:8-152:2.

This leaves only four (4) attorneys who reported at least some time that was inadvertently duplicated and incorrectly included in both Lieff Cabraser's and Thornton's fee declarations—Christopher Jordan, Jonathan Zaul, Ann Ten Eyck, and Rachel Wintterle.[4] *See* LCHB Interrog.

[3] It bears mentioning that both Ms. Weiss and Mr. McClelland were agency attorneys who were not paid directly by Lieff Cabraser, meaning Thornton paid an outside agency (not Lieff Cabraser) directly for the hours spent by Ms. Weiss and Mr. McClelland reviewing documents assigned to Thornton. *See* LCHB Interrog. Resp. Nos. 19, 24, 31; Hoffman Dep. at 60:2-8; 60:19-61:16; 80:8-13. Lieff Cabraser accordingly did not send invoices to Thornton for these two attorneys. Furthermore, Ms. Weiss worked remotely and thus was not making use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

[4] Messrs. Jordan and Zaul were the only Staff Attorneys who were directly paid by Lieff Cabraser but who also performed at least some work (roughly 9 weeks) that was reimbursed by Thornton (and later included in Thornton's fee declaration). *See* LCHB Interrog. Resp. Nos. 24, 31, 38; Hoffman Dep. at 61:17-62:5. Messrs. Jordan and Zaul were accordingly the only two Lieff Cabraser lawyers whose time (again, 9 weeks' worth) was invoiced to Thornton. Messrs. Jordan and Zaul, like Ms. Weiss, also worked remotely, and therefore did not make use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

Ms. Ten Eyck and Ms. Wintterle, meanwhile, were lawyers hired from and paid via an outside agency for the entirety of the 3 to 4 months they worked on the case. *See* LCHB

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Resp. Nos. 31, 65; Chiplock Dep. at 152:3-154:20, 156:7-21. And for each of these four (4) attorneys, the duration of the cost-sharing or hosting arrangement (and the resulting inadvertent redundancy in time-reporting) ranged from just 9 weeks to roughly 3 ½ months—modest, in other words, in comparison to the more than 5-year lifespan of the litigation. *See* LCHB Interrog. Resp. Nos. 31, 38, 65; Hoffman Dep. at 61:17-62:5 (describing sharing relationship as to Messrs. Jordan and Zaul "[t]hat didn't go on for maybe more than a month or two."). This factor (combined with the correct allocation of the lodestar by the two (2) other shared Lieff Cabraser/Thornton Staff Attorneys named above) made any timekeeping duplication between Lieff Cabraser's and Thornton's fee declarations even less readily detectable by Labaton Sucharow than the duplication between Labaton Sucharow's and Thornton's fee declarations.

Notwithstanding the foregoing, Labaton Sucharow acknowledges that it, as lead counsel, bore final responsibility to avoid errors in the Fee Petition that reasonably could be detected. *See* Goldsmith Dep. at 117:4-11. The double-counting in both pairs of fee declarations regrettably was not detected before the Fee Petition was filed. Upon learning of the double-counting, however, Labaton Sucharow disclosed it to the Court promptly, publicly, and candidly. *See* Goldsmith Dep. at 165:15-166:15.

D. Request No. 4 – Accuracy Of Fee Declaration Language

The language concerning "hourly rates" that was contained in the individual fee declarations was never intended to mislead the Court, but rather was intended to inform the Court that the hourly rates were the same as or materially similar to rates accepted by courts in other class action matters in which the Firms had filed fee petitions, and were not special rates

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Interrog. Resp. Nos. 19, 24, 31, 40. Lieff Cabraser did not send invoices for the hours worked by these two attorneys because Thornton paid the agency directly for their time. *See* LCHB Interrog. Resp. Nos. 19, 24, 38, 40.

for this action. *See* LS Interrog. Resp. Nos. 61, 71; LCHB Interrog. Resp. No. 63. For Labaton Sucharow and Lieff Cabraser, the fee petitions were also meant to impart that the same annual rates for each attorney and non-lawyer staff person listed therein are used in the lodestar reports for all fee petitions in a given year (typically for purposes of a lodestar cross-check). *Id.*; *see also* Rubenstein Decl. at 12 n.14.

Nonetheless, we recognize that the Court and perhaps others have interpreted this sentence in a manner other than as intended. In particular, we understand that the Court read this sentence to mean that the law firms' rates are billed to clients that pay for the firms' services on an hourly basis. Labaton Sucharow and Lieff Cabraser have in limited circumstances had clients who have paid by the hour that were actually billed at those rates, or the analogous rates in a given year, and the rates in question (or comparable rates in earlier years) were in fact the "regular" rates charged in such circumstances. *See* LS Interrog. Resp. Nos. 45, 46; Johnson Dep. at 53:13-16; Politano Dep. at 43:4-11; LCHB Interrog. Resp. Nos. 49, 54, 63; Heimann Dep. at 87:7-89:7; Chiplock Dep. at 194:24-198:5, 204:6-205:3. Therefore, even if the word "charged" were read in the literal fashion described above (rather than in the manner it was intended), the "hourly rates" sentence on its face is not misleading as to Labaton Sucharow and Lieff Cabraser. It nonetheless remains true that the overwhelming majority of these firms' clients (and all of Thornton's clients) retain the Firms' services on a contingency basis.

As concerns the language in Garrett Bradley's declaration that refers to the rates as those of attorneys and professional support staff "in my firm," Thornton responds that it did not intend through this language to suggest that all persons listed in the fee declaration were employees of Thornton. This language resulted from Thornton's use of a template declaration provided to all firms by Labaton Sucharow. Unfortunately, Thornton did not modify the template language

stating that all of the individuals listed in its fee petition were its own employees. As Thornton has acknowledged in its responses to the Special Master's inquiries and in depositions of its partners – *see, e.g.*, Garrett Bradley Dep. at 81:12-83:13 – it should have modified the language in the template Labaton Sucharow provided to make it more precise (for example, by inserting an additional phrase after "in my firm," such as "or performing work on behalf of my firm").

In an effort to avoid any potential confusion, misinterpretation, or perceived lack of transparency going forward, we recommend that counsel be encouraged to use the following revised and expanded language:

> The hourly rates for the attorneys and professional support staff in my firm, ***or performing work on behalf of my firm***, included in Exhibit A are the ~~same as my~~ firm's regular rates charged for their type of services ***in contingent-fee matters.*** ~~charged for their services, which~~ ***These rates (or materially similar rates)*** have been accepted ***by courts*** in other complex class actions ***for purposes of "cross-checking" lodestar against a proposed fee based on the percentage-of-fund method or determining a reasonable fee under the lodestar method.***
>
> ***Based on my knowledge and experience, these rates are within the range of rates normally and customarily charged in their respective cities by attorneys and professional support staff of similar qualifications and experience in cases similar to this litigation.***
>
> ***To the extent the firm represents clients in non-contingent/ hourly fee matters, these rates are also the regular rates that generally would be charged to those clients for services rendered. The firm's current clients, however, do not typically pay an hourly rate and instead retain the firm's services on a contingent-fee basis.***

This revised and expanded language is derived in part from the individual fee declarations submitted in the similar *Bank of New York Mellon* Indirect FX class action in which Lieff Cabraser and Thornton, but not Labaton Sucharow, were involved. *See* LCHB Interrog. Resp. No. 63; Chiplock Dep. at 195:14-202:22. The language is intended to clarify, among other

things, that the hourly rates used in connection with the lodestar cross-check of the requested fee—while fully supported, customary in the industry, and accepted by courts in other complex class actions—are used for all lodestar reports in a given year but are not typically billed to the firms' clients because the firms' clients do not typically pay by the hour. *See* Chiplock Dep. at 200:3-201:7, 208:15-209:18; Chiplock Dep. Ex. 2 (Lieff Cabraser fee declaration in *Bank of New York Mellon*); *see also* LS Interrog. Resp. Nos. 46 (setting forth rates charged to clients that paid by the hour), 71; LCHB Interrog. Resp. No. 63.

E. Request No. 5 – Factors To Consider In Setting Hourly Billing Rates Of Staff Attorneys

Labaton Sucharow submits that the appropriate factors and criteria law firm management should consider in setting hourly billing rates of "off-track" staff attorneys, including the Staff Attorneys referenced in the Fee Petition, are described in Labaton Sucharow's Responses to Interrogatory Nos. 44 and 45. *See also* Politano Dep. at 38:2-42:2.

Lieff Cabraser, for its response, refers to the response to Sections A and B above (and the testimony and discovery responses cited therein), in addition to the documents produced by Lieff Cabraser and the declaration by Professor Rubenstein.

Thornton, for its response, states that given the contingency nature of its work, Thornton does not set hourly billing rates annually or as a routine matter. *See* Thornton Interrog. Resp. Nos. 49, 51, 52, 55. In this case, Thornton used a rate of $425 per hour for the Staff Attorneys for whose labor and overhead it paid because that rate had been used and accepted by the court in *In re Bank of New York Mellon Corp.*, 12-MD-02335, S.D.N.Y., and because it was Thornton's understanding, from communications with co-counsel more than a year prior to the submission of the Fee Petition, that a rate of $425 per hour therefore would be reasonable to use in the State

Street Litigation. *See* Hoffman Dep. at 58:17-59:18; Garrett Bradley Dep. at 48:20-49:5; Thornton Interrog. Resp. Nos. 27, 52.

Thornton submits the following information concerning the hourly rate of Michael Bradley, the outside attorney who performed document review work on the matter, and for whose work Thornton used an hourly rate of $500 in its lodestar calculation. As Thornton has previously identified in its interrogatory responses, Mr. Bradley is an actively practicing, Massachusetts-admitted lawyer who occasionally performs work for Thornton and its clients. *See* Thornton Interrog. Resp. No. 45; Michael Bradley Dep. at 29:11-16. As detailed in his deposition and in Thornton's responses to interrogatories, Mr. Bradley is an experienced lawyer who has been practicing since 2005, including for the government and as a solo practitioner. *Id*. at 11:7-12:9. Michael Bradley is not an employee of the firm, but rather has provided legal services to the firm and its clients on occasion.

A need for Mr. Bradley's services arose in 2013, when the Firms began to receive documents in the State Street matter and, consequently, began staffing a document review. Garrett Bradley believed that Michael Bradley's experience as an attorney and his background, specifically his service as the former head of the Massachusetts Underground Economy Task Force, might make him particularly qualified to potentially provide a unique perspective on the documents he reviewed. As such, Garrett Bradley approached Michael Bradley, who agreed to assist Thornton with the document review. Garrett Bradley sought and received the approval of Michael Thornton, then-managing partner of Thornton, for this arrangement.

Michael Bradley was justified in requesting and receiving $500 per hour for his services. Michael Bradley Dep. at 28:17-29:5. Mr. Bradley and Garrett Bradley have testified that Michael Bradley's rate of $500 per hour was based on two key benchmarks. First, Michael Bradley had

been paid $450 per hour by a private client prior to beginning his work on the State Street matter.[5] Michael Bradley Dep. at 28:17-29:5. Second, Michael Bradley's $500 per hour rate was also benchmarked to his risk of receiving nothing for his time. Unlike in the case of his paying client, in the State Street matter Michael Bradley performed the work on a contingent basis, thus saving Thornton the upfront cost of paying him for his work, and taking on the risk that, if the case did not have a positive resolution for the Plaintiffs, he would not be compensated for his work. *See* Thornton Interrog. Resp. Nos. 43, 44; Michael Bradley Dep. at 28:17-29:5; Garrett Bradley Dep. at 53:22-54:10. Michael Bradley took this risk and performed work, without pay, for more than two years. Charging a slightly higher rate for Mr. Bradley's work than for the work of attorneys who were paid concurrently for their work accords with commonly accepted principles governing contingent fee matters. *See United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 13 (1st Cir. 2010) (quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969)) ("[T]he fact that a fee arrangement is contingent upon success is a relevant factor in determining the appropriate fee level. The reason is that 'the fact that the attorney is willing to take an all-or-nothing-arrangement might justify a fee which is higher than the going hourly rate in the community'"); *see also* Restatement (Third) of the Law Governing Lawyers § 35, Comment c, "Reasonable contingent fees" (2000) ("A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk.") *See also* Rubenstein Decl. at 30, n. 48.

[5] Indeed, Michael Bradley charged a private client $500 per hour in early 2017 as well. Michael Bradley Dep. at 16:17-17-3.

Finally, Thornton submits that, as his testimony and documents produced by Thornton demonstrate, Michael Bradley consistently reviewed documents in the Catalyst database over a two-year period. Mr. Bradley's work during this period totaled 449.1 hours. Thornton mistakenly undercounted this time in its lodestar chart, accounting for only 406.1 hours of his time. *See* Michael Bradley Dep. at 30:5-12; 55:13-56:10; 58:19-59:11; *see e.g.* TLF-SST-005020; TLF-SST-000588 – TLF-SST-000611; TLF-SST-010790; TLF-SST-010826; TLF-SST-010832; TLF-SST-013319.

F. Request No. 6 – Reasoning For Entering Into The Cost-Sharing Agreement In This Matter

Labaton Sucharow states that the principal reasons for entering into a cost-sharing agreement by which a firm employing staff attorneys invoices another firm for the work performed by one or more of those staff attorneys are to share costs and risk, so that the firm receiving and paying the invoices has "skin in the game" with respect to an ongoing and expensive project. Staff attorney cost-sharing is simply one example of the arrangements that law firms in multi-firm class actions make in an effort to share work, costs, and associated risk equitably. *See* Belfi Dep. at 50:19-51:16; LS Interrog. Resp. 30, 32 ; *see also* Chiplock Dep. at 127:11-128:16; Garrett Bradley Dep. at 43:4-13.

Here, as noted in No. 3 above, Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys to Thornton and invoiced Thornton on a monthly basis for the work those Staff Attorneys performed. While attorneys from both firms recall the cost-sharing arrangement, no one from either firm recalls an explicit agreement about how these hours would be accounted for on eventual fee declarations, which led to the reasonable assumptions and good-faith error described above.

Lieff Cabraser, for its part, assumed (like Thornton) that Thornton would include any Staff Attorney hours for which Thornton had borne financial responsibility, and thus the risk of non-payment, in its own lodestar report. LCHB Interrog. Resp. Nos. 34, 39, 40; Thornton Interrog. Resp. Nos. 31, 36. As noted above, four of the Staff Attorneys for whom Thornton shared financial responsibility with Lieff Cabraser were agency lawyers, for whom Thornton paid outside agencies directly. *See supra n.* 3, 4. Only two of the Staff Attorneys shared between Lieff Cabraser and Thornton were ordinarily paid directly by Lieff Cabraser. For just those two attorneys, therefore, Lieff Cabraser prepared invoices for the time to be reimbursed by Thornton (roughly 9 weeks' worth). *See supra* n. 4.

G. Request No. 7 – Recommendations On Best Practices

The Firms collectively submit the following recommendations that the Special Master may wish to include in his Report and Recommendation to the Court. Together we respectfully submit five global reforms that, taken together, will significantly reduce the likelihood of confusion, misinterpretation, or any perceived lack of transparency regarding counsel's disclosure concerning hourly rates, and will significantly reduce the likelihood of recurrence of errors of the kind found here. In addition, we submit individual policy changes that each firm will implement in order to further safeguard against the inadvertent errors that occurred in this case.

First, the Firms agree that, promptly after a court grants preliminary approval to a proposed settlement,[6] lead counsel shall commence or revisit a substantive dialogue with all

[6] *See* Goldsmith Dep. at 115:23-116:22 (116:17-22:"[I]n my mind, one of the reasons this happened is because you had a very large passage of time between the end of the review project and putting in the papers where the review project impacted the presentation."); 123:23-124:7 (preliminary approval is "the right time to do it because that's the time you have an actual settlement . . . . That is the point the lawyers are looking ahead to filing a settlement motion and

Footnote continued on next page

counsel in the case concerning protocols for reporting lodestar in a forthcoming petition for attorney's fees. The subjects of this dialogue shall include, without limitation, which law firms will submit an individual fee declaration; the hourly rates used for professionals and paraprofessionals; whether certain categories of time should be excluded in whole or in part; whether certain timekeepers should be excluded in whole or in part; and how time logged by staff attorneys or other attorneys engaged on a temporary basis will be reported. Lead counsel shall ensure that the lodestar reporting protocol is documented and circulated among all counsel, and that all counsel are in agreement before individual fee declarations are prepared and filed.[7]

Second, in cases where the costs of any staff may have been shared, lead counsel, upon receiving draft fee declarations from co-counsel, shall promptly circulate all such draft

Footnote continued from previous page
fee petition. So people are going to naturally have those issues in mind."), 124:8-18, 130:15-24; *see also* Chiplock Dep. at 174:24-176:17, 181:10-182:21 (testifying that significant and unusual factor here was passage of more than a year between (1) agreement in principle to settle litigation and discussions among counsel concerning lodestar reporting issues and (2) filing of fee petition).

[7] *See* Goldsmith Dep. at 122:4-127:3 (123:7-14: "[W]hen the court issues an order granting preliminary approval to the case, that should be the point, or at least the latest point, where all the counsel get together and discuss . . . how this is going to be handled."); Rogers Dep. at 105:12-15 ("[I]t probably would have been good for the three parties to have literally memorialized some kind of agreement."); Chiplock Dep. at 221:12-18 ("I think there should have been more coordination and communication amongst the firms before the individual fee declarations were submitted, in order to assure that we did not confuse the court."); Lesser Dep. at 90:13-15 ("Case of this size with this many firms, this number of attorneys involved, obviously, you can have better communication, more coordination . . . ."); Zeiss Dep. at 56:14-57:3 ("So now what I do is, when a settlement's passed to me, I ask our accounting department if there is any STA cost sharing, I speak with the litigation team, see if there's any STA cost sharing. . . . And then, if there is, yes, we talk internally about how we think it should be handled, and speak with the firms that are . . . sharing the costs and make sure we're all on the same page about how the time will be reported.").

declarations to all counsel before the fee petition is filed. All counsel shall review all the draft fee declarations closely and share any perceived errors or concerns with all other counsel.[8]

Third, each individual firm declaration submitted in support of a petition for attorney's fees shall include clear and accurate language concerning that firm's billing practices. For instance, the revised and expanded model language set forth in Section D above, or substantially similar language, will be used by the Firms in future fee applications. *See* Goldsmith Dep. at 126:3-11.

Fourth, the Firms agree that further direction from the presiding judge is necessary to ensure that all facts relevant to the court's analysis of a fee petition are brought to its attention. To that end, the firms suggest that the Special Master recommend that each judge presiding over a class action lawsuit draft a standing order that sets forth those facts which the presiding judge believes are important to his or her analysis of an eventual fee petition. Such direction would

[8] *See* Goldsmith Dep. at 125:4-9 ("Another issue that I would suggest or reform that I would suggest is that lead counsel, upon receiving drafts of all of the fee declarations from cocounsel, circulate them to all of the counsel in the case."), 125:18-24 ("What I would suggest going forward is that we particularly circulate them, everyone to everyone, so you've got multiple eyes, you got redundancy. And I think, again, it will prompt people to point out potential issues or problems."); *see* Johnson Dep. at 55:23-56:11 ("The second thing we have done is to work with Nicole Zeiss to expand the checklist that she uses for all settlements. In the past we focus[ed] that checklist on areas that we thought would potentially be more problematic, and those related primarily to expenses. We have now expanded that so that a cross check is done with all of the attorneys listed on the main fee application and any small fee declaration."); Chiplock Dep. at 159:5-18 ("So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger. Had I seen the other two petitions and seen the overlapping names, . . . it might have spurred me to say, ' . . . I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in.'"), 225:8-13 ("I think there would have been a benefit to the people who had been involved in the nitty gritty of the litigation maybe being more involved in eyeballing the fee declarations."), 228:10-16 ("[O]nly one firm [Labaton] had access to all the fee declarations before they were filed. And if there was an opportunity to catch a mistake, that was it, in addition to the opportunities that I had and missed before my individual fee declaration was filed."); Lesser Dep. at 90:16-18 ("[A]s far as reviewing critical documents, build some more redundancy into the system so that things don't get missed.").

ensure that class counsel do not mistakenly fail to identify facts that the court wishes to consider, enable class counsel to staff each case according to that judge's preferences (if any), and encourage the compilation and recordation of relevant information from the beginning of the case. *See, e.g.*, Heimann Dep. at 91:17-100:20.

Fifth, the Firms recommend that in complex class cases involving multiple firms, where there is a leadership structure amongst counsel imposed, the firms should report their lodestar to lead counsel on at least a semi-routine basis for the lifetime of the case. While typical in the multi-district litigation ("MDL") context (and often made mandatory in MDL orders appointing a leadership structure or committee), this practice is less regularized in class cases that are not MDLs. While such exchange was done in this case on several occasions and on an ad-hoc basis, regulating this process will aid in the capturing and correcting of errors or inadvertent duplication between the Firms as to any of their shared Staff Attorneys. Accordingly, it may be beneficial to make such periodic reports amongst plaintiffs' counsel a more regular and required feature of complex class cases such as this one, particularly if any timekeepers are performing work for more than one firm, and for lead counsel to be more specifically tasked with implementing and enforcing this requirement (*i.e.*, in the order appointing lead counsel) in addition to its other functions.

In addition to the above global recommendations, to avoid possible double-counting clerical errors like the ones that occurred here, Labaton Sucharow has now adopted for all cases going forward the following policy to formalize its general practice for the reporting of staff attorney hours in a fee petition: In all future class actions in which Labaton Sucharow serves as lead or co-lead counsel, all hours billed by staff attorneys who are Labaton Sucharow employees will be reported to the court exclusively in Labaton Sucharow's individual fee declaration and

lodestar report, regardless of whether or to what extent costs relating to such staff attorney were paid or reimbursed by another law firm during the pendency of the case.[9] Lieff Cabraser, for its part, will follow the same practice going forward.

For its part, when it enters into cost-sharing arrangements by which non-employee attorneys have performed work on a case, Thornton will disclose the existence of such agreements to the court in its individual fee declaration.

These reforms will be effective because they are straightforward, easy to implement, and widely if not universally applicable to the Firms' class action matters. We respectfully submit them for the Special Master's and the Court's consideration.

Dated: August 1, 2017

Respectfully submitted,

By: /s/ Joan A. Lukey

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[9] *See* Johnson Dep. at 55:2-8 ("[W]e are now prohibiting the practice of allowing staff attorneys to work as Labaton employees and for their hourly rates to be reimbursed to us by another firm. So that is prohibited in all cases."); Goldsmith Dep. at 126:12-127:3 ("I think personally that our firm should have a specific policy going forward on how this will be done. . . . And the policy that I would advocate is that all Labaton Sucharow staff attorney time should be on the Labaton Sucharow lodestar."); *see also* Belfi Dep. at 55:2-15; G. Bradley Dep. at 78:17-79:1; Chiplock Dep. at 138:3-21; Lesser Dep. at 55:15-20; Rogers Dep. at 93:2-11; Sucharow Dep. at 26:7-15; Thornton Dep. at 74:16-75:6 (remarks of Special Master describing method of reporting staff attorney lodestar and cost-sharing consistent with this policy).

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EXHIBIT 6

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES DUE ON JULY 10, 2017

The Firm's overall strategy, along with that of the other Plaintiffs' Law Firms, remained constant throughout the SST Litigation, which was to maximize the recovery to the class as a whole while taking into account the risk of litigation and the eventual possibility of an adverse judgment or denial of class certification. By the time the agreement in principle was reached to settle the SST Litigation, the Firm was prepared to accept (as was similarly accepted in the BNY Mellon settlement) that ERISA plans who were members of the class justifiably could be afforded a slight premium in their shares of the overall recovery given the separate litigation threat posed by the DOL and the potentially greater ease with which ERISA claims could be certified for class treatment (assuming such claims got past a motion to dismiss, which never technically happened in either the SST Litigation or in BNY Mellon). Accordingly, the Firm participated in discussions with Plaintiffs' Law Firms, ERISA counsel, and the DOL to construct the settlement plan of allocation in a manner that would afford participating ERISA plans a modest premium in their recoveries.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 24:

Please list the full name of each Staff Attorney who worked on the SST Litigation/ Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action

litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition.

RESPONSE TO INTERROGATORY NO. 24:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. Most of the information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The LCHB Staff Attorneys who worked on the SST Litigation/Document Review were Tanya Ashur, Joshua Bloomfield, Elizabeth Brehm, Jade Butman, James Gilyard, Kelly Gralewski, Christopher Jordan, Jason Kim, James Leggett, Colleen Liebmann, Andrew McClelland, Scott Miloro, Leah Nutting, Marissa Oh (Lackey), Peter Roos, Ryan Sturtevant, Virginia Weiss, and Jonathan Zaul. The hourly rate listed in the Fee Petition for all of these Staff Attorneys was $415, except for Joshua Bloomfield, Jade Butman, and Marissa Oh, whose listed hourly rate was $515.

Two other Staff Attorneys – Rachel Wintterle and Ann Ten Eyck – worked in LCHB's San Francisco offices alongside LCHB Staff Attorneys, were supervised in the same manner, and were assigned similar work as the other Staff Attorneys, but were contracted and paid for by Thornton through an outside agency, and thus are not included in the definition of "LCHB Staff Attorneys" for this Response. They were inadvertently and erroneously included in LCHB's lodestar calculation for reasons previously and elsewhere explained in these Responses.

The following LCHB Staff Attorneys were payroll employees paid directly by LCHB for the duration of the SST Litigation: Tanya Ashur, Elizabeth Brehm, James Gilyard, Kelly

Gralewski, Jason Kim, Christopher Jordan, Coleen Liebmann, Scott Miloro, Marissa Oh, Peter Roos, and Jonathan Zaul.

The following LCHB Staff Attorneys were payroll employees paid through an outside agency for the duration of the SST Litigation: Jade Butman (24 hours total), Andrew McClelland (58 hours total), and Virginia Weiss (473.50 hours total).

The following Staff Attorneys were, at different times during the SST Litigation, either paid directly by LCHB or paid through an outside agency, as follows:

Joshua Bloomfield: Paid via agency in 2013, paid directly by LCHB in 2015.

Leah Nutting: Paid via agency in 2013, paid directly by LCHB in 2015.

James Leggett: Paid via agency from 1/21/15—1/25/15, paid directly by LCHB as of 1/26/15.

Ryan Sturtevant: Paid via agency from 1/20/15—1/27/15, paid directly by LCHB as of 1/28/15.

The LCHB Staff Attorneys who did at least some work allocated to Thornton during the life of the SST Litigation were Chris Jordan, Andrew McClelland, Virginia Weiss, and Jonathan Zaul.

The following LCHB Staff Attorneys physically worked on the SST Litigation/Document Review in LCHB's San Francisco offices: Tanya Ashur, Jade Butman, James Gilyard, Jason Kim, James Leggett, Coleen Liebmann, Andrew McClelland, Marissa Oh, Peter Roos, and Ryan Sturtevant.

Scott Miloro physically worked in LCHB's New York offices.

The following LCHB Staff Attorneys worked remotely on the SST Litigation/Document Review (remote work locations are in parentheses): Joshua Bloomfield (San Francisco, CA),

Elizabeth Brehm (Shoreham, NY), Kelly Gralewski (San Diego, CA), Chris Jordan (Houston, TX and Atlanta, GA), Leah Nutting (San Francisco, CA), Virginia Weiss (Rochester, MN and Sacramento/Roseville, CA), and Jonathan Zaul (San Francisco, CA).

The following LCHB Staff Attorneys are still employed by or performing work for LCHB (total number of years worked for LCHB, with any gaps in employment excluded, are indicated in parentheses): Tanya Ashur (3.5 years), Kelly Gralewski (8.5 years), Chris Jordan (4.5 years), Jason Kim (5.5 years), James Leggett (3.5 years), Coleen Liebmann (2.5 years), Scott Miloro (5.5 years), Leah Nutting (4.5 years), Marissa Oh (3.5 years), Peter Roos (4.5 years), Ryan Sturtevant (3 years), Virginia Weiss (2.5 years), and Jonathan Zaul (4.5 years).

The following LCHB Staff Attorneys are no longer employed by or performing work for LCHB (number of years at LCHB is indicated in parentheses): Joshua Bloomfield (2 years), Elizabeth Brehm (2 years), Jade Butman (1 year), James Gilyard (2.5 years), and Andrew McClelland (1.5 years).

The following LCHB Staff Attorneys worked at least part-time on the SST Litigation/Document Review in 2013-2014, with any other LCHB cases to which they were assigned during that time-period indicated in parentheses: Joshua Bloomfield (BNY Mellon, British Airways Fuel Surcharge); Elizabeth Brehm; Kelly Gralewski (BNY Mellon, Microsoft-Canada, Florida Tobacco); Scott Miloro (BNY Mellon, Copytele, Siskin Patent, ING Direct Flat Fee, Multaq Qui Tam, Takata, Merck/Vioxx Securities Litigation, NYSCRF-Pratcher); and Leah Nutting (BNY Mellon).[1]

[1] For purposes of this Response, "BNY Mellon" refers to *In re Bank of New York Mellon Corp. Foreign Exchange Transactions Litigation*, MDL No. 2335 (LAK) (S.D.N.Y.); "British Airways Fuel Surcharge" refers to *Dover v. British Airways*, Case No. 1:12-cv-05567 (E.D.N.Y.); "Microsoft-Canada" refers to *Pro-Sys Consultants and Neil Godfrey v. Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE*, Case No. LO43175 (Vancouver Registry); "Florida Tobacco" refers to *In re Engle Cases*, No. 3:09-cv-10000-J-32 JBT (M.D. Fl.); "Copytele" refers to *In the Matter of the Arbitration between CopyTele and AU Optronics*, Case No. 50 117 T

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The following LCHB Staff Attorneys worked on the SST Litigation/Document Review from January through June 2015, with any other LCHB cases on which they performed work (even if only a handful of hours) during that time-period indicated in parentheses: Tanya Ashur (BNY Mellon), Joshua Bloomfield (British Airways Fuel Surcharge), Elizabeth Brehm, James Gilyard (BNY Mellon), Chris Jordan (BNY Mellon), Jason Kim (BNY Mellon), James Leggett (BNY Mellon), Coleen Liebmann (Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab), Scott Miloro (BNY Mellon, Multaq Qui Tam, Takata, Merck/Vioxx), Leah Nutting (BNY Mellon), Marissa Oh (BNY Mellon), Peter Roos (Nike Copyright, Apple Unlimited 3G, Benicar, Takata, Celera, Schwab), Ryan Sturtevant (Celera, Hong Leong Finance, Schwab), Virginia Weiss (BNY Mellon), and Jonathan Zaul (BNY Mellon, Photographer Copyright Class Actions).

The following Staff Attorneys put in more limited hours in 2015 on the SST Litigation/Document Review, with any other LCHB cases on which they performed work during that time-period indicated in parentheses: Jade Butman (Hong Leong Finance Limited,

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009883 13 (Internat'l Centre for Dispute Resolution); "ING Direct Flat Fee" refers to *ING Bank Rate Renew Cases*, Case No. 11-154-LPS (D. Del.); "Multaq Qui Tam" refers to *U.S. ex rel. Abbate v. Sanofi-Aventis, et al.*, Case No. 2 :15-cv-01510-SRC (D. N.J.); "Takata" refers to *In re Takata Airbag Litigation*, MDL No. 2599 (S.D. Fl.); "Merck/Vioxx Securities Litigation" refers collectively to *Honeywell International Inc. Defined Contribution Plans Master Savings Trust. v. Merck & Co.*, No. 14-cv 2523-SRC-CLW (S.D.N.Y.), *Janus Balanced Fund v. Merck & Co.*, No. 14-cv-3019-SRC-CLW (S.D.N.Y.), *Lord Abbett Affiliated Fund v. Merck & Co.*, No. 14-cv-2027-SRC-CLW (S.D.N.Y.), and *Nuveen Dividend Value Fund (f/k/a Nuveen Equity Income Fund), on its own behalf and as successor in interest to Nuveen Large Cap Value Fund (f/k/a First American Large Cap Value Fund) v. Merck & Co.*, No. 14-cv-1709-SRC-CLW (S.D.N.Y.); "NYSCRF-Pratcher" refers to *Richardson v. Pratcher*, No. 12-cv-08451-JGK (S.D.N.Y.); "Hong Leong Finance Limited" refers to *Hong Leong Finance Limited (Singapore) v. Morgan Stanley, et al.*, No. 653894/2013 (Sup. Ct. N.Y.); "Nike Copyright" refers to *Rentmeester v. Nike, Inc.*, D.C. No. 3:15-cv-00113-MO (D. Or.); "Apple Unlimited 3G" refers to *In Re Apple and AT&T iPad Unlimited Data Plan Litigation*, No. 5:10-cv-02553 RMW (N.D. Ca.); "Benicar" refers to *Benicar Litigation*, MDL No. 2606 (D. N.J.); "Celera" refers to *Biotechnology Value Fund, L.P. v. Celera Corp.*, 3:13-cv-03248-WHA (N.D. Cal.); "Schwab" refers collectively to *The Charles Schwab Corp. v. BNP Paribas Sec. Corp.*, No. CGC-10-501610 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503206 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503207 (Cal. Super. Ct.); and *The Charles Schwab Corp. v. Banc of America Sec. LLC*, No. CGC-10-501151 (Cal. Super. Ct.); and "Photographer Copyright Class Actions" refers to *Dennis Kunkel Microscopy, Inc. et al. v. John Wiley & Sons, Inc.*, C.A. No. 15-00094 (JLL) (JAD) (D. N.J.). "Siskin Patent" was a possible patent infringement investigation that did not result in a filed case.

Merck/Vioxx Securities Litigation, Schwab), Elizabeth Brehm, and Andrew McClelland (BNY Mellon).

The majority of LCHB's Staff Attorneys had substantial experience working on cases involving foreign-exchange trading and mismanagement of custodial funds by virtue of their work on the BNY Mellon litigation. The number of hours worked by each of the following Staff Attorneys in the BNY Mellon litigation, as recorded in the fee petition submitted by LCHB in that litigation (and previously produced to the Special Master), is indicated in parentheses: Tanya Ashur (2,414.50 hours), Joshua Bloomfield (2,183.00 hours), James Gilyard (2,614.50 hours), Kelly Gralewski (301.50 hours), Christopher Jordan (1,572.90 hours), Jason Kim (2,659.00 hours), James Leggett (2,476.20 hours), Andrew McClelland (1,799.00 hours), Scott Miloro (3,146.80 hours), Leah Nutting (3,128.40 hours), Marissa Oh (Lackey) (2,575.70 hours), Virginia Weiss (1,445.80 hours), and Jonathan Zaul (2,197.90 hours).

Of the few LCHB Staff Attorneys who did not work on the BNY Mellon litigation, Jade Butman, Coleen Liebmann, Peter Roos, and Ryan Sturtevant otherwise had experience working on securities/financial fraud matters at the Firm, including the Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab, and Celera matters listed above.[2]

Elizabeth Brehm was the only LCHB Staff Attorney who did not work on any other LCHB cases apart from the SST Litigation. Prior to working for LCHB, however, Ms. Brehm

[2] In the Hong Leong Finance Limited case, LCHB represented a Singaporean bank in a lawsuit against Morgan Stanley to recover losses stemming from a failed complex financial investment product that was created by Morgan Stanley and distributed to the Singaporean bank's clients. In the Merck/Vioxx Securities Litigation, LCHB represented a number of mutual funds managed by major investment advisors against Merck for losses sustained in the clients' holdings of Merck stock stemming from Merck's alleged misrepresentations concerning the safety of the painkiller drug Vioxx. In the Schwab cases, LCHB represented Charles Schwab in four separate individual securities actions against certain issuers and sellers of mortgage-backed securities ("MBS") for materially misrepresenting the quality of the loans underlying the securities in violation of California state law. In Celera, LCHB represented a group of affiliated funds investing in biotechnology companies in a securities fraud action arising from misconduct in connection with Quest Diagnostics Inc.'s 2011 acquisition of Celera Corporation.

specialized in securities/financial fraud and antitrust cases while an associate at another plaintiffs' class action firm (Kirby McInerney LLP).

Daniel P. Chiplock, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 25:

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

RESPONSE TO INTERROGATORY NO. 25:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The hours worked by and compensation paid to the LCHB Staff Attorneys for the SST Litigation are as follows: Tanya Ashur (843.50 hours, $33,740.00), Joshua Bloomfield (2,033.20 hours, $98,328.00), Elizabeth Brehm (1,682.90 hours, $75,747.38), Jade Butman (24.00 hours, $1,194.00), James Gilyard (882.00 hours, $35,280.00), Kelly Gralewski (1,478.90 hours, $67,650.50), Christopher Jordan (539.90 hours, $24,295.50), Jason Kim (904.00 hours, $37,968.00), James Leggett (893.00 hours, $35,810.00), Colleen Liebmann (24.00 hours, $1,008.00), Andrew McClelland (58.00 hours, $3,040.36), Scott Miloro (658.80 hours, $29,855.30), Leah Nutting (1,940.10 hours, $115,861.25), Marissa Oh (Lackey) (800.30 hours, $32,012.00), Peter Roos (780.00 hours, $39,230.00), Ryan Sturtevant (796.00 hours,

INTERROGATORY NO. 32:

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

RESPONSE TO INTERROGATORY NO. 32:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague. Subject to and without waiving those objections, LCHB responds as follows:

In the event of a successful verdict or settlement, the Firm's understanding was that the costs and expenses it had advanced during the litigation would be reported and broken out by category as they were in Exhibit B to the Firm's Fee Petition (e.g., Litigation Fund Contribution, Mediation Expenses, etc.). With respect to Staff Attorneys, the Firm's understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any attorney hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment. In this manner, the same Staff Attorney name could appear on more than one Plaintiffs' Law Firm's time report, since the financial responsibility for those particular Staff Attorneys shifted between firms during the litigation (in 2015 only, at least as far as LCHB is concerned).

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 46:

Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Film engaged in a fee dispute with a client or class representative

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

Dated: July 10, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT 7

From: Sucharow, Lawrence <LSucharow@labaton.com>
Sent: Tuesday, August 30, 2016 10:37 AM
To: Garrett J. Bradley
Subject: RE: State Street

Just to you.
I'm flying Tuesday but available til Noon your time & that day.
&

From: Garrett Bradley [mailto:GBradley@tenlaw.com]
Sent: Tuesday, August 30, 2016 10:27 AM
To: Michael Thornton; Daniel P. Chiplock; Sucharow, Lawrence
Cc: Belfi, Eric J.; Keller, Christopher J.
Subject: Fwd: State Street
&
Please see the attached fully executed fee agreement in the State Street matter.
&
Also when I spoke with Larry today he raised some concerns about the Judge's comments and the different percentages between Erisa and non-Erisa and would like to have a call tomorrow or next Tuesday to discuss this matter among the group and then, potentially, the Erisa counsel group as well. & Can everyone let me know their availability? &
&
Thank you ,
&
Garrett

EXHIBIT 8

The undersigned are co-counsel in the Arkansas Teacher Retirement System v. State Street Corporation, C.A. No. 11-CV-10230 (MLW) matter before Judge Mark L. Wolf which is scheduled for a final hearing on November 2, 2016. The matter relates to FX fraud.

The undersigned agree to the division of fees as follows:

10% ERISA Counsel
5.5% Labaton Sucharow's local counsel

Of the remaining 84.5%, the undersigned agree it shall be divided as follows:

47% Labaton Sucharow
29% Thornton Law Firm
24% Lieff, Cabraser, Heimann & Bernstein, LLP and Robert Lieff

Lawrence A. Sucharow for
LABATON SUCHAROW

Michael P. Thornton for
THORNTON LAW FIRM LLP

Daniel P. Chiplock for
LIEFF, CABRASER, HEIMANN &
BERNSTEIN LLP

Robert L. Lieff for Robert L. Lieff

EXHIBIT 9

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF [XXXXX] ON BEHALF OF
[XXXX] IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND PAYMENT OF EXPENSES

_____, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am [a member of] [associated with] with the law firm of [INSERT FIRM NAME] ("[ABREV. FIRM NAME]"). I submit this declaration in support of Lead Counsel's motion for an award of attorneys' fees and payment of litigation expenses on behalf of all Plaintiffs' counsel who contributed to the prosecution of the claims in the above-captioned class actions (the "Class Actions") from inception through August 30, 2016 (the "Time Period").

2. My firm is _____ [and counsel of record for plaintiff[s] [insert name]. [Supplement to explain role in the Class Actions and give overview of work performed.]

3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.

4. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

5. The total number of hours expended on this litigation by my firm during the Time Period is _____ hours. The total lodestar for my firm for those hours is $_____.

Comment [A1]: We realize that people investigated the claims before the cases were filed in 2011 and 2012. A reasonable inception date should be set, which would likely not be before Oct 2009 when the April 2008 qui tam complaint was unsealed.

Comment [A2]: In addition to not billing for fee/expense related time, you should only report lodestar that was directed at your clients in the Class Actions and the claims here, as opposed to other investigative work.

6. My firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expenses items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

7. As detailed in Exhibit B, my firm has incurred a total of $_____ in expenses in connection with the prosecution of the Class Actions. The expenses are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

Comment [A3]: Expenses should be vetted so that they all relate to the time period, the clients in the Class Actions, and the claims in the Class Actions. All first class airfare should be reduced to economy; working meal reimbursement (including meals with clients) should be reasonable; alcoholic drinks should not be claimed.

8. With respect to the standing of my firm, attached hereto as Exhibit C is a brief biography of my firm as well as biographies of the firm's partners and of counsels.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, 2016.

_____
XXXXXXXXXXXXXXXX

EXHIBIT A

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

LODESTAR REPORT

FIRM: [NAME]
REPORTING PERIOD: INCEPTION THROUGH AUGUST 30, 2016

PROFESSIONAL	STATUS*	HOURLY RATE	TOTAL HOURS TO DATE	TOTAL LODESTAR TO DATE
TOTAL				

Partner	(P)	Paralegal	(PL)
Of Counsel	(OC)	Investigator	(I)
Associate	(A)	Research Analyst	(RA)
Staff Attorney	(SA)		

EXHIBIT B

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

EXPENSE REPORT

Comment [A4]: Please delete any items that don't apply

FIRM: [NAME]
REPORTING PERIOD: INCEPTION THROUGH AUGUST 30, 2016

EXPENSE	TOTAL AMOUNT
Duplicating	
Postage	
Long-Distance Telephone / Fax / Conference Calls	
Messengers	
Filing / Service / Witness Fees	
Court Hearing & Deposition Transcripts	
Online Legal & Financial Research	
Overnight Delivery Services	
Experts/Consultants	
Litigation Support/Electronic Discovery	
Work-Related Transportation/Meals/Lodging	
Litigation Fund Contribution	
Miscellaneous	
TOTAL	**$0**

EXHIBIT 10

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF GEORGENE M. VAIRO

GEORGENE M. VAIRO, hereby declares and says:

1. I submit this declaration at the request of counsel for the Thornton Law Firm LLP. Specifically, I have been asked to provide an opinion as to whether Garrett Bradley of the Thornton Law Firm violated Federal Rule of Civil Procedure 11 in connection with the submission of Plaintiffs' Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs in the State Street FX litigation, *Arkansas Teacher Retirement System v. State Street Corp., et al.*, 11-cv-10230-MLW (D. Mass.) ("State Street Litigation").

2. Since 1995, I have been a Professor of Law and, in 2011, was named the David P. Leonard Professor of Law at Loyola of Los Angeles Law School. Currently, I am the David P. Leonard Professor of Law Emerita. Between 1982 and 1995, I was a Professor of Law at Fordham Law School in New York. Between 1987 and 1995, I served as the Associate Dean, and, in 1994, was named the Joseph R. Crowley Professor of Law, at Fordham Law School. I have been teaching, writing, and lecturing in the area of federal jurisdiction and procedure, including issues related to Rule 11 sanctions and class actions, since 1982. I have taught Federal Civil Procedure, Mass Tort Litigation, Federal Jurisdiction, International Dispute Resolution, and Class Action and Complex Litigation. I have written, and edited or co-edited, several books on federal practice and procedure. I have served as a member of the Board of Editors of Moore's Federal Practice since 1995, and have authored numerous law review and other articles about these subjects. I am the author of the chapters on removal jurisdiction, venue, change of venue, and multidistrict litigation for Moore's Federal Practice (3d ed. 1997), and update these chapters at least twice annually. Over the last 35 years, I have lectured or served on panels at numerous Federal Judicial Center, ALI-ABA, ABA, American Association of Law Schools, American College of Trial Lawyers, Pound Institute for Civil Justice, law school, local bar association, and other programs. In addition, I served on the Board of Trustees of the Dalkon Shield Claimants Trust from 1988, and as its Chairperson from August 1989, until the

termination of the Trust in 2000. I have served on the Board of Overseers of the RAND Institute for Civil Justice since 2006. Attached hereto as Exhibit A is a recent copy of my curriculum vitae.

3. One of my particular areas of expertise is Federal Rule of Civil Procedure 11. I have followed developments under the Rule since it was adopted in 1983. I have written numerous articles on Rule 11, including *Happy (?) Birthday Rule 11*, 37 Loy. L.A.L. Rev. 515 (2004) (Symposium ed.); *Rule 11 and the Profession*, 67 Fordham Law Rev. 589 (1998). I also have written a 1000 page treatise on Rule 11, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (3d ed. 2004) ("Vairo, Rule 11"). I was an invited speaker at the Advisory Committee on the Civil Rules hearings on Rule 11 in February 1992, which led to the amendments to Rule 11 that became effective in December 1993. I write and lecture on class action issues and developments, including *Is the Class Action Really Dead? Is that Good or Bad for Class Members*?, 64 Emory L.J. 477 (2014); *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 Univ. Texas Rev. of Litig. 721 (2013); and The Complete CAFA: Analysis and Developments Under the Class Action Fairness Act of 2005, LexisNexis (September 2011).

4. In addition to relying on my knowledge and experience, I have reviewed numerous documents supplied to me by counsel, including hearing transcripts, court filings, deposition transcripts, and interrogatory responses, in forming the basis for my opinions in this Declaration.

5. For the following reasons, it is my opinion that attorney Garrett Bradley of the Thornton Law Firm did not violate Fed. R. Civ. P. 11.

Rule 11 Background

6. In 1983, Rule 11 of the Federal Rules of Civil Procedure was substantially amended. The amendments to Rule 11 were part of a package of amendments designed to reverse the trends of increasing costs and delay in the federal courts. Unfortunately, Rule 11 became the source of debate and controversy.

7. One of the well-known problems with the 1983 version of Rule 11 was that it led to counterproductive satellite litigation that contributed to delay in the resolution of cases, rather than streamlining the administration of justice. For example, the Advisory Committee for Civil Rules noted that Rule 11 affected plaintiffs "more frequently and severely" than defendants; and that the Rule could lead to the counterproductive result that an attorney may decide not to withdraw a document that proves to be problematic because the act of doing so would trigger a sanctions proceeding either by opposing counsel or the court. The 1993 amendments to Rule 11 were designed to deal with these and other problems created by the 1983 version of Rule 11.[1]

8. The Advisory Committee expressly intended that its amendments to Rule 11 would reduce the volume of Rule 11 sanctions proceedings.[2] Although the 1993 amendments retained the "stop and think" requirement embodied in the Rule's reasonable inquiry requirement, as well as a "duty of candor," the amendments were designed to "generally provid[e] protection against sanctions if [attorneys] withdraw or correct contentions after a potential violation is called to their

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[1] Letter from Judge Sam C. Pointer, Chairman of the Advisory Committee for Civil Rules, To: Honorable Robert E. Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure (June 13, 1981, as revised in light of action taken by the Standing Committee at its meeting on July 18-20, 1991), at I. See Advisory Committee Note to 1993 Amendments to Rule 11, as approved by the Standing Committee ("Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.") (citing, G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1989)).

[2] Advisory Committee Note to 1993 Amendments to Rule 11.

attention."[3] Sanctions are appropriate, however, when an attorney "later advocat[es]" a paper presented to the court. Fed. R. Civ. P. 11(b).

9. Moreover, the Advisory Committee made clear in its Note to the 1993 amendments to Rule 11 that the rule is not a tool for compensation, and that sanctions ought to be imposed only to deter future conduct. The 1993 amendments to Rule 11, to put it another way, were designed to prevent and avoid hindsight sanctions determinations where an attorney or party withdraws or corrects contentions that otherwise might violate Rule 11.[4]

Procedural Context

10. On September 15, 2016, lead counsel in the State Street Litigation, Labaton Sucharow LLP ("Labaton"), filed Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Award Motion"). Dkt. # 102. That motion included a supporting declaration by Lawrence Sucharow ("Supporting Declaration") (Dkt. # 104) and additional declarations from the law firms seeking fees and expenses, including a declaration by Garrett Bradley of the Thornton Law Firm (Dkt. # 104-16).

11. The Thornton Law Firm, and other firms seeking fees and expenses, used a template provided by lead counsel Labaton in preparing their declarations. Dep. Testimony of Nicole Zeiss, June 14, 2017 at 20:13-21:17, 43:15-44:17; Dep.

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[3] *Id. See New Eng. Surfaces v. E. I. Dupont De Nemours & Co.*, 558 F. Supp. 2d 116, 123 n.7 (D. Me. 2008) (citing Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11 (the Rule now "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable")).

[4] Advisory Committee Note to 1993 Amendments to Rule 11 ("The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.) *See In re Disciplinary & Sanction Proceedings Against Gillig*, 807 F. Supp. 2d 604, 618 (N.D. Tex. 2011) ("In determining whether sanctions should be assessed, a court is not to judge an attorney's prefiling with the lens of 20/20 hindsight.").

Testimony of Garrett Bradley, June 19, 2017 at 81:19-82:8; Dep. Testimony of Evan Hoffman, June 5, 2017 at 93:10-94:8, 96:5-23.

12. Labaton collected the declarations from the various firms, and together with lead counsel's Supporting Declaration, filed such documents in support of the Award Motion. Dep. Testimony of Nicole Zeiss, June 14, 2017 at 16:10-18; Dep. Testimony of Evan Hoffman, June 5, 2017 at 103:5-15.

13. These declarations included lodestar analyses. Dkt. # 104.

14. Prior to the final settlement approval hearing and before any submission of fee declarations, during a status conference discussing the preliminary settlement agreement on June 23, 2016, Judge Mark L. Wolf asked attorney David Goldsmith of Labaton, lead counsel for the class, whether notice to the class of the proposed settlement would include the maximum amount of fees and expenses that Plaintiffs' class counsel would seek. Mr. Goldsmith said that the class attorneys were "contemplating in the 25 percent range." Dkt. # 85, Transcript of Status Conference, June 23, 2016 at 15:5-17. Judge Wolf responded: "That's great, . . . I usually start with 25 percent in mind." *Id.* at 18-22. On September 15, 2016, lead counsel filed the Award Motion containing the Supporting Declarations. Dkt. # 102.

15. On November 2, 2016, Judge Wolf held a hearing on the Award Motion. *See* Trans. of Hearing, Nov. 2, 2016, Dkt # 114 ("Hearing, Nov. 2, 2016"). Judge Wolf approved the $300 million settlement reached by the parties. Relying on the submissions of Plaintiffs' counsel, including the lodestar check showing fees and expenses for the Plaintiffs' firms of approximately $41 million, Judge Wolf approved an award of attorneys fees of $74,541,250, which represented 24.48% of the settlement fund. Together with an award of $1,257,697.94 in expenses, the Plaintiffs' attorneys were awarded 25.27% of the fund. Dkt. # 114 at 35:3-25.

16. On November 8, 2016, Garrett Bradley learned of a media inquiry concerning a potential double counting of fees for staff attorneys in the Supporting Declaration. Dep. Testimony of Garrett Bradley, June 19, 2017 at 85:23-86:11; Dep. Testimony of Nicole Zeiss, June 14, 2017 at 18:13-19:9.

17. Garrett Bradley immediately acted to alert his colleagues at his firm and co-counsel's firms of the need to investigate the media questions about potential billing errors. Dep. Testimony of Garrett Bradley, June 19, 2017 at 86:12-22. Two days later, on November 10, 2016, David Goldsmith of Labaton submitted a letter to Judge Wolf conceding that the Fee Petition included a double counting of staff attorney time. Dkt. # 116. A media article published December 17, 2016 discussed the letter and the contents of the Supporting Declaration. Dkt. # 117, Exhibit B.

18. On February 6, 2017, Judge Wolf issued an order calling for a hearing on March 7, 2017 and proposing the appointment of a Special Master, Gerald E. Rosen, a retired Federal District Court Judge. Dkt. # 117. In his order, Judge Wolf instructed that "Each of plaintiffs' counsel who submitted an affidavit in support of the request for an award of attorneys' fees, see Docket Nos. 104-15-104-24, shall attend" the March 7, 2017 hearing. Dkt. # 117 at 13.

19. At the hearing on March 7, 2017, Judge Wolf questioned several of the Plaintiffs' attorneys, including Garrett Bradley. Dkt. # 176 at 78:24-82:25 and 86:25-94:24. During the hearing, Garrett Bradley acknowledged the errors in the fee declaration language, including those that arose out of the Thornton Law Firm's use of the template provided by lead counsel. *Id.* at 87:10-12. He expressed regret for the errors. *Id.* at 86:25- 88:8-21, 90:24-91:7. At the conclusion of the hearing, Judge Wolf indicated that he would appoint Judge Rosen as Special Master, and the following day issued an order appointing Judge Rosen and setting forth his duties and powers. March 8, 2017 Order, Dkt. # 173.

Analysis

A. Garrett Bradley Met His Rule 11 Obligations Because He Took Immediate Action Once the Duplication and Template Issues Were Brought to His Attention.

1. Duplication Issue

20. As described in ¶¶ 7 and 8 above, a key aim of the 1993 amendments to Rule 11 was to encourage parties to correct offending papers presented to the court by prohibiting parties from "later advocating" a paper that otherwise would violate Rule 11.

21. Six days after Judge Wolf approved the settlement in the State Street Litigation, on November 8, 2016, Garrett Bradley learned of a media inquiry concerning apparent double counting of the names and time of several attorneys who were involved in document review. *See* ¶ 16, above.

22. Immediately upon learning of this possible issue ("the Duplication Issue"), Garrett Bradley acted to inform members of his firm and he, or others in his firm, informed Labaton and Lieff Cabraser attorneys who, in turn, immediately investigated whether there was a double count and found that there was. ¶ 17, above.

23. The three firms, with Labaton attorney David Goldsmith taking the lead, drafted a letter to Judge Wolf to inform him that there had, in fact, been a double counting of time. Garrett Bradley participated in the preparation of this letter, which conceded the mistake. The result of the double count was an approximately $4 million overstatement of the lodestar check -- in the Award Motion, the total lodestar amount stated was approximately $41 million, but it should have been approximately $37 million. On November 10, 2016, just two days after being informed about the possible double count, lead counsel submitted the letter to

Judge Wolf, confirming the double count and the overstatement of the lodestar amount. Dkt. # 116.

24. By immediately acting to inform his co-counsel, participating in the investigation of the possible double count and the preparation of the November 10, 2016 letter to the Court conceding the mistake, Garrett Bradley complied with his Rule 11 obligation as to the double count. Even if an attorney has failed to conduct a "reasonable inquiry" into factual contentions, Rule 11 sanctions may be imposed only when an attorney later advocates a position taken in a paper filed in court. Rule 11(b) provides that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or *later advocating* it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . ." that the paper is well-grounded in the facts and law, and not filed for an improper purpose. The "later advocating" language must be read together with Rule 11(c)(2), which provides a "safe harbor" for an attorney who is the target of a motion for sanctions if the offending paper is "withdrawn or appropriately corrected within 21 days." Fed. R. Civ. P. 11(c)(2).

25. Garrett Bradley ceased advocating the position taken in his declaration with regard to the double counting issue. Accordingly, it is inappropriate to find that Garrett Bradley violated Rule 11. While there is no "safe harbor" for an attorney who ceases relying on an offending paper AFTER the court issues an order to show cause, here Garrett Bradley took immediate action to investigate the issues raised by the media inquiry prior to Judge Wolf's February 6, 2017 Order. *See* Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 11 ("the Rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., **after** a show cause order has been issued on the court's own initiative") (emphasis added).

26. Moreover, "[*s*]*ua sponte* Rule 11 sanctions . . . must be reviewed with 'particular stringency.'" *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1256 (11th Cir. 2003). Only serious misconduct may be the basis for *sua sponte* imposition of sanctions. In *Young v. City of Providence*, 404 F.3d 33 (1st Cir. 2005), the First Circuit reversed the district court for imposing Rule 11 sanctions *sua sponte* based on an attorney's misstatements, stating: "It is true that courts ought not invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims. However, this is an argument for requiring *serious* misconduct, whoever initiated the inquiry into a violation -- not for distinguishing between the judge and opposing counsel. The "akin to contempt" language used by the Advisory Committee's Note may well have meant only that no safe harbor was needed *because* judges would act only in the face of serious misconduct." 404 F.3d at 39-40.

27. Garrett Bradley may not have fully complied with the "stop and think" aspect of Rule 11 because he signed the declaration without independently verifying whether the attorneys listed by the Thornton Law Firm in its declaration were also listed by one or the other of his co-counsel, with whom Thornton Law Firm had a fee allocation agreement. But Garrett Bradley did not violate Rule 11 because he informed the court that a mistake had been made two days after being alerted to the duplication problem.

28. Moreover, with respect to the Rule 11(b)(3) reasonable inquiry into the facts requirement, it is also significant that the double counting occurred on the fee petitions of co-counsel, the Labaton and Lieff Cabraser firms. The Thornton Law Firm, in fact, paid for the attorneys whose names appeared on Garrett Bradley's declaration. Nor did the Thornton Law Firm see the other firms' fee declarations before they were filed. Dep. Testimony of Evan Hoffman, June 5, 2017 at 103:5-15.

2. Use-of-Template Issues

29. In his February 6, 2017 Order, Judge Wolf raised additional issues, ones created by the Thornton Law Firm's use of the Labaton template. All lawyers who submitted fee declarations were ordered to attend the March 7, 2017 hearing. Garrett Bradley attended, and when confronted with inaccuracies related to the relationship of staff attorneys and others in his declaration to the Thornton Law Firm, he acknowledged that there were errors and apologized. *See* ¶ 19, above.

30. There is no evidence that Garrett Bradley recognized these errors before the Court issued its February Order.

31. For the same reasons discussed in ¶¶ 24-25 above, even if Garrett Bradley failed to conduct a reasonable inquiry, he did not violate Rule 11 because he acknowledged at the March 7, 2017 hearing that there were inaccurate statements in his declaration with respect to the nature of the staff attorneys, his firm's billing practices, and the other statements when he became aware of them. *See* ¶ 19, above; *see also* Ethical Report for Special Master Gerald E. Rosen prepared by Professor Stephen Gillers (Feb. 23, 2018) at 80-81 ("Gillers Report") (identifying six inaccuracies).

32. Even if the Court were to find that the inaccuracies violated Rule 11, the corrective action should obviate the need for the impostion of sanctions. *See New Eng. Surfaces v. E. I. Dupont De Nemours & Co.*, 558 F. Supp. 2d 116, 123 n.7 (D. Me. 2008) (citing Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11: the Rule now "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable"). *See also* Advisory Committee's Notes on 1993 Amendments to Fed. R. Civ. P. 11 ("Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.").

33. Although counsel should engage in their own Rule 11 investigation rather than rely on the work of co-counsel, it is reasonable under some circumstances for them to do so. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) ("We agree that reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry. See Fed. R. Civ. P. 11 advisory committee note."); *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 446 (5th Cir. 1992) (proper for attorney to rely on reports prepared by lawyer who was expert in the relevant area). Indeed, even the Advisory Committee Note to the generally more stringent 1983 version of Rule 11 suggests that reliance on co-counsel or forwarding counsel in appropriate circumstances may prevent a finding of a Rule 11 violation for a failure to engage in an independent investigation: "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as . . . whether he depended on forwarding counsel or another member of the bar." Fed. R. Civ. P. 11, advisory committee note. Given the complexity of the State Street Litigation and the time pressures associated with preparing for the settlement hearings, it was appropriate for the Thornton Law Firm attorneys to use the Labaton template as the basis for its lodestar analyis.

34. Moreover, for the reasons explained above, it was reasonable for counsel in a complex class action such as the State Street Litigation to rely on the template that was provided to them by Labaton, which was lead counsel in the State Street Litigation and especially experienced in submitting fee applications in complex class action litigation.

B. Garrett Bradley Did Not Violate the Rule 11 Duty of Candor to the Court Because the Record Fails to Show Clear and Convincing Evidence that Garrett Bradley Intentionally Misled the Court.

35. In his Report, Professor Gillers states that "There is ample evidence in the record that Garrett Bradley actually knew the Declaration contained inaccurarte information but signed it anyway." Gillers Report at 24, citing March 7, 2017 Hearing Tr., p.87: 13-14; 88: 2-9, 14-18;91: 5-7; 92: 3-8. As a predicate for concluding that Garrett Bradley's declaration contained false statements, Professor Gillers also states that he was "asked to assume that Garrett Bradley knew these statements were false when he submitted his Declaration." Gillers Report at 81. Professor Gillers then lists six statements from the declaration that contained inaccuracies.

36. Garrett Bradley admitted that these statements were inaccurate at the March 7, 2017 hearing, once he had been made aware of the issues. *See* ¶ 19, above. At the time he signed his declaration, he knew that staff attorneys from other firms and agencies were perfoming document review. But there is no evidence that he understood or believed that his declaration had incorrectly characterized these attorneys' relationship to his firm until the issue was raised in the February Order instructing him to appear at the March 7, 2017 hearing. In other words, although he had knowledge of certain facts, there is no evidence that he intended to mislead the court when he signed the declaration.

37. In the context of a sanctions proceeding or a proceeding that could lead to professional discipline, an attorney's reputation, among other things, is at risk. Accordingly, a high standard for finding misconduct must be met. *See In the Matter of Auerhahn*, No. 09-10206, WL 4352350 at *4 (D. Ma. Sept. 15, 2011 (adopting "clear and convincing" evidence standard in attorney disciplinary proceeding); *In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *81-86 (M.D. Fla. Oct. 18, 2017) (adopting the rule that "akin to

contempt" standard applies when courts consider Rule 11 sanctions *sua sponte*; collecting cases).

38. Although the statements identified by Professor Gillers were inaccurate, there is no evidence in the record that Garrett Bradley had intent to mislead the court, nor did he have reason to do so. Accordingly, his conduct did not rise to the level of culpability to justify sanctions for the following reasons:

1) Professor Gillers stated that there was ample evidence that Garrett Bradley knew the statements were inaccurate. Gillers Report at 24. Analysis of the statements cited by Professor Gillers do not support a finding of liability for failure to comply with the duty of candor imposed by Rule 11. For Rule 11 purposes, the "duty of candor" means that an attorney may not intentionally mislead the court. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) ("The district court's ruling appears to go even beyond the principle of Rule 3.3 of the ABA Model Rules which proscribes 'knowing' false statements of material fact or law. The district court made no finding of a knowing misstatement, and, given the well-established objective nature of the Rule 11 standard, such a requirement would be inappropriate. Both the earnest advocate exaggerating the state of the current law without knowingly misrepresenting it, and the unscrupulous lawyer knowingly deceiving the court, are within the scope of the district court's interpretation."). A violation of Rule 11 requires a finding of serious misconduct. *See In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *9 and *82 n.28 (M.D. Fla. Oct. 18, 2017) (imposing sanctions on counsel who "evinced a conscious disregard of their professional obligation" after receiving "numerous opportunities to voluntarily purge meritless

cases from the *Engle* docket, as well as several warnings about potential Rule 11 ramifications.")

2) The purpose for filing the Supporting Declaration was to provide a lodestar check on the request for a 25% fee award. All three law firms -- the Thornton Law Firm, Labaton, and Lieff Cabraser -- used the same template to support their fee declarations. Indeed, none of these declarations were wholly accurate. Dkt. # 176, Transcript of March 7, 2017 Hearing, at 78:24-82:85, 86:25-94-24.

3) Quite clearly, the key purpose of the fee declarations of all firms was to support the lodestar amount, meaning that the critical elements in the fee application were the hours worked by the various plaintiff attorneys and their hourly billing rates.

4) Although Garrett Bradley did not focus on the boilerplate language regarding staff attorneys in the declaration, the purpose of the declaration was to support the lodestar analysis. He should have read the entire declaration carefully, but his failure to do so does not undermine the validity of the number of hours and billing rates claimed for the staff attorneys in the declaration.

5) There is nothing in the record to indicate by clear and convincing evidence that Garrett Bradley intended to mislead the court regarding any aspect of the declaration. Rather, Garrett Bradley's reaction to the disclosure that the boilerplate language had resulted in Judge Wolf's believing that he had been misled was one of deep regret, thereby additionally belying any sense that he had intentionally misled the court. Dkt. # 176 at 88:8-21, 90:24-91:70. The inaccurate statements created a lack of clarity as to the nature of the relationship between many of the attorneys claimed in the

declaration and their relationship to the Thornton Law Firm. But, the material aspects of the declaration with respect to the hours and billing rates of the various attorneys listed in the declaration were true. Thus, there was no lack of candor for the purpose of Rule 11.

39. Garrett Bradley's "inaccurate statements" amount to mistatements, not lies. While unfortuante and regrettable, under the circumstances here, these statements amount to no more than mere "technical violations" of Rule 11. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986). The courts of appeals generally, both before and after the 1993 amendments to Rule 11, properly have taken a "lawyer sensitive" approach to Rule 11 to prevent an abusive use of the Rule. Vairo, Rule 11, at 68-69) (discussing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1987). Sanctions may be imposed when an attorney omits or mistates material facts, however, "courts generally will not impose sanctions for misstatements unless there is evidence that the proponent of the statement intended to mislead the court." Vairo, Rule 11, at 338 (collecting cases); *see also Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 146-47 (1st Cir. 2005) (reversing sanctions imposed by district court based on magistrate judge's Report and Recommendation: "In this case, the show cause order was prompted not by a concern that the recusal motion was objectively hopeless and so wasted a few hours but by what were perceived to be deliberate misrepresentations . . . This was the explicit and central concern of the show cause order. A judge is entirely warranted in pursuing suspected lies by counsel--probably this is done too rarely--but it is virtually certain that this show cause order would not have been issued absent the suspicion of deliberate falsehoods . . . Because there were no proven lies, we think that the Rule 11 findings cannot stand even though we agree that the motion was objectively hopeless."); *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069, 1077 (8th Cir. 2017) (the standard for imposing sanctions is whether the attorney's conduct "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.") (citation omitted); *Midwest*

Disability Initiative v. JANS Enters., 2017 U.S. Dist. LEXIS 204669, at *12-13 (D. Minn. Dec. 13, 2017) (quoting *Adams*).

40. In a seminal First Circuit case, the court found that Rule 11 does not demand perfection. *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 468 (1st Cir. 1993). There, the First Circuit reversed a trial court's decision to impose Rule 11 sanctions for failing to make a "reasonable inquiry" because the attorney made "no significant false statement." *Id.* at 467. Speaking for the court, Judge Breyer noted: "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Id.* Similarly, in another seminal case, the Second Circuit ruled that mere "technical violations" -- such as the failure to edit the boilerplate language in the Labaton template -- are not sanctionable. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (*de minimis* violation of Rule 11 does not warrant imposition of sanctions; reversing sanctions), *cert. denied; County of Suffolk v. Grascek*, 480 U.S. 918 (1987); *Greenberg v. Sala*, 822 F.2d 882, 886-7 (9th Cir. 1987) (affirming denial of sanctions although complaint contained factual errors; sanctions appropriate only for significant errors such as "some error or admission by a litigant [that] undermined his entire case at a stroke").

41. More recently, the Second Circuit found that even if a statement is "literally false," if there is nothing in the record to suggest that counsel's mistatement is intentionally false and the statement had "a material impact on the meaning of the statement," sanctions are inappropriate. *Kiobel v. Millson*, 592 F.3d 78, 83 (2d Cir. 2010) (reversing sanctions). District courts are right to be concerned about inaccurate statements. However, not all inaccurate statements are sanctionable. For example, the Ninth Circuit reversed sanctions a district court imposed because the district court believed it was misled. The Ninth Circuit stated: "With the district court's salutary admonitions against misstatements . . ., we have no quarrel. It is, however, with Rule 11 that we must deal. The district court's interpretation of Rule 11 requires district courts to judge the ethical propriety of

lawyers' conduct with respect to every piece of paper filed in federal court." *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986); *Young v. City of Providence*, 404 F.3d 33, 41 (1st Cir. 2005) ("We are not suggesting that a deliberate lie would be immune to sanction merely because corrective language can be found buried somewhere else in the document. But here the trial judge did not find, and in these circumstances could not have found, that defense counsel had intended to deceive.").

42. The inaccurate statements in Garrett Bradley's declaration must be viewed in context and as a part of a whole. *See Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) ("'The focus of ... Rule [11] is the court paper as a whole, not individual phrases or sentences construed separately or taken out of context.... [A]t some level of analysis, every unsuccessful litigation paper contains an unsupported allegation or flawed argument.'") (quoting Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 9(D) at 133-34 (1989)); *see also Young v. City of Providence ex rel. Napolitano*, 404 F.3d. 33, 41 (1st Cir. 2005) ("The general rule is that statements must be taken in context, and that related parts of a document must be taken together." (internal citations omitted)). *See also Forrest Creek Associates, Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987) ("[Rule 11 sanctions] do[] not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well grounded in fact.'").

43. The purpose of the Supporting Declaration was to provide lodestar numbers to the court. Although Garrett Bradley's declaration contained inaccuracies, while regrettable and of understandable concern to the Court, taken as a whole, especially given the enormity and complexity of the State Street litigation and the Award Motion itself, Garrett Bradley's declaration did not violate Rule 11. A recent case in which a district court intitiated an investigation is instructive. In *In re Engle Cases*, No. 3:09-cv-10000, 2017 U.S. Dist. LEXIS 172678, at *9-12 & *82 n.28 (M.D. Fla. Oct. 18, 2017), the four judge court noted: "As judges, we

are properly cautioned against using 20/20 hindsight in evaluating the actions of lawyers in the context of unprofessional conduct. We are insulated from the hurly-burly of the practice of law, the press of client demands, the call of time sheets to log, and the occasional dictatorial demands of the Court. So it is, with that caution in mind, that a full explanation of the factors that motivate us to impose sanctions." In a lengthy opinion, the court imposed sanctions, but in that case counsel had "evinced a conscious disregard of their professional obligation" after receiving "numerous opportunities to voluntarily purge meritless cases from the *Engle* docket, as well as several warnings about potential Rule 11 ramifications." *Id.* at *82 n. 28. There is no evidence that Garrett Bradley evinced conscious disregard of his professional obligations. Rather, he sought to correct the double counting error immediately upon learning of it, and when made aware of other issues raised by the use of the template language, he acknowledged and apologized for the misstatements made because he had failed to carefully read and edit the Labaton template.

44. In summary, for the reasons stated above, it is my opinion that Garrett Bradley's conduct in this action did not violate Rule 11.

I declare under penalty of perjury that the foregoing is true and correct:

Date and Place: March 26, 2018, Santa Barbara, CA

Georgene M. Vairo

Exhibit A

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and Litigation in Federal and State Courts (American Law Institute 1984, 1985)

Vairo, "Analysis of Proposed and 1985 Amendments to Federal Rules of Civil Procedure," J. McLaughlin, S. Schreiber & G. Vairo I, Civil Practice and Litigation in Federal and State Courts (American Law Institute 1985 & 1987)

Vairo, Amended Rule 4 of Civil Procedure And Its Effects on Process Serving, Nat'l L.J., Dec. 17, 1984, at 32, col. 1

Vairo, Amended Rule 4: Acknowledgment and Statute of Limitations Problems, Nat'l L.J., Dec. 24, 1984, at 20, col. 1

Vairo, For Whom the Class Action Tolls: Problems in Statutes of Limitations, Nat'l L.J., Jan. 30, 1984, at 30, col. 1

Vairo, Issuing Stays in Diversity Cases: A Cure for Growing Congestion?, Nat'l L.J., Feb. 14, 1982, at 22, col. 1

Hawk & Vairo, International Patent Licensing Restrictions, 8 Revue Suisse Du Droit International De La Concurrence 1 (1980)

Note, The Unionization of Law Firms, 46 Fordham L. Rev. 1008 (1978)

SELECTED PRESENTATIONS:

Loyola Law School Journalism School; Speaker on two panels; Basics of Civil Procedure & Class Action and Complex Dispute Resolution; LA; June 2014

PLI Class Action Program; keynote speaker; NYC; June/July since 2011

Pacific Pride Foundation; Supreme Court Marriage Equality Program; keynote speaker; Santa Barbara; July 2013

Thrower Symposium; Future of Class Actions; Panel Speaker; Emory Law School, Atlanta; Feb. 2014

International Assn. of Defense Counsel; Class Action Developments and Emerging Issues; Speaker; San Diego; Feb. 2014

Mass Tort Dispute Resolution Program; Speaker; Pepperdine; April 2014

ALI-CLE; Class Action and Aggregate Litigation Developments; moderator and speaker; April 2014

L.A. County Superior Court; Class Action Developments; presentation to all judges of the court; L.A.; May 2014

Panelist, AALS Section of Litigation Program, CAFA, Class Actions and Beyond (Jan. 2013)

Keynote Speaker, PLI Class Actions Program (July 2010-present)

Speaker, Loyola Law School Legal Journalism Program, "Complex Litigation and Class Actions Developments," (June 2011 & 2012)

Moderator and panelist, Loyola Law School Civil Justice Symposium on "Injuries Without Remedies" (March 2010)

Featured Speaker and Panelist, Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges, "Defending Against Summary Justice: The Role of the Appellate Courts" (July 2008)

Faculty Member of ALI/ABA Advanced Program on Federal and State Civil Litigation, since 1983

Panelist and Moderator, Mealey's TeleConference, Class Action Fairness Act and Other Recent Class Action Developments (Nov. 2007; March 2008)

Panelist, Mass Torts and Bankruptcy Panel, National Conference of Bankruptcy Judges, San Antonio (Nov. 2005)

Panelist, 2005 Stanford Law Review Symposium: The Civil Trial: Adaptation and Alternatives (Feb. 2005)

Moderator and Panelist, Mass Torts and Bankruptcy Panel, National Conference of Bankruptcy Judges, San Diego (Oct. 2003)

Moderator and Panelist, ADR and Mass Torts, CPR Institute for Dispute Resolution, San Diego (May 2003)

Featured Speaker, UBS Warburg Asbestos Litigation Conference (February 2003)

Featured Speaker and Panelist, Pound Institute for State Court Judges, "Trends in Federalism and their Implication for State Courts," (July 2002)

Featured Speaker and Panelist, ABA Section of Litigation Annual Meeting Program on New Federal Rules of Civil Procedure (August 1994)

Speaker, Burns Lecture, Loyola of Los Angeles Law School, "Rule 11: Past as Prologue," April 8, 1994

Speaker, New York State Bar Association and Association of the Bar of the City of New York Programs on 1993 Amendments to the Federal Rules of Civil Procedure (Winter, Spring and Summer 1994)

Lecturer, First and Third Circuit Judicial Workshop; Topic: Summary Judgment (March l992)

Invited Speaker, Civil Rules Advisory Committee Hearing on Fed. R. Civ. P. 11 (February 1991)

Panelist, Second Circuit Judicial Conference; Topic: Rule 11 (September l990)

Lecturer, Anglo-American Legal Exchange Program (September 1989); Topic: Rule 11

Lecturer, Eleventh Circuit Judicial Conference and Eighth and Tenth Circuit Judicial Workshop; Topic: Summary Judgment (May 1988; January 1989)

Lecturer, Fourth, Fifth, Sixth and Seventh Circuit Judicial Workshops (March - December 1988); Topic: Rule 11

Lecturer, Federal Judicial Center Seminar for Newly Appointed Judges (November 1987 and December 1988); Topic: Summary Judgment

Lecturer, Canada-United States Legal Exchange Program (October 1987) Topic: Rule 11

Panelist at Federal Bar Council program on sanctions; Annual Winter Meeting, St. John's, V.I., February 1987

Panelist at Federal Bar Council program on Rule 11, New York, New York, June 1986

Participant in Association of the Bar of the City of New York Program on Rule 11, April 1986

Panelist at NAACP Legal Defense and Education Fund Annual Lawyer Training Institute, Warrenton, Virginia, September 1985

Panelist at Legal Aid Society of New York Program on August 1983 Amendments to the Fed. R. Civ. P., February 1983

Lecturer for BAR/BRI, a major Bar Review course, in Massachusetts, Connecticut and New York on Conflict of Laws, Federal Jurisdiction and Business Organizations, 1983-1995

PROFESSIONAL SERVICE:

Editorial Board, *Moore's Federal Practice*, since 1995; Board of Overseers, Rand Corp. Institute for Civil Justice, since 2006; ABA Founding Academic Fellow of the Roscoe Pound Civil Justice Institute; Reporter, ABA TIPS Task Force on Asbestos Litigation, since January 2013; Member, Second Circuit Judicial Conference Planning Committee, l987-l990; Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1994-97; ALI/ABA Programs Subcommittee, since 1995; Member, Litigation Advisory Committee, Practicing Law Institute, 1990-2001; Member, Editorial Board, American Arbitration Association, *ADR Currents*, 1995-2002; Member, Advisory Group on American Law Institute Project on Complex Litigation (1987-1991); Editorial Board, The Practical Lawyer, 1990-2002; American Law Institute-American Bar Association, since l988.

BAR ADMISSIONS: New York, First Department, April 1980; United States District Court for the Southern District of New York and the Eastern District of New York, May 1980; United States Court of Appeals for the Second Circuit, May 1980; United States Supreme Court, May 1986; United States Court of Appeals for the Fourth Circuit, October l990; United States District Court, District of Connecticut, December l99l

BAR AND PROFESSIONAL ASSOCIATIONS: American Law Institute, elected October 13, 1989; American Bar Association, Section of Litigation, Subcommittee on Rule 11; American Bar Association, Judicial Administration Division, Federal Courts Committee; New York State Bar Association, Executive Committee of Commercial and Federal Litigation Section; Association of the Bar of the City of New York, Federal Courts Committee (l988-l99l term); Long Term Planning Committee (1993-1996 term); Women's Bar Association of the State of New York

OTHER SERVICE: Board of Directors, Sweet Briar College (Vice Chair); Board of Trustees, Museum of Contemporary Art Santa Barbara (First Vice President and member of Executive Comm.); Board of Directors, Pacific Pride Foundation

PERSONAL: Born May l4, l950; Activities include road bicycle racing (2005 National Championships, Women's 55+ Road Race & Criterium; 2005 CA State Championships, Women's 55+ Road Race, Criterium & Time Trial; 2004 CA State Women's 90 + 2-person TT Champion; Everest Challenge Road Race (5th Cat. 3, Sept. 2005), and charity bike rides (California AIDS Ride 3, 4 & 5 (San Francisco to Los Angeles); Florida AIDS Ride 2 (Orlando to Miami); Alaska AIDS Vaccine Ride (Fairbanks to Anchorage); Death Ride (Tour of the California Alps)); sailing; hiking; running (completed l98l N.Y.C.

Marathon in 3 l/2 hours); basketball (point guard on National Law School Basketball Tournament Championship (men's team, l978); 4 years College Varsity basketball, field hockey and lacrosse teams; cooking; vegetable gardening; and power and sail boating.

EXHIBIT 11

COHEN MILSTEIN SELLERS & TOLL PLLC
ANDREW N. FRIEDMAN (admitted *pro hac vice*)
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Co-Lead Plaintiffs' Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation	Case No: 15-md-02617-LHK (NC) **DECLARATION OF ANDREW N. FRIEDMAN IN SUPPORT OF PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS** Date: February 1, 2018 Time: 1:30 p.m. Judge: Hon. Lucy H. Koh Ctrm: 8, 4th Floor

I, Andrew N. Friedman, declare:

1. I am an attorney admitted to practice in the Northern District of California *pro hac vice* in the above-captioned lawsuit ("Action") against the Anthem Defendants ("Anthem") and the Non-Anthem Defendants (collectively, "Defendants"), and am Court-appointed Co-Lead Plaintiffs' Counsel in this action. I have practiced law since 1983. I am a partner with the firm of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") in Washington, D.C. and have been litigating class actions at Cohen Milstein since 1985. I am making this declaration in support of Plaintiffs' Motions for Final Approval of Class Action Settlement and for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards.

2. I believe the proposed settlement of this Action is extremely beneficial to the Class. Among other things, the Settlement provides for at least two years of free credit monitoring and significant enhancements to Anthem's data security practices. By settling now, the Class is able to take advantage of these remedies that likely will be unavailable or worth substantially less by the time this case could be litigated to a final judgment.

3. I acted as Co-Lead Counsel in this case and worked in coordination with Co-Lead Counsel, Eve Cervantez, as well as all other co-counsel. As Co-Lead Counsel, my firm worked on virtually every aspect of this litigation, although I regularly made work assignments in this Action to avoid duplicative efforts. Ms. Cervantez and I conferred almost daily for nearly two years on strategic decisions in this case and ultimately made decisions concerning virtually every significant action in the litigation. For the nearly two years of active litigation, I spent approximately 60 percent of my billed time on this litigation, while the other partner and two associates who spent the most time on this case from my Firm spent approximately half of their billed time. As a result, these four attorneys were precluded from undertaking significant work in other cases during that time period. Among the tasks in which I, or legal professionals at my Firm, took primary responsibility include:

- Conducting an extensive factual investigation into the data breach, with particular focus on highly technical aspects and the potential disclosure of class member data on the Dark Web;
- Conducting discovery of BCBSA (including taking 2 depositions thereof);
- Responding to Defendants' Requests for Production;
- Responding to Defendants' Interrogatories;
- Collecting, redacting Personally Identifiable Information from, and producing documents for over 100 Named Plaintiffs;
- Regularly holding meet and confer conferences with Defendants' counsel over the scope of discovery requests and drafting numerous joint discovery dispute letters regarding same, some of which were submitted to Magistrate Judge Cousins;
- Coordinating the production of 29 Plaintiffs' computers and tablets (totaling 50 devices) to the Independent Forensic Examiner;
- Preparing for and defending Plaintiffs' depositions, as well as preparing other Plaintiffs' counsel to do same, for the 105 Plaintiffs who were deposed;
- Reviewing documents and deposing 9 senior Anthem executives and information security personnel;
- Deposing three of Defendants' experts who provided opinions regarding whether the Anthem Data Breach resulted in Plaintiffs' PII becoming available for online sale, whether Chinese advanced persistent threat groups steal personal information in order to commit financial crimes against individuals, and whether Plaintiffs' damages expert's proposed conjoint survey was feasible;
- Defending the deposition of Plaintiffs' expert witness regarding whether the Anthem Data Breach created an increased risk of PII exposure and fraud for class members; and
- Arguing at Hearings on various motions, including the motion regarding Request for Production No. 33 involving the forensic examination of Plaintiffs' computers and tablets.

4. In addition, as one of Co-Lead Counsel, I oversaw the litigation and, along with Co-Lead Counsel, Eve Cervantez, made final strategy decisions, and drafted, edited, reviewed

and/or approved all filings with the Court and correspondence with opposing counsel. Among the tasks in which we oversaw and assisted in include:

- Drafting the First, Second, Third, and Fourth Consolidated Amended complaints;
- Drafting sections of the oppositions to two Motions to Dismiss;
- Preparing for the hearings on the first and second motions to dismiss;
- Strategizing over the scope of Defendants' responses to Plaintiffs' discovery requests;
- Coordinating the preparation for and taking of numerous defendant witnesses;
- Coordinating the drafting of and argument of numerous discovery motions;
- Attending and arguing at nine Case Management Conferences;
- Coordinating with plaintiffs' counsel in the two remaining state court actions related to the Anthem data breach;
- Drafting sections of the class certification motion;
- Coordinating and assisting in the selection of Plaintiffs' experts and preparing for the deposition of Plaintiffs' expert on the increased risk of fraud to members of the Class and preparing for the deposition and defending the deposition of one of Plaintiffs' damage experts; and
- Conducting settlement negotiations, including participating in three mediation sessions before Judge Layn Philips.

ATTORNEY SKILL AND EXPERIENCE

5. For 47 years, Cohen Milstein has been a leading class action firm, recovering tens of billions of dollars for injured plaintiffs. Cohen Milstein is unique among class action firms in the breadth of its practice areas. It has demonstrated a commitment to protecting consumers and the public interest in dozens of antitrust, securities, consumer protection, product liability, civil

rights, and human rights class actions. Cohen Milstein has earned recognition as a "class-action powerhouse" (*Forbes*), "the most effective law firm in the U.S. for lawsuits with a strong social and political component" (*Corporate Legal Times*), one of "America's 25 Most Influential Law Firms" (*The Trial Lawyer*), and one of the "Most Feared Plaintiffs Law Firms" (*Law360*). In 2016, *Law360* included Cohen Milstein as one of only three Plaintiffs firms on its list of Class Action Groups of the Year.[1] A more detailed description of my firm's practice and achievements can been found at www.cohenmilstein.com

6. The attorneys primarily working on this matter from my firm also brought their significant collective experience and skill to bear in reaching this excellent result for the class.

- **Andrew Friedman.** I am a partner and Co-Chair of the firm's Consumer Protection practice group. Practicing in the class action field since 1985, I have specialized in litigating complex, multi-state class action lawsuits against manufacturers and consumer service providers such as banks, insurers, credit card companies and others. Over the years, I have been lead or co-lead counsel in numerous important cases, bringing relief to millions of consumers and recovering hundreds of millions of dollars in class actions. I was one of the principal counsel in cases against Nationwide and Country Life, which asserted sales marketing abuses in the marketing of so-called "vanishing premium policies," where insurance agents sold insurance policies to unsuspecting consumers promising that after a relatively short time the dividends generated from the policy would be so high as to be able to fully pay the premiums. The Nationwide case resulted in a settlement valued at between $85 million and $103 million, while a settlement with Country Life made $44 million in benefits available to policyholders. Recently, I litigated a lawsuit against Symantec, Corp., and Digital River, Inc., a four-year long nationwide class action battle regarding the marketing of a re-download service in conjunction with the sale of Norton software. The case settled in a $60 million all-cash deal one month before the case was about to go to trial – one of the most significant consumer settlements in years.

  I have significant experience specific to privacy and data breach cases. Among other cases, I was appointed to the Plaintiffs' Steering Committee in both *In re Vizio, Inc. Consumer Privacy Litig*. (C. D. Cal.) (a case alleging that a major television manufacturer surreptitiously collected sensitive personal information from television

[1] http://www.law360.com/articles/743097/class-action-group-of-the-year-cohen-milstein.

purchasers) and *In re The Home Depot, Inc. Customer Data Sec. Breach Litig.* (N.D. Ga) (a data breach case relating to the theft of credit cards from Home Depot customers on behalf of financial institutions). I also played significant roles in *In re: Science Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.* (D.D.C.) (case involving data breach of medical and personal health information of 4.7 million former and active duty military personnel dismissed on standing grounds) and *Nader v. Capital One Bank* (USA), N.A. (C.D. Cal.) (one of principal counsel in litigation involving bank covertly recording outbound customer service calls, resulted in $3 million settlement).

Prior to my current role as Co-Chair and member of the Consumer Protection group, I was a member of the Securities Litigation & Investor Protection practice, litigating many important matters, including the *Globalstar Securities Litigation* in which I served as one of the lead trial counsel. The case settled for $20 million during the second week of the trial.

Prior to joining the firm, I was an attorney with the U.S. Patent and Trademark Office. I graduated from Tufts University in 1980 and the National Law Center at George Washington University in 1983.

- **Geoffrey Graber.** Mr. Graber is a partner specializing in complex litigation aimed at protecting consumers deceived and harmed by consumer service providers such as banks, insurance, and health care companies. Prior to joining the firm, Mr. Graber served as Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities (RMBS) Working Group at the United States Department of Justice, overseeing the DOJ's nationwide investigation into the packaging and sale of mortgage-backed securities leading up to the financial crisis. The investigations overseen by Mr. Graber ultimately recovered more than $36 billion. Previously, he also served as Counsel in the DOJ's Civil Division, proposing and leading a three-year investigation of Standard & Poor's and its ratings and structured finance products from 2004 to 2007. Before joining the DOJ, Mr. Graber was an associate at a top-tier defense firm, where he defended Fortune 500 companies and their officers and directors in securities and derivative suits, consumer class actions, and government investigations. Mr. Graber graduated from Vassar College in 1995 and the University of Southern California Gould School of Law in 2000.

- **Sally Handmaker.** Ms. Handmaker is an associate and a member of the firm's Consumer Protection practice group, litigating actions to enforce consumer rights under federal and state laws. Ms. Handmaker has been the lead associate in several highly-successful consumer class actions in which she was involved in all aspects of litigation. These include a $60 million settlement against Symantec and Digital River alleging misrepresentations regarding the companies' Extended Download Service and a $60 million settlement against Caterpillar alleging that engine exhaust system defects resulted in power losses and shutdowns that prevented or impeded their vehicles from transporting goods or passengers. Prior to joining Cohen Milstein, Ms.

Handmaker was a litigation associate at a top-tier defense firm, working on complex commercial and general litigation matters in federal and state courts covering a variety of subject matters, including antitrust, securities litigation, sports, intellectual property, and employment. Ms. Handmaker graduated from the University of Southern California in 2007 and the University of Virginia School of Law in 2011.

- **Eric Kafka.** Mr. Kafka is an associate and a member of the firm's Consumer Protection practice group, litigating actions to enforce consumer rights under federal and state laws. Mr. Kafka is the lead associate in several complex and ongoing consumer class actions in which he is involved in all aspects of litigation. Prior to joining Cohen Milstein, Mr. Kafka was a litigation associate at a top-tier defense firm, working on complex commercial and general litigation matters. Prior to law school, Mr. Kafka worked on multiple successful political campaigns. Mr. Kafka graduated from Yale University in 2008 and Columbia University School of Law in 2014, where he was recognized as a Harlan Fiske Stone Scholar for superior academic achievement.

TIME AND EFFORT DEDICATED TO THE CASE

7. Exhibits 1 and 3 to the Declaration of Eve H. Cervantez provide detailed summaries of the amount of time spent by my firm's partners, attorneys, and professional support staff who were involved in this litigation through September 30, 2017. They do not include any time devoted to preparing this declaration or otherwise pertaining to the Motion for Attorneys' fees. The lodestar calculation is based on my firm's current billing rates, and was prepared from contemporaneous time records regularly prepared and maintained by my firm. The hourly rates for my firm's partners, attorneys, and professional support staff are the usual and customary hourly rates charged for their services in similar complex litigation. In addition, my firm has submitted fee petitions in other cases that have reported hourly rates at amounts comparable to those sought herein (or their historical equivalents), and courts have approved an award of attorneys' fees in such cases. *See, e.g.*, *Nitsch v. DreamWorks Animation SKG, Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161, at *9 (N.D. Cal. June 5, 2017) (Koh, J.) (finding that Cohen Milstein's 2017 "billing rates for the attorneys, paralegals, and litigation support staff . . . are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs

have submitted adequate documentation justifying those rates" – my rate of $870 per hour was approved for a partner (Daniel Small), who graduated law school four years after I did); *In Re Broadcom Corp. Stockholder Litig.*, No. 15-cv-00979-JVS-PJWx (C.D. Cal. Feb. 27, 2017) (finding Cohen Milstein's fees "to be high but reasonable," noting attached declarations and exhibits demonstrated "that the firm's attorneys are experienced and successful litigators" and that "other courts have recently approved the firm's proposed rates" and concluding that the 2017 "rates are also reasonable for the market" – my rate of $870 was approved for a partner (Carol Gilden), who graduated law school my same year; a rate ten dollars per hour lower than Mr. Graber's ($720) was approved for a partner (Joshua Devore) who graduated law school his same year); *In Re: Cast Iron Soil Pipe and Fittings Antitrust Litig.*, No. 1:14-md-2508-HSM-CHS (E.D. Tenn. May 26, 2017) (granting attorneys' fees of one-third of the settlement fund at Cohen Milstein's fees after considering "the value of the services on an hourly basis " – a rate $30 per hour more than my rate was approved for a partner (Kit Pierson) who graduated law school my same year; Ms. Handmaker's rate of $490 per hour was approved for an associate (Robert Braun) who graduated law school her same year as "fairly reflect[ing] the benefit of the services rendered."); *see also Khoday et al. v. Symantec Corp. et al.*, No. 0:11-cv-00180-JRT-TNL (D. Minn. Apr. 5, 2016) (fee award using Cohen Milstein's 2015 rates to calculate the lodestar value of class counsel's work to "double-check" the percentage-of-the-fund method, including my 2015 rate of $815 per hour and Ms. Handmaker's 2015 rate of $445 per hour).

8. Throughout the litigation, Plaintiffs' Counsel staffed the matter efficiently and took steps to avoid duplication of effort.

9. The total number of hours reasonably expended on this litigation by my firm from inception through September 30, 2017 is 16,350.9. The total lodestar for my firm at current rates is $7,719,178.50. Expense items are billed separately and are not duplicated in my firm's lodestar.

10. The expenses my firm incurred in litigating this action are reflected in the books and records of my firm. These books and records are prepared from expense vouchers, receipts, and check records and other source materials and accurately reflect the expenses incurred.

11. My firm incurred a total of $116,054.19 in unreimbursed internal expenses from inception through October 5, 2017. In addition, my firm contributed $228,000 to the cost fund. All of these expenses were reasonable and necessary for the prosecution of this litigation. A summary of those expenses by category is attached as Exhibit 7 to the Declaration of Eve Cervantez.

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

Executed on December 1, 2017.

/s/ Andrew N. Friedman
Andrew N. Friedman

EXHIBIT 12

EXHIBIT 1

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Abington Cole & Ellery LLP	22.60	$ 12,430.00
Altshuler Berzon LLP	11,088.30	$ 6,509,819.50
Barrack, Rodos & Bacine	1,312.50	$ 653,171.50
Berger & Montague, P.C.	184.00	$ 114,831.50
Bonnett, Fairbourn, Friedman & Balint. P.C.	1,143.40	$ 443,085.00
Boucher LLP	801.30	$ 198,754.00
Branstetter, Stranch & Jennings, PLLC	2,196.30	$977,342.00
Cafferty, Clobes, Meriwether & Sprengel LLP	5.50	$3,632.50
Carlson, Lynch, Sweet, Kilpela & Carpenter LLP	205.80	$ 77,197.50
Chestnut Cambronne Attorneys at Law	16.80	$8,715.00
Cohen & Malad	2,253.80	$ 1,040,895.00
Cohen Milstein Sellers & Toll	16,350.90	$7,719,178.50
Consumer Law Practice of Dan LeBel	16.60	$ 8,531.00
Cotchett Pitre & McCarthy LLP	32.10	$ 12,840.00
Desai Law Firm PC	8.10	$4,175.00
Emerson Scott LLP	113.50	$ 74,099.50
Fagan Emert & Davis LLC	19.90	$ 7,960.00
Farmer, Jaffe, Weissing LLP	31.60	$16,410.00
Federman & Sherwood	316.10	$180,795.00
Finkelstein Thompson LLP	19.40	$ 13,530.00
Fitapelli & Schaffer LLP	17.90	$ 4,800.00
Forbes Law Group	310.50	$ 116,405.00
Gibbs Law Group LLP	10,844.20	$ 4,902,419.50

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Goldman Scarlato & Penny PC	2,006.90	$ 1,295,152.50
Harwood Feffer LLP	24.00	$ 18,600.00
Heins Mills & Olson PLC	665.00	$254,815.00
Janet, Jenner & Suggs, LLC	20.30	$6,885.00
Kantrowitz, Goldhamer & Graifman, P.C.	182.60	$ 94,092.50
Kaplan, Fox, & Kilsheimer LLP	367.70	$184,459.50
Karon LLC	10.30	$6,508.50
Keller Rohrback Law Offices LLP	3,607.00	$1,521,311.00
Law Offices of Paul C. Whalen, P.C.	133.10	$106,480.00
Law Office of Angela Edwards	191.00	$ 100,275.00
Levi & Korsinsky LLP	176.10	$ 97,039.50
Lieff Cabraser Heimann & Berstein	10,594.6	$ 5,097,053.00
Litigation Law Group	8.60	$5,195.00
Lockridge Grindal Nauen PLLP	410.40	$138,920.00
Milberg LLP	719.0	$302,157.50
Morgan & Morgan	692.00	$ 353,080.00
Murray Law Firm	576.70	$203,745.00
Pomerantz LLP	1,109.70	$528,869.00
Robinson Calcagnie Robinson Shapiro Davis, Inc.	370.50	$ 203,270.00
Schubert Jonckheer & Kolbe LLP	3,808.30	$ 1,423,234.00
Scott + Scott LLP	547.90	$ 219,970.00
Skepnek Law Firm	107.40	$ 60,015.00
Stritmatter Kessler Whelan Koehler Moore Kahler	175.80	$ 77,250.00

Summary of Total Lodestar by Firms

Firm	Total Firm Hours	Total Lodestar
Stueve, Siegel, Hanson LLP	2,244.10	$ 953,503.50
Stull, Stull & Brody	1,537.90	$ 1,059,189.00
The Giatras Law Firm	28.30	$7,895.00
Tousley, Brain Stephens	10.70	$ 6,096.50
Webb, Klase & Lemond LLC	238.50	$ 127,192.50
Weitz & Luxenburg, P.C.	135.40	$61,435.00
Zimmerman Reed LLP	542.10	$217,643.50
Total	**78,553.00**	**$37,832,349.00**

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Abington Cole & Ellery LLP	22.6	$ 12,430.00	Cornelius P. Dukelow	Partner	2001	$ 550.00	22.6	$ 12,430.00
Altshuler Berzon LLP	11,088.3	$6,509,819.50	Eve Cervantez	Partner	1992	$ 860.00	3,039.4	$ 2,613,884.00
			Jonathan Weissglass	Partner	1994	$ 820.00	623.6	$ 511,352.00
			Stacey Leyton	Partner	1998	$ 770.00	27.4	$ 21,098.00
			Danielle E. Leonard	Partner	2001	$ 690.00	2,395.3	$ 1,652,757.00
			Peder J. Thoreen	Partner	2001	$ 690.00	13.5	$ 9,315.00
			Zoe Palitz	Associate	2010	$ 460.00	11.1	$ 5,106.00
			Corinne Johnson	Fellow	2012	$ 405.00	47.7	$ 19,318.50
			Meredith Johnson	Associate	2012	$ 405.00	2,016.5	$ 816,682.50
			Tony LoPresti	Associate	2012	$ 405.00	774.5	$ 313,672.50
			Adan Martinez	Legal Clerk	Legal Clerk	$ 285.00	119.3	$ 34,000.50
			George A. Warner	Legal Clerk	Legal Clerk	$ 285.00	28.7	$ 8,179.50
			Hannah Kieschnick	Legal Clerk	Legal Clerk	$ 285.00	33.8	$ 9,633.00
			Lisa Bixby	Legal Clerk	Legal Clerk	$ 285.00	31.6	$ 9,006.00
			Ming Cheung	Legal Clerk	Legal Clerk	$ 285.00	47.0	$ 13,395.00
			Rebecca Chan	Legal Clerk	Legal Clerk	$ 285.00	16.1	$ 4,588.50
			Zach Manfredi	Legal Clerk	Legal Clerk	$ 285.00	60.9	$ 17,356.50
			Hannah Cole	Paralegal	Paralegal	$ 250.00	113.6	$ 28,400.00
			Jocelyn Smith	Paralegal	Paralegal	$ 250.00	303.0	$ 75,750.00
			Luke R. Taylor	Paralegal	Paralegal	$ 250.00	41.2	$ 10,300.00
			Matt Broad	Paralegal	Paralegal	$ 250.00	1,333.1	$ 333,275.00
			Rachel Busch	Paralegal	Paralegal	$ 250.00	11.0	$ 2,750.00
Barrack, Rodos & Bacine	1,312.5	$ 653,171.50	William J. Ban	Partner	1982	$ 660.00	69.8	$ 46,068.00
			Stephen R. Basser	Partner	1976	$ 770.00	100.0	$ 77,000.00
			Daniel J. Brooker	Associate	2008	$ 375.00	345.5	$ 129,562.50
			Chad A. Carder	Partner	2002	$ 500.00	248.8	$ 124,400.00
			Jeffrey W. Golan	Partner	1980	$ 770.00	11.1	$ 8,547.00
			Samuel M. Ward	Partner	2001	$ 600.00	179.2	$ 107,520.00
			Julie B. Palley	Associate	2007	$ 470.00	202.2	$ 95,034.00
			Matthew A. Toomey	Associate	2010	$ 440.00	130.5	$ 57,420.00
			Jennifer R. Mueller	Paralegal	Paralegal	$ 300.00	25.4	$ 7,620.00
Berger & Montague, P.C.	184.0	$ 114,831.50	Eric Lechtzin	Partner	1991	$ 665.00	1.1	$ 731.50
			Jon Lambiras	Partner	2003	$ 600.00	167.9	$ 100,740.00
			Michael Dell'Angelo	Partner	1997	$ 715.00	3.1	$ 2,216.50
			Shanon Carson	Partner	2000	$ 795.00	1.7	$ 1,351.50
			Sherrie Savett	Partner	1973	$ 960.00	10.2	$ 9,792.00
Bonnett, Fairbourn, Friedman & Balint, P.C.	1,143.4	$ 443,085.00	Amy L. Owen	Contract Attorney	2011	$ 275.00	287.9	$ 79,172.50
			Francis J. Balint, Jr.	Partner	1982	$ 750.00	1.0	$ 750.00
			Manfred P. Muecke	Associate	2002	$ 425.00	854.5	$ 363,162.50
Boucher LLP	801.3	$ 198,754.00	Shehnaz Bhujwala	Partner	2002	$ 750.00	87.1	$ 65,325.00
			Lauren Burton	Contract Attorney	2014	$ 185.00	707.6	$ 130,906.00
			Priscilla Szeto	Associate	2015	$ 395.00	6.2	$ 2,449.00
			Christine Cramer	Paralegal	Paralegal	$ 185.00	0.4	$ 74.00
Branstetter, Stranch & Jennings, PLLC	2,196.3	$ 977,342.00	Raquel Bellamy	Associate	2011	$ 350.00	6.3	$ 2,205.00
			Karla Campbell	Partner	2008	$ 575.00	240.3	$ 138,172.50
			Kourtney Hennard	Contract Attorney	2013	$ 385.00	66.7	$ 25,679.50
			Callie Jennings	Associate	2016	$ 275.00	31.3	$ 8,607.50
			Seamus Kelly	Associate	2013	$ 425.00	1,035.1	$ 439,917.50
			Megan Killion	Associate	2008	$ 575.00	8.9	$ 5,117.50
			Michael Isaac Miller	Associate	2009	$ 525.00	111.9	$ 58,747.50
			Anthony Orlandi	Associate	2006	$ 525.00	5.5	$ 2,887.50
			Christina M. Osbourne	Contract Attorney	2013	$ 410.00	596.9	$ 244,729.00
			Michael Stewart	Partner	1994	$ 700.00	44.0	$ 30,800.00
			J. Gerard Stranch	Partner	2003	$ 660.00	5.3	$ 3,498.00
			James G. Stranch	Partner	1973	$ 905.00	0.5	$ 452.50
			K. Grace Stranch	Associate	2014	$ 420.00	35.7	$ 14,994.00
			Jennifer Steele	Paralegal	Paralegal	$ 300.00	0.3	$ 90.00
			Amanda Winski	Paralegal	Paralegal	$ 190.00	2.2	$ 418.00
			Mariah Young	Paralegal	Paralegal	$ 190.00	5.4	$ 1,026.00
Cafferty Clobes Meriwether & Sprengel LLP	5.5	$ 3,632.50	Bryan Clobes	Partner	1988	$ 775.00	1.3	$ 1,007.50
			Daniel Herrera	Associate	2008	$ 625.00	4.2	$ 2,625.00
Carlson Lynch Sweet Kilpela & Carpenter LLP	205.8	$ 77,197.50	Gary Lynch	Partner	1989	$ 675.00	15.9	$ 10,732.50
			Jamisen Etzel	Associate	2011	$ 350.00	74.7	$ 26,145.00
			Pamela Miller	Associate	2003	$ 350.00	115.2	$ 40,320.00
Chestnut Cambronne Attorneys at Law	16.8	$ 8,715.00	Francis Rondoni	Partner	1980	$ 550.00	13.3	$ 7,315.00
			Gary Luloff	Associate	2008	$ 400.00	3.5	$ 1,400.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Cohen & Malad	2,253.8	$ 1,040,895.00	Alex C. Trueblood	Associate	2014	$ 350.00	218.5	$ 76,475.00
			Aaron J. Williamson	Associate	2015	$ 350.00	550.6	$ 192,710.00
			Edward B. Mulligan V.	Associate	2010	$ 350.00	0.8	$ 280.00
			Irwin B. Levin	Partner	1978	$ 775.00	1.1	$ 852.50
			Jeffrey A. Hammond	Partner	2004	$ 595.00	0.6	$ 357.00
			Lynn A. Toops	Partner	2006	$ 595.00	730.9	$ 434,885.50
			Laura C. Jeffs	Of Counsel	1990	$ 325.00	216.2	$ 70,265.00
			Richard E. Shevitz	Partner	1985	$ 775.00	85.8	$ 66,495.00
			Scott D. Gilchrist	Partner	1992	$ 675.00	0.3	$ 202.50
			Vess A. Miller	Partner	2006	$ 595.00	276.5	$ 164,517.50
			Cindy Meadows	Paralegal	Paralegal	$ 200.00	107.1	$ 21,420.00
			Aaron J. Williamson	Law Clerk	Law Clerk	$ 200.00	9.8	$ 1,960.00
			Elizabeth Hyde	Law Clerk	Law Clerk	$ 95.00	4.0	$ 380.00
			Eric Coleman	Law Clerk	Law Clerk	$ 110.00	2.5	$ 275.00
			Jennifer Redmond	Law Clerk	Law Clerk	$ 200.00	47.4	$ 9,480.00
			Jonathon Welling	Law Clerk	Law Clerk	$ 200.00	1.7	$ 340.00
Cohen Milstein Sellers & Toll PLLC	16,350.9	$ 7,719,178.50	Beirne, Brian	Contract Attorney	2015	$ 245.00	803.9	$ 196,955.50
			Clarke, Michael	Contract Attorney	2010	$ 285.00	121.5	$ 34,627.50
			Coker, Ross F.	Contract Attorney	2001	$ 245.00	477.0	$ 116,865.00
			Craig, Shunita	Contract Attorney	2012	$ 275.00	795.0	$ 218,625.00
			Feldstein, David A.	Contract Attorney	2011	$ 280.00	442.5	$ 123,900.00
			Frias, Erik N.	Contract Attorney	2003	$ 385.00	494.2	$ 190,267.00
			Friedman, Andrew, N.	Partner	1983	$ 870.00	2,232.9	$ 1,942,623.00
			Graber, Geoffrey	Partner	2000	$ 720.00	1,681.9	$ 1,210,968.00
			Handmaker, Sally	Associate	2011	$ 490.00	1,871.0	$ 916,790.00
			Handorf, Karen, L.	Partner	1975	$ 855.00	65.2	$ 55,746.00
			Hart, Kendra	Contract Attorney	2012	$ 390.00	267.3	$ 104,247.00
			Hora, Derek	Contract Attorney	2012	$ 245.00	820.2	$ 200,949.00
			Kafka, Eric	Associate	2014	$ 425.00	1,884.6	$ 800,955.00
			Lanou, John H.	Contract Attorney	2000	$ 400.00	354.6	$ 141,840.00
			Malloy, Molly M.	Contract Attorney	2011	$ 275.00	40.0	$ 11,000.00
			McNamara, Douglas, J.	Of Counsel	1995	$ 700.00	52.8	$ 36,960.00
			Napier, Deborah L.	Contract Attorney	1990	$ 495.00	23.8	$ 11,781.00
			Riera-Seivane, Jaime A.	Contract Attorney	1993	$ 450.00	432.4	$ 194,580.00
			Smith, Pamela L.	Contract Attorney	1984	$ 495.00	462.2	$ 228,789.00
			Solen, Donna F.	Contract Attorney	1997	$ 420.00	152.8	$ 64,176.00
			Toll, Steven, J.	Partner	1975	$ 970.00	135.7	$ 131,629.00
			Tsighe, Ariam M.	Contract Attorney	2012	$ 245.00	41.5	$ 10,167.50
			Shea, Kelly Ann	Contract Paralegal	Contract Paralegal	$ 260.00	55.3	$ 14,378.00
			Bournazian, Thea	Investigator	Investigator	$ 440.00	154.2	$ 67,848.00
			Bushan, Anjali	Legal Clerk	Legal Clerk	$ 270.00	53.0	$ 14,310.00
			Lewis, Adam	Legal Clerk	Legal Clerk	$ 270.00	48.2	$ 13,014.00
			Meth, Madeline H.	Legal Clerk	Legal Clerk	$ 270.00	16.5	$ 4,455.00
			Conway, Charles	Paralegal	Paralegal	$ 270.00	306.3	$ 82,701.00
			Hamdan, Shireen	Paralegal	Paralegal	$ 280.00	1,430.4	$ 400,512.00
			Wozniak, Mariah	Paralegal	Paralegal	$ 280.00	634.0	$ 177,520.00
Consumer Law Practice of Dan LeBel	16.6	$ 8,531.00	Daniel T. LeBel	Partner	2006	$ 605.00	10.3	$ 6,231.50
			Zachary R. Scribner	Associate	2015	$ 365.00	6.3	$ 2,299.50
Cotchett, Pitre & McCarthy LLP	32.1	$ 12,840.00	Divya Rao	Associate	2013	$ 400.00	32.1	$ 12,840.00
Desai Law	8.1	$ 4,175.00	Aashish Desai	Partner	1996	$ 750.00	4.3	$ 3,225.00
			Sonia Nava	Paralegal	Paralegal	$ 250.00	3.8	$ 950.00
Emerson Scott LLP	113.5	$ 74,099.50	John G. Emerson	Partner	1980	$ 795.00	18.6	$ 14,787.00
			David G. Scott	Partner	2006	$ 625.00	94.9	$ 59,312.50
Fagan, Emert, & Davis, LLC	19.9	$ 7,960.00	Paul T. Davis	Partner	1997	$ 400.00	18.6	$ 7,440.00
			Brennan P. Fagan	Partner	2001	$ 400.00	1.3	$ 520.00
Farmer, Jaffe, Weissing LLP	31.6	$ 16,410.00	Steven R. Jaffe	Partner	1983	$ 650.00	19.8	$ 12,870.00
			Brittany Henderson	Associate	2015	$ 300.00	11.8	$ 3,540.00
Federman & Sherwood	316.1	$ 180,795.00	William B. Federman	Partner	1982	$ 850.00	97.8	$ 83,130.00
			Carin L. Marcussen	Associate	2003	$ 510.00	167.0	$ 85,170.00
			Kyle Eckman	Associate	2012	$ 350.00	0.3	$ 105.00
			Gregg Lytle	Associate	2008	$ 450.00	0.5	$ 225.00
			Allicia Bolton	Paralegal	Paralegal	$ 250.00	1.0	$ 250.00
			Traylor Frandelind	Paralegal	Paralegal	$ 135.00	4.0	$ 540.00
			Robin Hester	Paralegal	Paralegal	$ 250.00	45.5	$ 11,375.00
Finkelstein Thompson LLP	19.4	$ 13,530.00	Mila Bartos	Partner	1993	$ 850.00	4.3	$ 3,655.00
			Douglas Thompson	Partner	1969	$ 850.00	1.2	$ 1,020.00
			Rosemary Rivas	Partner	2000	$ 600.00	0.9	$ 540.00
			Alyssa Dang	Associate	2013	$ 300.00	1.7	$ 510.00
			Roseanne Mah	Of Counsel	2005	$ 475.00	4.8	$ 2,280.00
			Gordon Fauth	Of Counsel	1997	$ 850.00	6.5	$ 5,525.00

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Fitapelli & Schaffer LLP	17.9	$ 4,800.00	Joseph A. Fitapelli	Partner	2001	$ 500.00	1.3	$ 650.00
			Nicholas P. Melito	Associate	2013	$ 250.00	16.6	$ 4,150.00
Forbes Law Group	310.5	$ 116,405.00	Frankie Forbes	Partner	2001	$ 500.00	38.2	$ 19,100.00
			Keynen "KJ" Wall	Of Counsel/Partner	2001	$ 450 / $ 500	3.5	$ 1,605.00
			Mike Fleming	Of Counsel	2001	$ 450.00	13.9	$ 6,255.00
			Mark Van Blaricum	Of Counsel	2002	$ 450.00	2.3	$ 1,035.00
			Quentin Templeton	Associate	2014	$ 350.00	252.3	$ 88,305.00
			Melissa Ebling	Legal Clerk	Legal Clerk	$ 350.00	0.3	$ 105.00
Gibbs Law Group	10,844.2	$ 4,902,419.50	David Berger	Partner	2008	$ 575.00	2,759.2	$ 1,586,540.00
			Joshua Bloomfield	Associate	2000	$ 395.00	945.4	$ 373,433.00
			Aaron Blumenthal	Associate	2015	$ 350 / $ 365	1,957.0	$ 714,270.50
			Caroline Corbitt	Associate	2015	$ 365.00	292.9	$ 106,908.50
			AJ De Bartolomeo	Partner	1988	$ 740.00	175.5	$ 129,870.00
			Eric Gibbs	Partner	1995	$ 805.00	406.0	$ 326,830.00
			Scott Grzenczyk	Associate	2011	$ 525.00	12.6	$ 6,615.00
			Shane Howarter	Associate	2016	$ 340.00	10.7	$ 3,638.00
			Dylan Hughes	Partner	2000	$ 685.00	14.3	$ 9,795.50
			Amanda Karl	Associate	2014	$ 415.00	88.6	$ 36,769.00
			J. Mani Goehring (née Khamvongsa)	Associate	2008	$ 375.00	213.4	$ 80,025.00
			Linda Lam	Associate	2014	$ 415.00	40.7	$ 16,890.50
			Steve Lopez	Associate	2014	$ 415.00	31.4	$ 13,031.00
			Michael Marchese	Associate	2015	$ 350.00	859.9	$ 300,965.00
			Marcus McElhenney	Contract Attorney	2014	$ 350.00	1,656.7	$ 579,845.00
			Geoffrey Munroe	Partner	2003	$ 660.00	441.1	$ 291,126.00
			Andre Mura	Partner	2004	$ 635.00	46.5	$ 29,527.50
			Patrick Nagler	Contract Attorney	2011	$ 375.00	87.0	$ 32,625.00
			Dave Stein	Partner	2007	$ 605.00	39.0	$ 23,595.00
			Clay Stockton	Associate	2012	$ 400.00	197.3	$ 78,920.00
			Linh Vuong	Associate	2012	$ 450.00	190.2	$ 85,590.00
			Kristen Boffi	Paralegal	Paralegal	$ 220.00	10.7	$ 2,354.00
			Jason Gibbs	Paralegal	Paralegal	$ 190.00	36.4	$ 6,916.00
			Walter Murcia	Paralegal	Paralegal	$ 200.00	206.1	$ 41,220.00
			Monsura Sirajee	Paralegal	Paralegal	$ 200.00	125.6	$ 25,120.00
Goldman, Scarlato, Penny LLP	2,006.9	$ 1,295,152.50	Mark Goldman	Partner	1986	$ 725.00	1,264.6	$ 916,835.00
			Douglas Bench	Associate	2006	$ 475.00	150.3	$ 71,392.50
			Laura Mummert	Associate	2000	$ 595.00	592.0	$ 306,925.00
Harwood Feffer LLP	24.0	$ 18,600.00	Sam Rosen	Partner	1968	$ 775.00	24.0	$ 18,600.00
Heins, Mills, & Olson PLC	665.0	$ 254,815.00	Vincent J. Esades	Partner	1994	$ 700.00	8.9	$ 6,230.00
			David Woodward	Partner	1975	$ 700.00	8.3	$ 5,810.00
			Maureen E. Sandey	Associate	2011	$ 375.00	646.8	$ 242,550.00
			Irene M. Kovarik	Paralegal	Paralegal	$ 225.00	1.0	$ 225.00
Janet, Jenner & Suggs, LLC	20.3	$ 6,885.00	Lisa Lee	Associate	2012	$ 350.00	19.2	$ 6,720.00
			Ahleah Knapp	Paralegal	Paralegal	$ 150.00	0.4	$ 60.00
			Cameron Swanson	Paralegal	Paralegal	$ 150.00	0.2	$ 30.00
			Olivia Colonero	Paralegal	Paralegal	$ 150.00	0.5	$ 75.00
Kantrowitz, Goldhamer, Graifman, PC	182.6	$ 94,092.50	Gary Graifman	Partner	1981	$ 825.00	10.0	$ 8,250.00
			Sarah Haque	Associate	2014	$ 500.00	171.1	$ 85,550.00
			Margaret Hernandez	Paralegal	Paralegal	$ 195.00	1.5	$ 292.50
Kaplan Fox & Kilsheimer LLP	367.7	$ 184,459.50	Laurence D. King	Partner	1988	$ 500.00	0.4	$ 200.00
			Linda M. Fong	Of Counsel	1985	$ 625.00	3.7	$ 2,312.50
			Matthew George	Of Counsel	2005	$ 620.00	1.5	$ 930.00
			Mario M. Choi	Associate	2005	$ 500.00	359.9	$ 179,950.00
			Lauren Dubick	Associate	2007	$ 485.00	2.2	$ 1,067.00
Karon LLC	10.3	$ 6,508.50	Daniel Karon	Partner	1991	$ 695.00	7.8	$ 5,421.00
			Beau Hollowell	Associate	2006	$ 435.00	2.5	$ 1,087.50
Keller Rohrback Law Offices, LLP	3,607.0	$ 1,521,311.00	Cari Laufenberg	Partner	2003	$ 750.00	254.2	$ 190,650.00
			Amy Hanson	Associate	1998	$ 525.00	72.4	$ 38,010.00
			Chris Springer	Associate	2008	$ 400.00	23.0	$ 9,200.00
			Jeff Lewis	Partner	1975	$ 895.00	12.3	$ 11,008.50
			Jason Chukas	Associate	1995	$ 400.00	1,605.3	$ 642,120.00
			Tyrone Smith	Associate	2006	$ 400.00	1,466.2	$ 586,480.00
			Carly Eyler	Paralegal	Paralegal	$ 230.00	1.7	$ 391.00
			Cate Brewer	Paralegal	Paralegal	$ 225.00	3.9	$ 877.50
			Colleen Mold	Paralegal	Paralegal	$ 225.00	5.0	$ 1,125.00
			Jennifer Dallape	Paralegal	Paralegal	$ 215.00	3.5	$ 752.50
			Sandra Douglas	Paralegal	Paralegal	$ 225.00	22.1	$ 4,972.50
			Tana Daugherty	Paralegal	Paralegal	$ 260.00	137.4	$ 35,724.00
Law Office of Paul C. Whalen, P.C.	133.1	$ 106,480.00	Paul C. Whalen	Partner	1996	$ 800.00	133.1	$ 106,480.00
Law Office of Angela Edwards	191.0	$ 100,275.00	Angela Edwards	Partner	1993	$ 525.00	191.0	$ 100,275.00

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Levi & Korsinsky LLP	176.1	$ 97,039.50	Nancy A. Kulesa	Partner	2001	$ 765.00	33.1	$ 25,321.50
			Shannon L. Hopkins	Partner	2003	$ 850.00	1.0	$ 850.00
			Courtney Maccarone	Associate	2011	$ 525.00	119.3	$ 62,632.50
			Stephanie Bartone	Associate	2012	$ 450.00	12.0	$ 5,400.00
			Joanna Chlebus	Paralegal	Paralegal	$ 265.00	0.4	$ 106.00
			Judith Bennett	Paralegal	Paralegal	$ 265.00	2.4	$ 636.00
			Samantha Halliday	Paralegal	Paralegal	$ 265.00	7.9	$ 2,093.50
Lieff Cabraser (LCHB)	10,594.6	$ 5,097,053.00	Ashur, Tanya	Contract Attorney	2000	$ 415.00	48.0	$ 19,920.00
			Ballan, Evan	Contract Attorney	2017	$ 345.00	18.6	$ 6,417.00
			Bennett, Corey	Contract Attorney	2009	$ 415.00	19.0	$ 7,885.00
			Diamand, Nicholas	Partner	2002	$ 650.00	14.2	$ 9,230.00
			Dunlavey, Wilson	Asscociate	2015	$ 370.00	297.5	$ 110,075.00
			Gardner, Melissa	Associate	2011	$ 455.00	915.8	$ 416,689.00
			Gilyard, James	Contract Attorney	2002	$ 415.00	1,015.0	$ 421,225.00
			Guo, Eva	Contract Attorney	1994	$ 415.00	1,530.5	$ 635,157.50
			Heller, Roger	Partner	2001	$ 675.00	25.5	$ 17,212.50
			Leggett, James	Contract Attorney	2012	$ 415.00	32.0	$ 13,280.00
			Lichtman, Jason	Partner	2006	$ 565.00	622.5	$ 351,712.50
			Meltser, Jessica	Paralegal	2016	$ 345.00	19.9	$ 6,865.50
			Nguyen, Phi Anh	Contract Attorney	2008	$ 415.00	2,317.0	$ 961,555.00
			Rudolph, David	Partner	2004	$ 625.00	579.1	$ 361,937.50
			Sobol, Michael	Partner	1989	$ 900.00	638.2	$ 574,380.00
			Solen, Donna	Contract Attorney	1997	$ 415.00	486.5	$ 201,897.50
			Sugnet, Nicole Diane	Partner	2006	$ 510.00	1,708.8	$ 871,488.00
			Innes-Gawn, Siobhan	Paralegal	Paralegal	$ 360.00	16.6	$ 5,976.00
			Keenley, Elizabeth	Paralegal	Paralegal	$ 350.00	21.4	$ 7,490.00
			Carnam, Todd	Paralegal	Paralegal	$ 360.00	29.5	$ 10,620.00
			Rudnick, Jennifer	Paralegal	Paralegal	$ 360.00	179.8	$ 64,728.00
			Swenson, Yun	Paralegal	Paralegal	$ 360.00	59.2	$ 21,312.00
Litigation Law Group	8.6	$ 5,195.00	Gordon M. Fauth, Jr.	Principal	1997	$ 775.00	3.7	$ 2,867.50
			Rosanne L. Mah	Associate	2005	$ 475.00	4.9	$ 2,327.50
Lockridge, Grindal, Nauen, PLLP	410.4	$ 138,920.00	Karen H. Riebel	Partner	1991	$ 780.00	12.0	$ 9,360.00
			Kate M. Baxter-Kauf	Associate	2011	$ 475.00	4.2	$ 1,995.00
			Rachel A. Kitze Collins	Associate	2014	$ 450.00	1.3	$ 585.00
			Stacy Kabele	Contract Attorney	1996	$ 325.00	387.2	$ 125,840.00
			Carey R. Johnson	Paralegal	Paralegal	$ 200.00	5.7	$ 1,140.00
Milberg LLP	719.0	$ 302,157.50	Ariana Tadler	Partner	1992	$ 825.00	14.9	$ 12,292.50
			Henry Kelston	Partner	1978	$ 675.00	108.5	$ 73,237.50
			Andrei Rado	Partner	1999	$ 625.00	14.4	$ 9,000.00
			John Hughes	Associate	2012	$ 375.00	312.3	$ 117,112.50
			John Seredynski	Associate	2010	$ 350.00	60.1	$ 21,035.00
			Carey Alexander	Associate	2012	$ 350.00	63.8	$ 22,330.00
			Adam Bobkin	Associate	2010	$ 375.00	0.5	$ 187.50
			Cindy Bomzer	Paralegal	Paralegal	$ 325.00	6.0	$ 1,950.00
			Jason A. Joseph	Paralegal	Paralegal	$ 325.00	61.0	$ 19,825.00
			Chris Thompson	Investor Analysis	Investor Analysis	$ 325.00	77.5	$ 25,187.50
Morgan & Morgan	692.0	$ 353,080.00	Marisa Glassman	Partner	2009	$ 500.00	284.3	$ 142,150.00
			Angela Mirabole	Associate	2003	$ 500.00	330.1	$ 165,050.00
			John Yanchunis	Partner	1980	$ 950.00	42.8	$ 40,660.00
			Candice Clendenning	Paralegal	Paralegal	$ 150.00	5.1	$ 765.00
			Emily Lockwood	Paralegal	Paralegal	$ 150.00	29.7	$ 4,455.00
Murray Law Office	576.7	$ 203,745.00	Arthur M. Murray	Partner	2001	$ 600.00	3.0	$ 1,800.00
			Stephen B. Murray, Jr.	Partner	1995	$ 600.00	4.6	$ 2,760.00
			C. Joseph Murray	Associate	1980	$ 350.00	545.6	$ 190,960.00
			Caroline W. Thomas	Associate	2014	$ 350.00	0.4	$ 140.00
			D. Alex Onstott	Associate	2015	$ 350.00	23.1	$ 8,085.00
Pomerantz LLP	1,109.7	$ 528,869.00	Jayne Goldstein	Partner	1986	$ 820.00	1.0	$ 820.00
			Jessica Dell	Associate	2005	$ 500.00	869.6	$ 434,800.00
			Perry Gattegno	Associate	2013	$ 390.00	239.1	$ 93,249.00
Robinson Calcagnie Robinson Shapiro Davis, Inc.	370.5	$ 203,270.00	Daniel Robinson	Partner	2003	$ 700.00	37.8	$ 26,460.00
			Wesley Polishuk	Associate	2007	$ 550.00	313.7	$ 172,535.00
			Jennifer Rogers	Paralegal	Paralegal	$ 225.00	19.0	$ 4,275.00
Schubert Jonckheer & Kolbe LLP	3,808.3	$ 1,423,234.00	Noah Schubert	Partner	2011	$ 600.00	4.5	$ 2,700.00
			Greg Stuart	Contract Attorney	2005	$ 390.00	2,230.1	$ 869,739.00
			Elizabeth Newman	Contract Attorney	2007	$ 350.00	1,572.7	$ 550,445.00
			Andy Katz	Of Counsel	2009	$ 350.00	1.0	$ 350.00
Scott + Scott, LLP	547.9	$ 219,970.00	Joseph Guglielmo	Partner	1996	$ 875.00	0.6	$ 525.00
			Erin Comite	Partner	2002	$ 725.00	0.3	$ 217.50
			Hal Cunningham	Contract Attorney	2006	$ 625.00	1.9	$ 1,187.50
			Katie Shank	Contract Attorney	2015	$ 400.00	545.1	$ 218,040.00

Detailed Lodestar Information by Firm and Biller

Firm	Total Firm Hours	Total Firm Fees	Biller	Position	Grad Year	Rate	Hours Billed	Total Attorney Fees
Skepnek Law Firm	107.4	$ 60,015.00	William J. Skepnek	Partner	1978	$ 600.00	89.7	$ 53,820.00
			Stephan Lindell Skepnek	Associate	2015	$ 350.00	17.7	$ 6,195.00
Strimatter Kessler Whelan Koehler Moore Kahler (Stritmatter Kessler)	175.8	$ 77,250.00	Catherine J. Fleming	Of Counsel	2007	$ 500.00	140.3	$ 70,150.00
			Jill Sullivan	Paralegal	Paralegal	$ 200.00	23.7	$ 4,740.00
			Jeanne Laird	Paralegal	Paralegal	$ 200.00	11.8	$ 2,360.00
Stueve, Siegel, Hanson LLP	2,244.1	$ 953,503.50	Jennifer Carter	Associate	2004	$ 475.00	10.4	$ 4,940.00
			Crystal Cook	Associate	2013	$ 425.00	4.7	$ 1,997.50
			Sean Cooper	Associate	2013	$ 425.00	13.2	$ 5,610.00
			Tanner Edwards	Associate	2015	$ 375.00	452.3	$ 169,612.50
			Jason Hartley	Partner	1997	$ 825.00	0.5	$ 412.50
			Lauren Luhrs	Associate	2013	$ 425.00	11.1	$ 4,717.50
			Abby McClellan	Associate	2013	$ 425.00	139.6	$ 59,330.00
			J. Austin Moore	Associate	2011	$ 475.00	700.6	$ 332,785.50
			Norman Siegel	Partner	1993	$ 865.00	139.0	$ 120,235.00
			Barrett Vahle	Partner	2004	$ 645.00	97.3	$ 62,758.50
			Brad Wilders	Partner	2007	$ 625.00	1.6	$ 1,000.00
			Michael Wise	Associate	2014	$ 350.00	8.9	$ 3,115.00
			Lauren Wolf	Associate	2010	$ 395.00	79.1	$ 31,244.50
			Michelle Campbell	Paralegal	Paralegal	$ 275.00	370.6	$ 101,915.00
			Katrina Cervantes	Paralegal	Paralegal	$ 245.00	5.9	$ 1,445.50
			Tina Glover	Paralegal	Paralegal	$ 245.00	0.2	$ 49.00
			Mary Rose Marquart	Paralegal	Paralegal	$ 275.00	21.2	$ 5,830.00
			Cheri Perez	Legal Assistant	Paralegal	$ 225.00	6.3	$ 1,417.50
			Erika Reyes	Paralegal	Paralegal	$ 245.00	124.2	$ 30,429.00
			Margaret Smith	Paralegal	Paralegal	$ 245.00	39.6	$ 9,702.00
			Melissa Warner	Legal Assistant	Paralegal	$ 225.00	2.0	$ 450.00
			Sheri Williams	Legal Assistant	Paralegal	$ 225.00	2.2	$ 495.00
			Peter Rupp	Systems Director	Systems Director	$ 295.00	13.6	$ 4,012.00
Stull, Stull, & Brody	1,537.9	$ 1,059,189.00	Howard Longman	Senior Attorney	1982	$ 925 / $ 950	92.1	$ 87,490.00
			Patrick Slyne	Senior Attorney	1988	$ 925.00	497.8	$ 460,465.00
			Melissa Emert	Senior Attorney	1988	$ 925.00	27.5	$ 25,437.50
			Patrice Bishop	Senior Attorney	1994	$ 500 / $ 850	133.8	$ 69,175.00
			Michael Klein	Associate	2004	$ 825.00	1.4	$ 1,155.00
			Jason D'Agnenica	Associate	1998	$ 500 / $ 765	785.3	$ 415,466.50
The Giatras Law Firm	28.3	$ 7,895.00	Matthew Stonestreet	Associate	2010	$ 300.00	14.5	$ 4,350.00
			Troy Giatras	Partner	1990	$ 450.00	5.6	$ 2,520.00
			Pam Hutton	Paralegal	Paralegal	$ 125.00	8.2	$ 1,025.00
Tousley, Brain, Stephens	10.7	$ 6,096.50	Chase C. Alvord	Partner	1996	$ 710.00	2.8	$ 1,988.00
			Kim D. Stephens	Partner	1981	$ 795.00	2.7	$ 2,146.50
			Jacob D. C. Humphreys	Associate	2009	$ 450.00	3.3	$ 1,485.00
			Jason T. Dennett	Partner	2000	$ 710.00	0.3	$ 213.00
			MWA	Paralegal	Paralegal	$ 165.00	1.6	$ 264.00
Webb, Klase, & Lemond, LLC	238.5	$ 127,192.50	E. Adam Webb	Partner	1996	$ 600.00	38.5	$ 23,100.00
			G. Franklin Lemond, Jr.	Partner	2004	$ 525.00	190.4	$ 99,960.00
			Kristina Ludwig	Associate	2016	$ 295.00	4.5	$ 1,327.50
			Matthew C. Klase	Partner	2002	$ 550.00	5.1	$ 2,805.00
Weitz & Luxenberg, P.C.	135.4	$ 61,435.00	James Bilsborrow	Associate	2008	$ 500.00	117.5	$ 58,750.00
			Corinne Sullivan	Paralegal	Paralegal	$ 150.00	17.9	$ 2,685.00
Zimmerman Reed, LLP	542.1	$ 217,643.50	Brian C. Gudmundson	Partner	2004	$ 695.00	10.8	$ 7,506.00
			Wm Dane DeKrey	Associate	2014	$ 375.00	53.2	$ 19,950.00
			Bryce D. Riddle	Associate	2014	$ 375.00	7.0	$ 2,625.00
			James P. Watts	Associate	1981	$ 450.00	308.3	$ 138,735.00
			Adam Almen	Contract Attorney	2013	$ 300.00	162.3	$ 48,690.00
			Leslie A. Harms	Paralegal	Paralegal	$ 275.00	0.5	$ 137.50
TOTAL	**78,553.0**	**$37,832,349.00**						

EXHIBIT 13

Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Master Docket No. 09-md-02063-JLK-KMT (MDL Docket No. 2063)

IN RE: OPPENHEIMER ROCHESTER FUNDS GROUP SECURITIES LITIGATION

This document relates to the following Actions:

In re AMT-Free Municipals Fund
09-cv-1243-JLK (*Prince*)
09-cv-1447-JLK (*Connel*)
09-cv-1510-JLK (*Amato*)
09-cv-1619-JLK (*Furman*)

In re AMT-Free New York Municipal Fund
09-cv-1621-JLK (*Isaac*)
09-cv-1781-JLK (*Kurz*)

In re Rochester National Municipal Fund
09-cv-550-JLK (*Bock*)
09-cv-706-JLK (*Stokar*)
09-cv-927-JLK (*Tackmann*)
09-cv-1042-JLK (*Krim*)
09-cv-1060-JLK (*Truman*)
09-cv-1482-JLK (*Laufer*)
09-cv-1908-JLK (*Lariviere*)

In re Rochester Fund Municipals
09-cv-703-JLK (*Begley*)
09-cv-1479-JLK (*Bernstein*)
09-cv-1481-JLK (*Mershon*)
09-cv-1622-JLK (*Stern*)
09-cv-1478-JLK (*Vladimir*)
09-cv-1480-JLK (*Weiner*)

In re New Jersey Municipal Fund
09-cv-1406-JLK (*Unanue*)
09-cv-1617-JLK (*Baladi*)
09-cv-1618-JLK (*Seybold*)
09-cv-1620-JLK (*Trooskin*)

In re Pennsylvania Municipal Fund
09-cv-1483-JLK (*Woods*)
09-cv-1368-JLK (*Egts*)
09-cv-1765-JLK (*Wunderly*)

DECLARATION OF KIP B. SHUMAN ON BEHALF OF THE SHUMAN LAW FIRM IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Kip B. Shuman, Esq., declares as follows pursuant to 28 U.S.C. § 1746:

1. I am the principal of The Shuman Law Firm. I submit this declaration in support of Lead Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses in the above-captioned actions (the "Actions") from inception through May 30, 2014 (the "Time Period").

2. The Shuman Law Firm is Court-appointed Liaison Counsel.

A. I, Kip B. Shuman, was primarily responsible for the activities of liaison counsel in these Actions, including ensuring that liaison counsel efforts were competently and efficiently performed. Having only three lawyers dedicated to these Actions resulted in the efficient prosecution of these Actions, and avoided any needless duplication of efforts. I participated in all material aspects of this litigation, except the review of documents produced by Defendants.

B. Rusty Glenn, partner. Mr. Glenn was all involved in all material aspects of this litigation. Mr. Glenn also reviewed and analyzed documents and was responsible for all logistical matters of all court filings.

C. Nancy Kulesa, attorney. Ms. Kulesa reviewed, analyzed and coded documents.

3. The lodestar schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney from my firm who was involved in the prosecution of the Actions during the Time Period. The lodestar calculation is based on my firm's current billing rates. For personnel who are no longer employed at my firm, the lodestar calculation is based on billing rates for such personnel in his or her final year of employment by my firm.

4. The lodestar schedules attached were prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the

Court. Time expended in preparing this application for fees and reimbursement of expenses has not been included in this request.

5. The hourly rates for the attorneys in my firm included in the lodestar schedules are the same as the regular rates charged for their services in non-contingent matters and/or which have been accepted in other securities, shareholder, or class action litigation.

6. The total number of hours expended on this litigation by my firm during the Time Period is 3,031.93 hours. The total lodestar for my firm for those hours is $1,674,716.25.

7. My firm's lodestar figures are based upon the firm's current billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

8. As detailed in Exhibit B, my firm has incurred a total of $246,524.09 in unreimbursed expenses incurred in connection with the prosecution of the Actions during the Time Period.

9. The expenses incurred are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred. Third-party expenses are not marked up.

10. With respect to the standing of my firm, attached hereto as Exhibit C is a firm resume.

11. I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 2014.

s/ Kip Shuman
Kip B. Shuman

Exhibit A

LODESTAR REPORT

FIRM: The Shuman Law Firm
REPORTING PERIOD: INCEPTION THROUGH MAY 30, 2014

PROFESSIONAL	STATUS*	HOURLY RATE	TOTAL HOURS	TOTAL LODESTAR TO DATE
Kip B. Shuman	P	625.00	1,172.65	$732,906.25
Rusty E. Glenn	P	525.00	1,173.04	$615,846.00
Nancy Kulesa	CA	475.00	686.24	$325,964.00
TOTAL			**3,031.93**	**$1,674,716.25**[1]

*Partner (P)
Contract Attorney (CA)

[1] In order to arrive at the total lodestar, time records were divided into four separate categories and then aggregated. The first category separates time incurred by individual case. This first category is billed at 100% to the Actions. The second category includes time attributable to all the Oppenheimer-related actions. That time was previously billed 50% to the Champion and Core actions (i.e., the fixed-income cases). The remaining 50% is now billed to the Actions. That time is further reduced by 1/7 (.143) to account for the California action, which is not part of this settlement. The third category relates to time incurred in all the Actions. That time is reduced by 1/7 (.143) to, again, account for the California action. The fourth category represents time related to this Settlement and is billed at 100%. These divisions are made to ensure that time dedicated to the Fixed Income Cases is not double counted and to reduce the lodestar, on a percentage basis, to account for fact that only six of the seven Rochester cases have settled, but that a significant amount of time incurred benefited all the Actions.

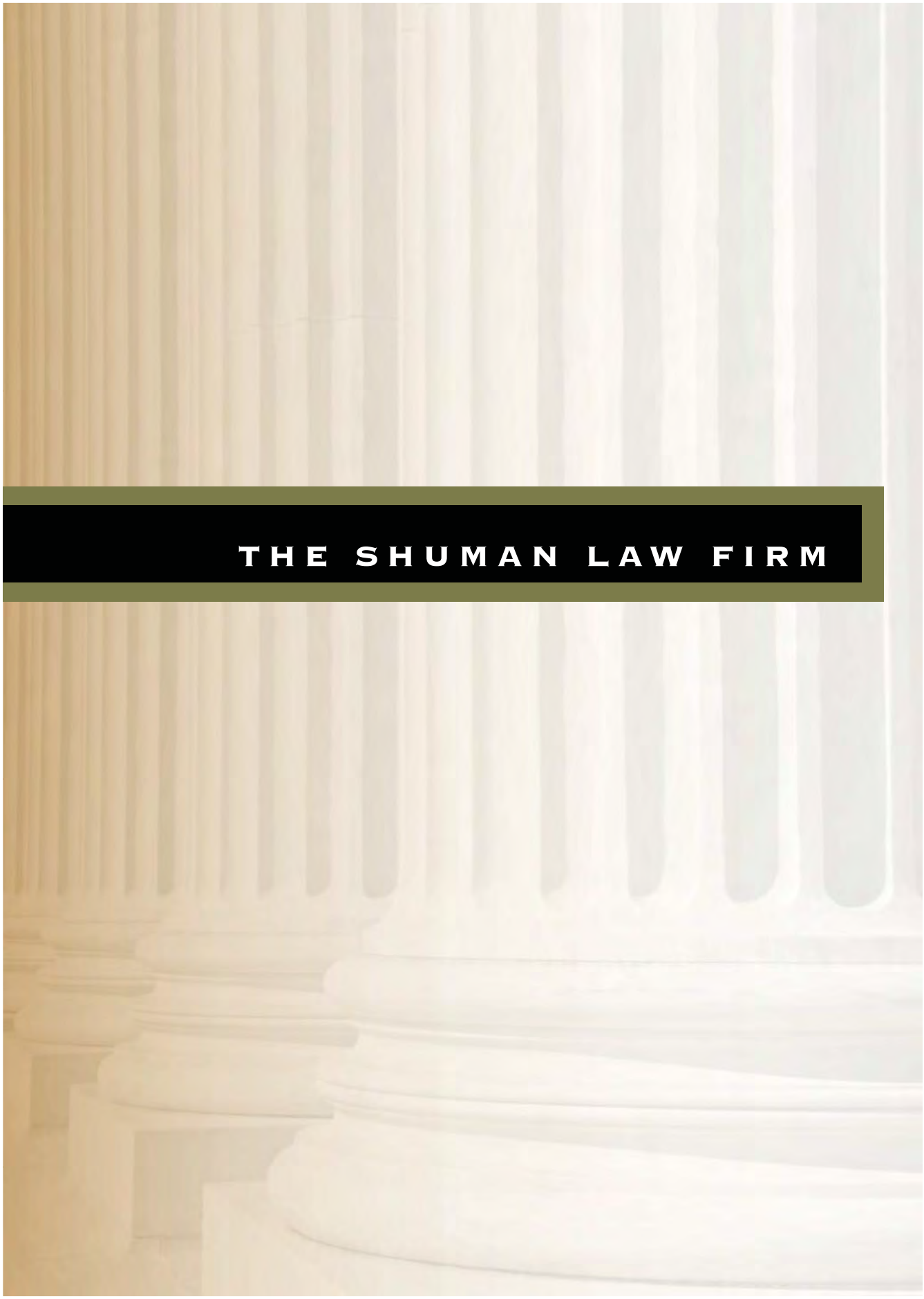
Exhibit B

DISBURSEMENT REPORT

FIRM: The Shuman Law Firm
REPORTING PERIOD: INCEPTION THROUGH May 30, 2014

DISBURSEMENT	TOTAL AMOUNT
Duplicating	0
Postage	14.26
Telephone / Fax	2,555.48
Messengers	351.44
Filing Fees	2,000.00
Transcripts	75.58
Computer Research	1,036.18
Federal Express	651.45
Travel/Meals/Hotels	14,686.36
Mediation Fees	1,250.00
Miscellaneous	751.03
Litigation Fund Contributions	223,152.31
TOTAL	**$246,524.09**[2]

[2] Expenses have been reduced to exclude costs already reimbursed from the Fixed Income Case and to reduce certain costs, proportionately, given that the California Action is not a part of this Settlement.


THE SHUMAN LAW FIRM

The Shuman Law Firm prides itself with its unwavering dedication to serving clients at the highest legal and ethical standards in the prosecution of corporate securities fraud throughout the United States. We are passionate about advancing the rights of defrauded shareholders and work steadfastly to

MISSION STATEMENT

redress damages suffered by our clients. We take great pleasure in our commitment to two fundamental principles – client communication and satisfaction. We view our size as an asset which facilitates communication and enables us to better serve our clients. We believe our success as a law firm cannot only be measured by the amount of money we recover, but also the trust we develop with our clients and their approval of our work done on their behalf.

We are proud to acknowledge that RiskMetrics Group's Securities Class Action Services division recognized the Shuman Law Firm as one of the top 50 plaintiffs' law firms in the United States, ranked by total dollar amount of final securities class action settlements in 2008 in which the law firm served as lead or co-lead counsel.

FIRM BACKGROUND

The Shuman Law Firm is a nationally recognized law firm located in majestic Boulder, Colorado. Our firm specializes in representing shareholders who have suffered financial losses from corporate securities fraud or other corporate malfeasance.

Since its inception in 1994, Kip B. Shuman, principal of The Shuman Law Firm, has worked to recover hundreds of millions of dollars on behalf of defrauded investors. The Shuman Law Firm has acted as class counsel for institutional investors, including public pension funds, labor unions, as well as thousands of individual investors in securities class actions and derivative litigation.

Most recently, The Shuman Law Firm served as counsel in over forty derivative lawsuits emanating from the well-publicized stock option backdating scandal that came to light in 2006. In these cases, corporate executives of publicly-traded companies manipulated company stock options in a manner that allowed the executives to enrich themselves to the tune of hundreds of millions of dollars at the expense of the companies and shareholders. The Shuman Law Firm has played a central role in causing many corporate executives who received manipulated stock options to return their ill-gotten profits to the companies they served.

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In many instances, The Shuman Law Firm has caused the manipulated stock options to be either rescinded or re-priced to ensure that executives cannot profit from their wrong doing. In addition, The Shuman Law Firm has caused the boards of directors of these companies to adopt robust corporate governance changes that are specifically designed to create a system of checks and balances which ensure that stock option manipulation will not occur in the future. These cases provide one recent example of The Shuman Law Firm's commitment to protecting the rights of shareholders. See pages 6-8 for a partial list of stock option backdating derivative cases and the results achieved.

ACCOLADES

In comparison with the thousand-plus attorney mega-firms commonly seen today, The Shuman Law Firm and its predecessor firm, has been frequently recognized by the courts for the high quality of its work and results achieved.

- At a hearing to appoint lead plaintiffs, lead counsel, and liaison counsel in In Re Rhythms Securities Litigation, United States District Court Senior Judge John L. Kane complimented Mr. Shuman on having done an "excellent job" in all of the class action securities matters held in his court to date.

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• In *In re Qwest Communications International, Inc., Securities Litigation,* which is believed to be the largest securities fraud case in the history of the State of Colorado, the Court in granting approval of the final settlement of the action stated: "I have for my duration as the presiding judge in this case respected and admired your competent counsel, because as I have commented and as my lead law clerk have commented repeatedly, the quality of your briefing and your argument and authority was exemplary and something that I would hope would be emulated by other counsel in the same or similar circumstances."

• In *Queen Uno v. Coeur D'Alene Mines Corporation,* the Court recognized the "skill and experience, reputation and ability" of plaintiffs' counsel, stating that counsel are "well respected litigators in the securities field," "highly skilled in class action litigation and federal securities law," and that " the substantial amount recovered is testament to their skill."

• Likewise, in approving the final settlement of another national securities fraud class action, *Schaffer v. Evolving Systems, Inc.,* the court recognized the effort and ability of plaintiffs' counsel, stating that "the $10 million settlement ... is a good recovery, in fact, almost extraordinarily good. And I commend counsel for having achieved that result."

Mr. Shuman, of The Shuman Law Firm, has exceptional success in prosecuting shareholder class actions and derivative actions. Below is a sample of his more notable cases.

NOTABLE CASES

- *Rasner v. FirstWorld Communications Inc.*, Case No. 00-K-1376 (D. Colo.) (co-lead counsel) ($25.925 million recovered).

- *In re Tele-Communications, Inc. Sec. Litig.*, Case No. 97CV421 (Colo.) (co-lead counsel) ($26.5 million recovered).

- *Muhr v. Transcrypt Int'l, Inc.*, Case No. CI98-333 (Neb.) (co-lead counsel) (approximately $25 million recovered).

- *In re Samsonite Corp. Sec. Litig.*, Case No. 98-K-1878 (D. Colo.) (co-lead counsel) ($24 million recovered).

- *Queen Uno Ltd. Partnership. v. Coeur D'Alene Mines Corp.*, Case No. 97-WY-1431 (D. Colo.) (co-lead counsel) ($13 million recovered).

- *In re Secure Computing Corp. Sec. Litig.*, Case No. C-99-1927 (N.D. Cal.) (co-lead counsel) ($10.1 million recovered).

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• *Angres v. Smallworldwide PLC,* Case No. 99-K-1254 (D. Colo.) (co-lead counsel) ($9.85 million recovered).

• *In re Qwest Comms. Int'l Sec. Litig.,* Case No. 01-cv-1451 (D. Colo.) (liaison counsel) ($450 million recovered).

• *In re First American Corporation Shareholder Derivative Litigation,* Case No. SACV-06-1230 (C.D. Cal.) (corporate reforms obtained included, separating roles of the Chairman of the Board and CEO, enhanced Chairman of the Board duties, the creation of lead independent director, and revised compensation guidelines).

• *In re Quest Software, Inc. Derivative Litigation,* Case No. SACV-06-751 (C.D. Cal.) (corporate reforms obtained included, separating roles for Chairman of Board and CEO, enhanced Chairman of the Board duties, amendments to stock option plans, revisions to compensation committee and audit committee charters, and revised compensation guidelines).

• *In re NVIDIA Corp. Derivative Litigation,* Case No. C-06-06110 (N.D. Cal.) (payments, re-pricing and other benefits to the company for mispriced stock options valued at over $15 million; corporate reforms obtained included, enhanced board of director duties and independence requirements, creation of lead independent director with specified duties, and revised compensation and stock option policies).

continued on next page

• *In re Newpark Resources, Inc. Derivative Litigation,* Case No. 06-7340 (E.D. La.) (payment of $8.3 million to the company for mispriced stock options; creation and implementation of code of ethics for senior officers and directors, creation and implementation of policy on reporting, cooperating with investigation and discipline in connection with policy violations, modifications to company policy regarding remediation actions related to material weaknesses in internal controls over financial reporting).

• *In re Meade Instruments Corp. Derivative Litigation,* Case No. 06CC00205 (Cal. Super. Ct., Orange County) (corporate reforms included, enhanced timing, disclosures, and doc-umentation of company equity compensation awards of awards, the creation of a compliance officer and enhanced duties for compensation and audit committees).

• *In re Cheesecake Factory Incorporated Derivative Litigation,* Case No. CV-06-6234 (C.D. Cal.) (repayment to the company by certain directors and officers for mispriced exercised stock options; corporate reforms included, the addition of an independent director, maintenance of a lead independent director with specified duties, enhanced board of director duties and independence requirements, and revised compensation and stock option policies).

Kip B. Shuman kip@shumanlawfirm.com

Kip B. Shuman, founding member of the firm, has prosecuted class actions and derivative actions in Colorado and throughout the United States for more than fifteen years. Mr. Shuman concentrates his practice on representing injured shareholders through securities class actions and derivative litigation.

Mr. Shuman graduated from U.C.L.A. in 1984 and the University of San Francisco School of Law in 1989.

OUR SECURITIES LITIGATION TEAM

Mr. Shuman has materially participated in or has had primary responsibility for more than fifty class action lawsuits, including actions that were the subject of the following opinions: *Queen Uno Ltd. P'ship. v. Coeur d'Alene Mines Corp., 2 F. Supp. 2d 1345 (D. Colo. 1998); Queen Uno Ltd. P'ship. v. Coeur D'Alene Mines Corp., 183 F.R.D. 687 (D. Colo. 1998); Schaffer v. Evolving Sys. Inc., 29 F. Supp. 2d 1213 (D. Colo. 1998); In re Intelcom Group, Inc., Sec. Litig., 169 F.R.D. 142 (D. Colo. 1996); In re Hirsch, 984 P.2d 629 (Colo. 1999); Leonard v. McMorris, 272 F.3d 1295 (10th Cir. 2001); In re Secure Computing Sec. Litig., 2001 U.S. Dist. LEXIS 13563 (N.D. Cal. 2001); Angres v. Smallworldwide, 94 F. Supp. 2d 1167 (D. Colo. 2000); In re Ribozyme Pharm., Inc. Sec. Litig., 192 F.R.D. 656 (D. Colo. 2000); Kerns v. SpectraLink Corp., 2003 U.S. Dist. LEXIS 6194 (D. Colo. 2003); Kerns v. SpectraLink Corp.,*

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2003 U.S. Dist. LEXIS 11711 (D. Colo. 2003); Gregg v. Sport-Haley, Inc., 2003 U.S. Dist. LEXIS 6195 (D. Colo. 2003); and In re Rhythms Sec. Litig., 300 F. Supp. 2d 1081 (D. Colo. 2004).

Mr. Shuman has lectured in the area of class actions, teaching a continuing legal education course entitled, *Litigating the Class Action Lawsuit in Colorado.* He was also a panelist at the 35th Rocky Mountain Securities Conference and presented on the topic of *Pleading Requirements in the Tenth Circuit after the Private Securities Litigation Reform Act of 1995.*

Mr. Shuman is a member of both the Colorado and California State Bars, and is admitted to practice before the United States District Courts for the Northern District and Central District of California, the United States District Court for Colorado, and the United States Ninth and Tenth Circuit Courts of Appeals.

RUSTY E. GLENN rusty@shumanlawfirm.com

Rusty E. Glenn, an associate of the firm, concentrates his practice on representing injured shareholders through securities class actions and derivative litigation.

Mr. Glenn received his B.S., summa cum laude, from Baker University, an M.A. in Economics from the University of Kansas Graduate School of Economics and his law degree from the University of Kansas School of Law where he was awarded the

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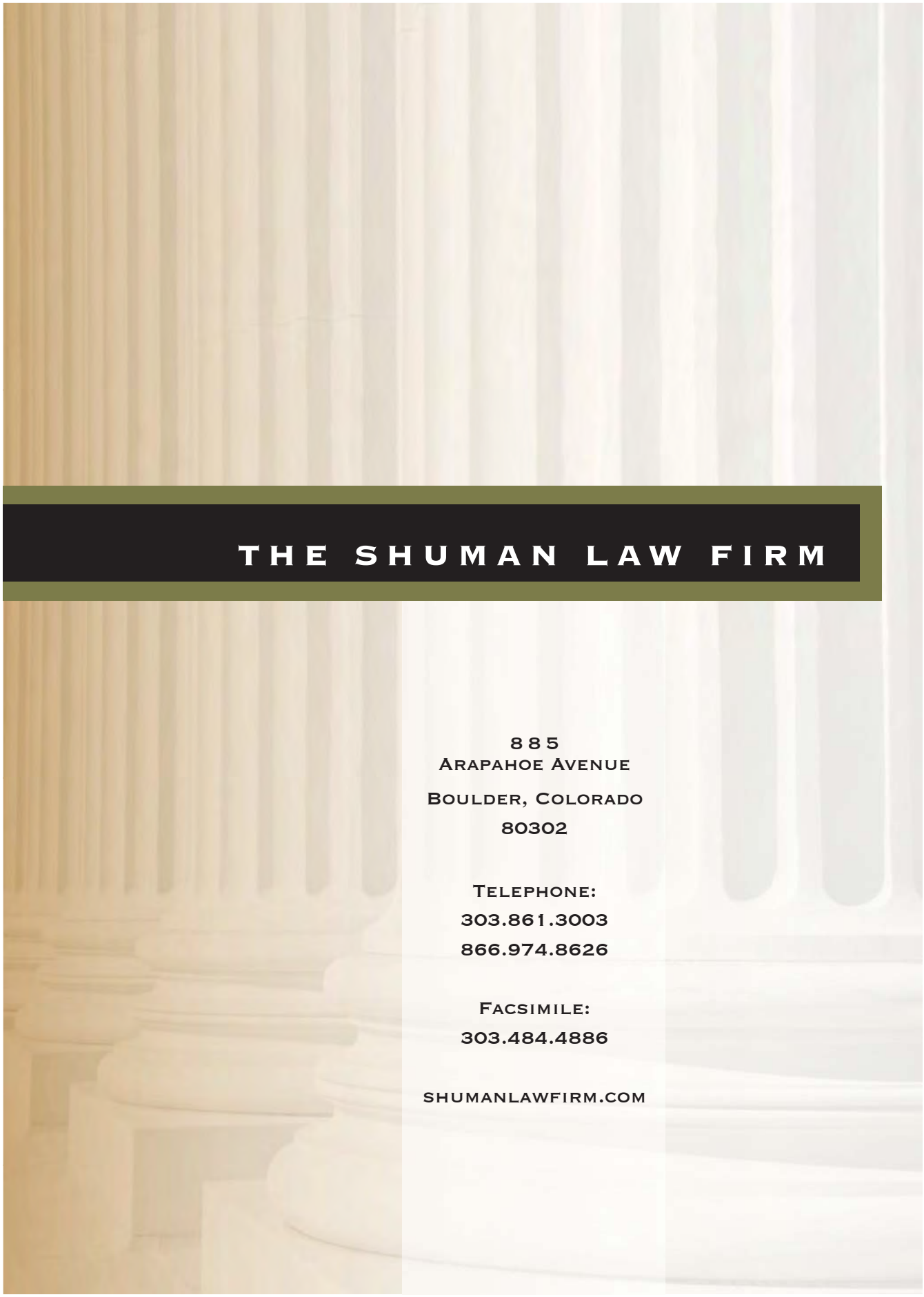
Hinkle Elkouri Tax Procedure Award for his scholastic achievement and community service in providing volunteer income tax assistance to low-income individuals. He also studied at Bahceshir University in Istanbul, Turkey under U.S. Supreme Court Justice Antonin Scalia.

Mr. Glenn's professional experience includes two years as Constituent Director for Kansas Senate Democratic Leader Anthony Hensley. In addition, Mr. Glenn gained experience in the investigation and prosecution of financial crimes and corporate fraud while working for the Federal Bureau of Investigation in Washington, D.C. and Kansas City, Missouri. Upon graduation from law school, Mr. Glenn joined The Shuman Law Firm and has prosecuted numerous class actions and derivative actions.

Mr. Glenn is a member of the Colorado State Bar, and is admitted to practice before the United States District Court for the District of Colorado, and the United States Tenth Circuit Court of Appeals.



THE SHUMAN LAW FIRM

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866.974.8626

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EXHIBIT 14

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LABATON SUCHAROW LLP'S RESPONSE TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES TO LABATON SUCHAROW LLP – JULY 10 RESPONSE

INTERROGATORY 47:

Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY 47:

The Firm incorporates the General Objections set forth above. We note that most contingency fee arrangements with clients provide for payment on a percentage of total award basis, subject to the approval of the Court and a lodestar cross-check. Subject to and without waiving the foregoing objections, the Firm references the following documents previously produced: LBS005407-LBS005416.

INTERROGATORY 48:

Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY 48:

The Firm incorporates the General Objections set forth above. Subject to and without waiving the foregoing objections, the Firm provides the following information:

Case Name	Role	Status	Labaton Compensation	Notes
In re Barrick Gold Securities Litigation, No. 13-cv-3851 (S.D.N.Y.)	Liaison Counsel	Settled	2016 Fee Motion	Rates are set forth below.
In re Britannia Bulk Holdings Inc. Securities Litigation, No. 08-cv-9554 (S.D.N.Y.)	Liaison Counsel	Dismissed	None	

Case Name	Role	Status	Labaton Compensation	Notes
International Assoc. of Heat and Frost Insulators and Asbestos Workers Local #6 Pension Fund, et al. v. International Business Machines Corp., No. 15-cv-2492 (S.D.N.Y.)	Liaison Counsel	Dismissed	None	
In re Banco Bradesco S.A. Sec. Litig., No. 16-cv-4155 (S.D.N.Y.)	Liaison Counsel	Pending	None	
In re Icagen, Inc. Shareholder Litigation, C.A. No. 6692 (Del. Ch.)	Local Counsel (Counsel for Plaintiff)	Settled	2012 Fee Motion	Fee motion was not made on the basis of lodestar and rates were not reported.
Oklahoma Firefighters Pension and Retirement System v. Xerox Corporation, No. 16-cv-8260 (S.D.N.Y.)	Liaison Counsel to the Class	Pending	None	

BARRICK GOLD – Labaton Rates

PROFESSIONAL	STATUS	HOURLY RATE	JD Year
Keller, C.	(P)	$950	1997
Gardner, J.	(P)	$925	1990
Gottlieb, L.	(P)	$925	1990
Stocker, M.	(P)	$875	1995
Belfi, E.	(P)	$875	1995
Zeiss, N.	(P)	$850	1995
Hallowell, S.	(P)	$800	2003
Fonti, J.	(P)	$800	1999
Hoffman, T.	(P)	$800	2004
Tountas, S.	(P)	$775	2003
Fox, C.	(OC)	$750	1994
Wierzbowski, E.	(A)	$725	2001
Erroll, D.	(A)	$675	2001
Avan, R.	(A)	$600	2006
Buell, G.	(A)	$550	2009
Stampley, D.	(A)	$460	2009
Coquin, A.	(A)	$425	2014
Hane, C.	(A)	$390	2013

PROFESSIONAL	STATUS	HOURLY RATE	JD Year
Jouvin, Z.	(SA)	$500	2003
Wharff, W.	(SA)	$500	2001
Hurtado, S.	(SA)	$500	2002
Kramer, D.	(SA)	$500	2001
Torrez, F.	(SA)	$500	2003
Figueroa, Y.	(SA)	$500	1999
Lugo Melendez, K.	(SA)	$500	2013
Horlacher, S.	(SA)	$500	2000
Assefa, M.	(SA)	$500	2003
Salzman, E.	(SA)	$500	2003
Flanigan, M.	(SA)	$435	1998
Hirsh, J.	(SA)	$410	2001
Davis, O.	(SA)	$390	2000
Stinaroff, D.	(SA)	$360	2007
Korode, J.	(SA)	$360	2005
Schervish, W.	(LA)	$550	2007
Pontrelli, J.	(I)	$495	N/A
Greenbaum, A.	(I)	$455	N/A
Crowley, M.	(I)	$435	N/A
Polk, T.	(I)	$430	N/A
Wroblewski, R.	(I)	$425	N/A
Malonzo, F.	(PL)	$340	N/A
Carpio, A.	(PL)	$325	2005
Rogers, D.	(PL)	$325	N/A
Mehringer, L.	(PL)	$325	N/A
Russo, M.	(PL)	$300	N/A
Farber, E.	(PL)	$205	N/A

Partner	(P)	Of Counsel	(OC)
Associate	(A)	Staff Attorney	(SA)
Legal Analyst	(LA)	Investigator	(I)
Paralegal	(PL)		

Dated: July 10, 2017

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Attorneys for Labaton Sucharow LLP

VERIFICATION

On behalf of Labaton Sucharow LLP, I have read Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response. The Response was prepared with the assistance of the employees, representatives, and counsel of Labaton Sucharow LLP, and the information provided is not fully within my personal knowledge. I reserve the right to make changes or additions to these responses if it appears at any time that errors or omissions have been made or if more accurate or complete information becomes available. To the extent that these responses are within my personal knowledge, I certify them to be true. To the extent that these responses are not within my personal knowledge, I have no reason to believe that they are not true.

Signed under oath under the penalties of perjury this 11th day of July, 2017.

Lawrence A. Sucharow, Chairman

CERTIFICATE OF SERVICE

I, Justin J. Wolosz, hereby certify that on this Tenth day of July I have caused a copy of the foregoing Labaton Sucharow LLP's Response To Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response to be served via email and overnight mail upon William F. Sinnott, Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, MA 02108.

Justin J. Wolosz

8186704

EXHIBIT 15

United States Court of Appeals
For the First Circuit

No. 12-1520

ANGEL RUIZ-RIVERA,

Plaintiff, Appellant,

v.

DOW LOHNES, PLLC, a/k/a Dow Lohnes and Albertson, PLLC,

Defendant, Appellee,

BENNY F. CEREZO, ET AL.,

Defendants.

Before

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

JUDGMENT

Entered: January 8, 2014

Appellant Angel Ruiz-Rivera filed a complaint against various law firms and lawyers, and the complaint contained state-law claims of breach of contract and malpractice. After appellee Dow Lohnes, PLLC filed a motion to dismiss based on the fact that complete diversity was lacking, appellant requested voluntary dismissal without prejudice. See Fed. R. Civ. P. 41(a)(1)(A)(i). The district court granted appellant's request, noting that it had no subject matter jurisdiction over the case; the court also, sua sponte, sanctioned appellant under Fed. R. Civ. P. 11 by directing him to pay appellee's attorneys' fees.

Appellee then filed a motion for reconsideration, arguing that the dismissal should have been with prejudice based upon either (1) the "two dismissal rule," see Rule 41(a)(1)(B), or (2) the court's inherent power. The district court granted appellee's motion, and the judgment was amended to reflect a with-prejudice dismissal. For the following reasons, the dismissal with prejudice cannot be affirmed.

I. Dismissal of the Complaint

Rule 41(a)(1)(A)(i) provides, in relevant part, that a plaintiff may obtain a voluntary dismissal, without a court order, by filing a "notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." As for the effect of such a notice, Rule 41(a)(1)(B) states as follows:

> Unless the notice . . . states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal -- or state -- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(emphasis added). We also have held that the "two dismissal" rule does not apply "unless the defendants are the same or substantially the same or in privity in both actions." American Cyanamid Co. v. Capuano, 381 F.3d 6, 17 (1st Cir. 2004) (internal quotation marks and citation omitted).

The problem with the district court's application of the "two dismissal" rule is that neither of the prior Puerto Rico cases relied upon by that court to invoke the rule -- (1) Instituto de Educacion Universal v. United States Dept. of Educ., No. 98–cv-2225, and (2) Instituto de Educacion Universal v. United States Dept. of Educ., No. 96-cv-1893 -- had been voluntarily dismissed by appellant. Thus, these cases cannot count for purposes of Rule 41(a)(1)(B). And, while appellant had, in fact, voluntarily dismissed the case cited by appellee, see Ruiz-Rivera v. Wolff, No. 09-cv-1873, that case also provides no basis for invoking the "two dismissal" rule.

In this regard, appellee's only argument in support of a finding of privity is based on the district court's cryptic statement that "both plaintiff and Dow Lohnes are privy in prior civil actions which were adjudicated on the merits." Appellee's Brief, at 24 (internal quotation marks and citation omitted). Of course, and leaving aside exactly what the district court meant by the above statement, the fact that a plaintiff and a defendant may have been in privity in a past case is irrelevant for purposes of the "two dismissal" rule. Rather, in order for this rule to apply, it is "the defendants [who must be] the same or substantially the same or in privity in both actions." See American Cyanamid Co., 381 F.3d at 17 (emphasis added). Given the lack of any effort on appellee's part to explain how it is in privity with the Wolff defendants, Rule 41(a)(1)(B) simply is not available as a basis for a with-prejudice dismissal.

If more were needed, and it is not, we note that the claims in the two cases are not the same. Not only do the two cases present different bases for relief -- now, legal malpractice/breach of contract claims and, in Wolff, claims of violation of constitutional, statutory, and regulatory law, as well as fraud on the courts -- but the claims also do not arise from the same series of events. That is, the claims in the case at hand arise from appellee's conduct in representing IEU in the administrative proceedings, while the claims in Wolff arise from the conduct of the defendants in that case -- DOE officials and a private corporation -- during these proceedings and during the related judicial proceedings.

Appellee's alternative argument that the district court could have used its inherent authority

to order a with-prejudice dismissal also is unavailing. That is, such a dismissal ordinarily operates as an adjudication on the merits, and, where, as here, a district court is without subject matter jurisdiction over the case, it usually is barred from making any merits-related rulings. In re Orthopedic "Bone Screw" Products Liability Litig., 132 F.3d 152, 156-57 (3rd Cir. 1997) (so holding and distinguishing the sanction of attorneys' fees which is a matter collateral to the merits); Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 122 (2d Cir. 1999) ("where federal subject matter jurisdiction does not exist, federal courts do not have the power to dismiss with prejudice, even as a procedural sanction"). See also Christopher v. Stanley-Bostitch, Inc., 240 F.3d 95, 100 (1st Cir. 2001) (per curiam) (citing the above cases and holding that "orders relating to the merits of the underlying action are void if issued without subject matter jurisdiction"). While appellee relies on In re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996), that case is distinguishable, and we are not persuaded by appellee's argument.

Given the above, then, the district court, under Rule 41(a)(1)(A), had no discretion to enter anything other than a without-prejudice dismissal. See Universidad Cent. del Caribe, Inc. v. Liaison Comm. on Med. Educ., 760 F.2d 14, 19 (1st Cir. 1985) (if neither an answer or a motion for summary judgment has been filed before the submission of a notice of dismissal, "Rule 41(a)(1) is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discretion"; internal quotation marks and citation omitted). Therefore, the judgment of the district court must be vacated, and the matter remanded for a judgment of dismissal without prejudice.

II. Rule 11 Sanctions

Ordinarily, "an order imposing Rule 11 sanctions is not appealable until the particular sanction is chosen and ordered by the district court." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1337.4, at 765 (3d ed. 2004) (citing cases). See also Century 21 Real Estate Corp. v. Century 21 Real Estate, Inc., 929 F.2d 827, 830 (1st Cir. 1991) (concluding that an appeal from a grant of attorneys' fees that had not been quantified was premature). Here, the district court never set the amount of attorneys' fees that appellant would be required to pay, and the sanction order therefore is not final. However, in the interests of judicial efficiency, we note that the district court failed to comply with the procedural requirements of the rule.

In particular, Rule 11(c)(3), which authorizes a district court to impose sanctions sua sponte, as here, provides that "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." As we have held, this language means that when a district court is considering sua sponte sanctions, Rule 11 requires the court "to first issue an order to show cause why the challenged conduct had not violated Rule 11." Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 244 n.27 (1st Cir. 2010) (emphasis added). Here, the district court failed to issue the required show cause order. We also add that because of this omission, the court was without authority to impose attorneys' fees as a sanction. See Rule 11(c)(5) (stating that, unless a district court issues the Rule 11(c)(3) show-cause order before a voluntary dismissal, the court "must not impose a monetary sanction"; emphasis added). Thus, even if the sanction order were before this court, we could not affirm it.

III. Conclusion

The judgment of the district court is vacated, and the matter is remanded for further proceedings in accordance with this opinion. All pending motions are denied. No costs will be awarded under Fed. R. App. P. 39.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Daniel Dominguez, Judge, US District Court of Puerto Rico
Frances Rios de Moran, Clerk, US District Court of Puerto Rico
Angel Ruiz-Rivera
Salvador Antonetti-Stutts
Nashely Pagan-Isona
Ruben Cerezo-Hernandez

EXHIBIT 16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SHIRE LLC and SHIRE US INC., Plaintiffs, v. ABHAI, LLC, Defendant.	Civil Action No. 1:15-cv-13909 (WGY) Bench Trial

PLAINTIFFS' APPLICATION FOR REASONABLE ATTORNEYS FEES AND EXPENSES IN ACCORDANCE WITH THE COURT'S MARCH 22, 2018 ORDER

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I. INTRODUCTION

On March 22, 2018, the Court issued its Findings of Fact, Rulings of Law, and Order for Judgment, which awarded attorneys' fees and costs to Plaintiffs Shire LLC and Shire US Inc. (collectively, "Shire") as sanctions due to the litigation misconduct of Defendant Abhai, LLC and its parent, KVK Tech, Inc. ("KVK" or, collectively, "Abhai")[1]. D.I. 377 at 77. The Court directed Shire to "submit a revised claim for attorneys' fees and costs limited to (a) recovering for the time wasted dealing with Abhai's inaccurate stability and dissolution data, (b) discovering the litigation misconduct discussed immediately above, and (c) dealing with Abhai's revised stability and dissolution data." *Id.* Shire hereby submits this detailed account of its attorneys' fees and costs that fall within the Court's enumerated categories and respectfully requests the Court award Shire accordingly.

II. BACKGROUND FACTS

Due to Abhai's misconduct, this litigation was extended by five months—with Shire forced to conduct its own dissolution testing, reconsider Abhai's repudiated dissolution data, analyze Abhai's new dissolution data, and investigate why Abhai did not timely produce its dissolution data. *See* D.I. 377 at 64–81. With the Court having already determined that Shire is eligible for an award of the fees and costs stemming from Abhai's misconduct, this submission is intended solely to document those fees and costs.

[1] Both Abhai and KVK are fully responsible for the litigation misconduct in this case. D.I. 337 at 70 ("The conduct of Abhai and KVK reflects an appalling lack of awareness of a litigant's responsibility to our justice system . . . ."). Abhai, a shell with limited assets, has eschewed any reliance on a distinction between Abhai and KVK. D.I. 189 at 9–10. For these reasons, both Abhai and KVK should be ordered to pay the sanctions award.

A. Category (a): "time wasted dealing with Abhai's inaccurate stability and dissolution data"

For category (a), the relevant time frame is September 2016 through April 2017. This time frame begins when the parties started preparing for corporate depositions, analyzing the dissolution data, and preparing for expert reports and ends when the Court and Shire were first made aware of Abhai's use of erroneous data. Shire took the deposition of Dr. Ranga Namburi, Abhai's corporate 30(b)(6) witness and the person who discovered the inaccurate data, on October 14, 2016. D.I. 277 at 65–66. In November 2016, in response to Dr. Namburi's deposition, Shire undertook additional discovery regarding Abhai's dissolution data, including a request for all versions of its dissolution test protocols. D.I. 332 (Shire's Post Trial FFCL) ¶ 749. Abhai produced most of its dissolution test protocols on November 23, 2016—all except the newest version, from October 2016. D.I. 332 ¶ 755.

During this same timeframe, Shire's counsel analyzed and reviewed Abhai's documents and laboratory notebooks, worked with its experts, and prepared expert reports regarding Abhai's dissolution testing. Shire worked with Shen Luk of Juniper Pharma Services ("Juniper")—Shire's expert on coating thickness and dissolution testing—to analyze Abhai's dissolution protocols and perform dissolution testing of Abhai samples. D.I. 332 ¶¶ 38–41. Additionally, Shire worked with Jennifer Dressman, Shire's principal infringement expert, in analyzing Abhai's dissolution testing data for her rebuttal expert report and trial testimony. D.I. 332 ¶¶ 24–27. In reaching their initial conclusions about the release of Abhai's ANDA Product, Shire's experts relied not only on the documents produced by Abhai during the course of discovery, but also on representations made by Dr. Namburi. D.I. 332 ¶ 726.

The opening expert reports for Dr. Luk and Dr. Dressman were served on October 21, 2016. On December 16, 2016, Shire served the rebuttal expert report of Dr. Dressman in

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response to the expert report of Diane Burgess, Abhai's expert. In her rebuttal report, Dr. Dressman explained that Abhai's own dissolution testing, including the later-repudiated test data, confirmed that Abhai's ANDA product infringed. *See* D.I. 145 (Shire's Pre-Trial FFCL) ¶¶ 140–66. Shire began preparing for Dr. Dressman's and Dr. Burgess' depositions in early January 2017, and Shire took and defended their depositions on January 20, 2017 and January 27, 2017, respectively. Beginning in early March 2017, Shire began to prepare its pretrial motions and briefing and to prepare for trial itself; this included preparing to cross-examine Dr. Burgess and to conduct the direct examinations of Dr. Dressman and Dr. Luk. Trial began on March 27, 2017, Dr. Burgess testified on March 28, 2017, and Dr. Dressman and Dr. Luk were about to take the stand when, on April 3, Abhai revealed that much of its dissolution data was, in fact, incorrect.

B. Category (b): "discovering the litigation misconduct"

For category (b), the relevant time frame is April 2017 through August 2017, during which Shire was diligently investigating the facts surrounding Abhai's withholding of relevant information. On April 3, 2017, Abhai produced its "corrected" dissolution data and, on the next day, moved to amend the trial order to include the just-produced data. *See* D.I. 152–155. As instructed by this Court, Shire conducted a thorough investigation of these developments. Throughout April 2017, Shire poured through Abhai's newly produced documents and—faced with more obstructive conduct from Abhai—moved to compel discovery on May 5, 2017. D.I. 183. On May 15, 2017, this Court ordered Abhai to produce Mr. Tabasso's call logs and text messages. D.I. 195. With Shire pushing hard for more document production relating to "who knew what when" about the repudiated and corrected data, Abhai coughed up a vast number of documents. As Abhai admitted, Shire "collected over 60,000 pages of documents from Abhai since April 4." D.I. 264 (Joint Add. Pre-Trial Mem.) ¶ 237. These documents were not only

relevant to this investigation, but also relied on at trial and included in the Court's opinion. *See*, *e.g.*, D.I. 377 at 66–70, 73.

In June and July 2017, Shire deposed numerous Abhai officers and employees—Benjamin Roembke, Sameer Late, Kevin O'Loughlin, Todd Leo, Murty Vepuri, Frank Nekoranik, Ashvin Panchal, Jordan Rees, and Anthony Tabasso—regarding Abhai's ownership structure, company practices and testing procedures, document retention policies, and knowledge of the erroneous and allegedly corrected dissolution testing. Shire requested that Abhai call its fact witnesses at trial, and Shire prepared to cross-examine them. But Abhai refused to produce these witnesses at trial. D.I. 337 at 64, n. 6. Shire was forced instead to prepare and submit proffers of what each of these witnesses would have testified to had Abhai cooperated. Shire submitted their proffers on September 15, 2017. D.I. 287–290.

C. Category (c): "dealing with Abhai's revised stability and dissolution data"

For category (c), the relevant time frame is April 2017 through September 2017. When Abhai produced its allegedly corrected dissolution data in April 2017, Shire had to review and analyze each corrected data point and determine its impact on Shire's existing analysis and corresponding infringement arguments. Starting in May 2017, Shire worked with its experts, Dr. Luk and Dr. Dressman, to review and amend each of their expert reports in light of the new "corrected" dissolution testing. In addition, as Abhai could no longer be relied upon to produce accurate dissolution data, Shire—through Dr. Luk—needed to conduct its own dissolution testing of each strength of Abhai's ANDA product. The supplemental expert reports were served in late June 2017, and reply reports were served in early August 2017 along with a corresponding motion for leave. Abhai deposed Dr. Dressman on August 4, 2017 and Dr. Luk on August 18, 2017. Shire deposed Dr. Burgess on August 24, 2017. At trial, Dr. Luk testified on September 5,

2017, Dr. Burgess testified on September 5, 6, and 8, 2017, and Dr. Dressman testified on September 14, 2017.

III. SHIRE'S REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE

Sanctions, under federal law and procedure, are appropriate in these circumstances through three different avenues: (1) Federal Rules of Civil Procedure 37; (2) the Court's inherent authority; and (3) 35 U.S.C. § 285, which provides a court with authority "in exceptional cases [to] award reasonable attorney fees to the prevailing party."[2] Under Rule 37, a court must order reasonable expenses, including attorneys' fees, if a party "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2). Additionally, federal courts possess "inherent powers," not conferred by rule or statute, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). That authority includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).

A "permissible sanction is an assessment of attorney's fees . . . instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (internal quotations omitted). According to a "but-for causation standard," "[t]he award is then the sum total of the fees that, except for the misbehavior, would not have accrued." *Id.* at 1187. "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838

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[2] Shire is the prevailing party and, given the extent of Abhai's litigation misconduct, this case qualifies as "exceptional." *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 726 F.3d 1359, 1366–67 (Fed. Cir. 2013) (noting the "well-established rule that litigation misconduct and unprofessional behavior may suffice, by themselves, to make a case exceptional under § 285.") As the Court has already awarded Shire its attorneys' fees and costs due to Abhai's litigation misconduct, Shire will not separately discuss Section 285, which provides a separate statutory basis for the fees and costs Shires seeks.

(2011). Accordingly, this Court determined it was appropriate to award attorneys' fees and costs as sanctions due to Abhai's litigation misconduct "limited to (a) recovering for the time wasted dealing with Abhai's inaccurate stability and dissolution data, (b) discovering the litigation misconduct discussed immediately above, and (c) dealing with Abhai's revised stability and dissolution data." D.I. 377 at 77.

The Federal Circuit and the District of Massachusetts generally follow the "lodestar" method for determining the amount of reasonable attorneys' fees: the number of hours reasonably expended multiplied by a reasonable hourly rate. *Bywaters v. United States*, 670 F.3d 1221, 1228 (Fed. Cir. 2012); *Jin Hai Li v. Foolun, Inc.*, 273 F. Supp. 3d 289, 292 (D. Mass. 2017). The starting point for this calculation is determining the number of adequately documented hours. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar calculation then requires a determination of a reasonable hourly rate that is benchmarked to the "prevailing rates in the community" for lawyers of like "qualifications, experience, and specialized competence." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295 (1st Cir. 2001). Adjustments to the lodestar calculation upward or downward may be made in "rare" and "exceptional" circumstances, if based on specific findings of factors not subsumed within the loadstar calculation. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010).

A. Shire Spent a Reasonable Number of Hours Responding to Abhai's Misconduct

The first step in following the lodestar method is to calculate the number of hours reasonably expended by the attorneys for the prevailing party, excluding those hours that are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434; *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984). Evidence supporting the reasonableness of the hours expended and hourly rates, including contemporaneous time records, invoices, and other

documentation is provided along with a declaration of Shire's counsel. *See* Collins Decl., Ex. A. While billing for a litigation of this size is complicated, and Abhai may try to pick at the bills, Shire believes the hours and amount spent were necessary to protect its rights in this situation and therefore reasonable, especially given that it was Abhai's own obstructive conduct that warranted such measures. In total, Shire identified at least 3,230.3 attorney hours, resulting in a total of $2,087,889 in attorneys' fees fitting the Court's three enumerated categories. A detailed description of the work performed by Shire's attorneys is outlined below and supported by the attached documentation.

1. Category (a): "time wasted dealing with Abhai's inaccurate stability and dissolution data"

For category (a), the time entries included in the calculation from September 2016 to April 2017 include:

- time spent analyzing Abhai's ANDA containing dissolution and stability data;
- time spent reviewing Abhai's lab notebooks containing dissolution and stability data;
- time spent working with Juniper on dissolution testing;
- time spent working on Dr. Luk's opening expert report related to dissolution testing (including the four pages in his 37-page opening report plus the short description in Appendix E of his dissolution testing methodology);
- time spent working with Dr. Dressman on her reply report addressing dissolution data;
- time spent preparing Dr. Dressman for deposition;
- time spent reviewing Dr. Burgess's expert report on inaccurate dissolution data;
- time spent deposing Dr. Burgess on inaccurate dissolution data;
- time spent preparing Dr. Luk for deposition;
- time spent deposing Abhai/KVK employees on inaccurate dissolution data;

- time spent preparing Dr. Dressman and Dr. Luk for trial on inaccurate dissolution data; and
- time spent preparing to cross examine Dr. Burgess on inaccurate dissolution data.

2. Category (b): "discovering the litigation misconduct"

For category (b), the time entries included in the calculation from April 2017 to August 2017 include:

- time spent during first trial reviewing newly disclosed dissolution and stability data;
- time spent opposing Abhai's attempt to amend the pretrial order and introduce evidence at the first trial not produced during fact discovery;
- time spent at the court hearing convened to determine the best path forward;
- time spent drafting discovery requests;
- time spent reviewing Abhai's responses to interrogatories and request for production;
- time spent reviewing Abhai documents produced after the first trial in April 2017;
- time spent pressing Abhai for more information and additional documents;
- time spent moving to compel production of documents and additional information, including related legal research;
- time spent researching the relationship between KVK and Abhai;
- time spent collecting dissolution testing for third parties to show issues with Abhai's testing; and
- time spent preparing for and taking the depositions of Anthony Tabasso, Jordan Rees, Ashvin Pancheal, Frank Nekovanik, Murty Vepuri, Ranga Namburi, Todd Leo, Benjamin Roembke, Sameer Late, and Kevin O'Loughlin.

3. Category (c): "dealing with Abhai's revised stability and dissolution data"

For category (c), the time entries included in the calculation from April 2017 to September 2017 include:

- time spent developing a response to the revised stability and dissolution data;

- time spent analyzing Abhai's document productions in light of revised stability and dissolution data;
- time spent with Dr. Luk and Juniper regarding new dissolution studies being conducted;
- time spent with Dr. Dressman on a supplemental expert report addressing Abhai's revised stability and dissolution data;
- time spent working with consulting experts to understand issues raised by the revised dissolution data;
- time spent collecting information about other dissolution studies for Adderall XR, including those in Shire's NDA;
- time spent moving to compel Abhai to produce more documents and provide additional information relevant to understanding the revised stability and dissolution data; and
- time spent preparing Dr. Dressman for the second trial.

4. Requested Attorney Fees Were Carefully Reviewed

Counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" *Hensley*, 461 U.S. at 434. That has been done here. Before any invoices are sent to a client, Covington reviews all time records for inefficiency and redundancy. Additionally, any fees or costs not clearly falling within the three enumerated categories have been eliminated.

For example, Shire's counsel surrendered any time entries where the entries were vague—even if the entry otherwise indicated the work was likely to be related to the categories. *See* Collins Decl. ¶ 5. Additionally, time entries that included tasks unrelated to the Court's categories were not included. *See id.* Moreover, Shire has not included fees for its paralegals or other legal staff. *See id.* at ¶ 6. And Shire's counsel were efficient in allocating work. *See id.* at ¶ 3. Experience levels were carefully matched to the demands of a particular project to contain

costs without sacrificing the odds of success. *See id.* Shire's counsel have reviewed the bills carefully and do not believe there is any duplication of effort. *See id.* at ¶ 4–5.

These fees and costs are in line with contemporary patent litigation. Based on the widely accepted American Intellectual Property Law Association ("AIPLA") 2017 Report of the Economy Survey, the average litigation costs for a patent infringement case under the Hatch Waxman Act with more than $25 million at risk is $1.15 million through discovery and $2.654 million through trial. Collins Decl., Ex. F at I-128; *see also id.* at I-116 (average cost in Boston is $3.714 million); *id.* at I-122 (average cost with a firm having 60+ attorneys is $4.992 million). The 90% percentile for Hatch Waxman litigation—presumably regular cases, not those involving essentially two trials—is $7.75 million. *Id.* at I-128. Moreover, Adderall XR® is a blockbuster, and a variety of complex issues, including intricate non-infringement analysis and contentious discovery into Abhai's litigation misconduct, resulted in essentially two separate trials. This level of complexity required a higher skill set, and more time, labor, and experience to handle.

To put the above further into perspective, the total litigation expenses for Shire in this one particular matter were over $8.6 million. Collins Decl. ¶ 8. The amount of fees and costs requested as sanctions due to Abhai's litigation misconduct is approximately a quarter of the total for this case. Furthermore, the litigation costs actually incurred by Shire since discovering Abhai's misconduct in April 3, 2017 through the second trial in September 15, 2017 is over $4.8 million. *Id.* Shire is, however, submitting less than half of these fees and costs to the Court for consideration. Because these hours were genuine worked hours, and were not duplicative or unnecessary, they are included in Shire's lodestar calculation.

5. Local Representation Fees

Choate Hall & Stewart LLP ("Choate"), acting primarily as local counsel, billed a total of $33,128 representing Shire in connection with this matter related to the Courts identified

categories. Shire has specifically limited its requested recovery to just the five-day period Choate attended and prepared for the second trial. Marandett Decl. ¶ 8. In an attempt to streamline its request, Shire is not submitting other fees and costs expended on local representation that are arguably related to Abhai's misconduct. For comparison, Choate's total fees for the period from April 2017 through December 2017 is over $157,000. Marandett Decl. ¶ 7. These hours were specific to work needed for local representation, non-duplicative of Covington's work and necessary to the representation.

B. Shire's Reasonable Hourly Rate Is Comparable to Prevailing Rates in the Community for Patent Litigation

A court's second step in calculating the lodestar requires a determination of a reasonable hourly rate—a determination benchmarked to the "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895–96 (1984). The "community" is generally the forum state. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Evidence of the attorneys' customary rates and the actual fee arrangement in the case may further be considered in determining reasonableness. *See Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("The presence of a pre-existing fee agreement may aid in determining reasonableness.")). A district court may also rely on its own knowledge of prevailing market rates. *See, e.g.*, *Warnock v. Archer*, 397 F.3d 1024, 1027 (8th Cir. 2005).

The hourly rates and biographies for Shire's counsel are provided in the attached declarations. Collins Decl. ¶ 9, Ex. E; Marandett Decl. ¶ 7, Ex. A. The rates billed to Shire in this case were consistent with each attorneys' customary, market-driven rate at the time the service was rendered, and are appropriate for the level of skill and experience of each attorney or

paralegal. These rates are consistent with the rates of similarly situated attorneys. In Boston, litigation rates have been reported as follows[3]:

	2016 Rates			2017 Rates		
Rank	High	Low	Average	High	Low	Average
Associate 1	$335	$325	$330	$495	$295	$350
Associate 2	$495	$360	$455	$730	$350	$435
Associate 3	695	350	$520	N/A	N/A	N/A
Associate 3	$625	$540	$555	$670	$380	$580
Associate 4	N/A	N/A	N/A	N/A	N/A	N/A
Associate 5	N/A	N/A	N/A	$815	$425	$555
Associate 6	$765	$695	$755	$730	$340	$570
Associate 7	N/A	N/A	N/A	$865	$350	$615
Associate 8	$930	$400	$710	$730	$540	$665
Counsel	$895	$695	$840	$970	$350	$810
Junior Partner	$925	$550	$715	$895	$580	$715
Senior Partner	$1,450	$405	$870	$1,450	$485	$855

The American Lawyer also reported the following billing average billing rates for top national practices: $1,000/hour for partners; $745/hour for senior associates; $630 for mid-level associates, and $485/hour for junior associates.[4] While the rates here are on the higher end of the reported surveys, this case warranted such rates: not only was the suit complex, but patent litigation is also a specialty in which practitioners largely reside in larger cities where rates are much higher.

[3] Original search results attached as Exhibit G, which were retrieved from Valeo Partners Rates Database on 3/28/2018, available at http://reports.valeopartners.com/rates/report.

[4] The American Lawyer article is available at https://www.law.com/americanlawyer/almID/1202799338640/Read-This-Before-You-Set-Your-2018-Billing-Rates/

In sum, under the lodestar methodology, the number of attorney hours worked fitting the Court's categories totaled approximately 3,230.3 hours. Multiplied by reasonable hourly rates, these hours yield a total of $2,087,889.

C. Shire Expended Reasonable Costs in Response to Abhai's Misconduct

"[R]easonable expenses, necessary for the prosecution of a case, are ancillary to and may be incorporated as part of a fee award under a prototypical federal fee-shifting statute." *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 17 (1st Cir. 2011). A party seeking to recover costs and expense need not document its request with "page-by-page precision, [however] a bill of costs must represent a calculation that is reasonably accurate under the circumstances." *Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1380 (Fed. Cir. 2006).

Here, Shire seeks compensation for a total of $292,150.72 in costs. The major categories of these expenses are discussed below, and a chart summarizing expenses along with supporting documentation of expenses is provided. Collins Decl. ¶ 7, Exs. A–D.

A large category of costs are expert fees. A "district court may invoke its inherent power to impose sanctions in the form of reasonable expert fees in excess of what is provided for by statute." *Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008); *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 378–79 (Fed. Cir. 1994). Recovering fees for Dr. Dressman and Dr. Luk post-April 2017 is appropriate because the experts were prepared to testify at trial in April, and would have testified then but for Abhai's delayed disclosure of its erroneous dissolution data. Dr. Dressman and Dr. Luk had to re-analyze Abhai's new, corrected dissolution data and revise their expert reports in addition to being prepared to give testimony at the second trial.

Another category of costs is vendor fees. This category includes deposition costs related to taking the fact and expert witnesses' testimony regarding the erroneous and allegedly

corrected dissolution data. All of the submitted expenses are reasonable and appropriate expenses under the Court's inherent power. *See, e.g.*, *Mathis v. Spears*, 857 F.2d 749, 757, 759 (Fed. Cir. 1988).

Finally, post-judgment interest is appropriate from the date of this Court's judgment awarding attorney fees pursuant to 28 U.S.C. § 1961, *see id.* at 759–60 (citations omitted), and Shire asks the Court to award post-judgment interest.[5]

IV. CONCLUSION

For the foregoing reasons, Shire respectfully requests the Court to award its reasonable attorneys' fees and costs.

Dated: April 18, 2018

[5] Awarding post-judgment interest here is particularly appropriate in light of the fact that it is now approximately one entire year from the date on which this trial would have concluded if not for Abhai's misconduct.

Respectfully Submitted,

/s/ Eric J. Marandett
Eric J. Marandett (BBO# 561730)
Margaret E. Ives (BBO# 668906)
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tahamilton@cov.com

Attorneys for Plaintiffs Shire LLC and Shire US Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served upon all counsel of record by electronic mail.

Dated: April 18, 2018

By: */s/ Eric J. Marandett*

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MR. JORGE FRANCISCO SÁNCHEZ AND DOLORES SERVICE STATION AND AUTO PARTS, INC., Plaintiffs, v. ESSO STANDARD OIL COMPANY (PUERTO RICO), Defendant.	CIVIL NO. 08-2151(JAF) INJUNCTION FOR VIOLATIONS OF THE SOLID WASTE DISPOSAL ACT, CIVIL PENALTIES
ESSO STANDARD OIL COMPANY (PUERTO RICO), Third-Party Plaintiff, v. JORGE LUIS SÁNCHEZ-SÁNCHEZ; ET AL., Third-Party Defendants.	

AGREED FINAL JUDGMENT

Upon the Court having considered all pleadings, statements and evidence submitted during the bench trial held from August 16, 2010 to August 19, 2010, at which trial Plaintiffs, Jorge Francisco Sanchez and Dolores Service Station and Auto Parts, Inc. ("Plaintiffs"), defendant Esso Standard Oil Company (Puerto Rico) ("Esso"), and Third-Party Defendants Jorge Luis Sanchez-Sanchez and Alicia Solano-Diaz ("Sanchez Parents") and Angel Manuel Sanchez-Gomez and Hector Benito Sanchez-Gomez ("Property Owners") appeared through their respective counsel, and had the opportunity to submit their positions thereto, and

having determined that it had jurisdiction over the subject matter and the parties in this case, it is hereby FOUND, DETERMINED, ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Court heard evidence and arguments of counsel and renders judgment for Esso.

2. The Court entered written findings of fact and conclusions of law after the trial of this matter. (Docket No. 477.) Except as contradicted in this judgment, these findings of fact and conclusions of law shall be given preclusive effect.

3. Based on those findings of fact and conclusions of law, the Court ordered the Plaintiffs take nothing by their suit and that Esso recover $128,871.93 from Plaintiffs, Sanchez Parents, and Property Owners under Esso's CERCLA claim, and that Esso recover $512,823.98 from Plaintiffs for the combined costs of the court-ordered Comprehensive Site Assessment ("CSA") and expert services related to the CSA.

4. On February 22, 2011, the parties agreed to compromise their claims. Plaintiffs and Property Owners agreed to pay Esso a total amount of $315,000 to settle all claims between the parties. Plaintiffs and Property Owners agreed to pay the stated total amount via payments in the amount of $31,500 every six months beginning August 31, 2011. Final payment will be made on or before February 22, 2016.

5. Based on the Court's orders and agreement between the parties, the Court finds that the agreement between the parties is supported by the pleadings and findings and accepts and incorporates the settlement agreement into this judgment.

6. The Court orders that Esso shall recover $315,000 pursuant to the terms of the settlement agreement. The Court orders execution to issue in the event of a failure on the

part of the Plaintiffs to make any of the payments outlined above. In the event of a failure to make any payment, Esso may execute on the outstanding amount due on an accelerated basis.

7. The Court shall retain jurisdiction to enforce the terms of the settlement agreements submitted by the parties, the terms of which are incorporated into this Judgment.

8. Esso and Mr. Cabrera have resolved the issue of Mr. Cabrera's sanction. Mr. Cabrera will pay Esso $10,000 in lieu of sanctions to be imposed by this Court, to be paid in equal $2,500 payments every six months, beginning August 31, 2011. Final payment will be made on or before February 28, 2013. The Court orders execution to issue in the event of a failure on the part of Mr. Cabrera to make any of the payments outlined above. In the event of a failure to make any payment, Esso may execute on the outstanding amount due on an accelerated basis.

9. The Court denies all relief not expressly granted in this judgment.

10. Esso relinquishes all rights to the bond and does not object to release of same.

11. FINAL JUDGMENT is hereby entered accordingly, and without the imposition of costs to any party.

SO ORDERED.

In San Juan, Puerto Rico this 13th day of April, 2011.

S/JOSE ANTONIO FUSTE
José Antonio Fusté
Chief U.S. District Judge

EXHIBIT 18

From: Rogers, Michael H. <MRogers@labaton.com>
Sent: Tuesday, July 14, 2015 12:37 PM
To: Michael Lesser; Daniel P. Chiplock; Evan Hoffman; Dugar, Kirti
Cc: Kussin, Todd
Subject: State Street Topic Memos
Attachments: Topic Memo [redacted] (Bolano).docx; Topic Memo [redacted] (Griffin 1).docx; Topic Memo [redacted] (Vaidya 1).DOCX; Topic Memo [redacted] (Saad).doc; Topic Memo [redacted] (Bishop).DOCX; Topic Memo [redacted] (Pospischil).DOC; Topic Memo [redacted] (Griffin 2).doc; Topic Memo [redacted] (Grant).DOCX; Topic Memo [redacted] (Kaplan).DOC; Topic Memo [redacted] (Powell).DOC; Topic Memo [redacted] (Packman).DOC; Topic Memo [redacted] (Packman).XLSX; Topic Memo [redacted] (Vaidya 2).docx; Topic Memo [redacted] (Pietrofesa).DOC; Topic Memo [redacted] (Greene).DOC; Topic Memo [redacted] (Fouchong).DOC; Topic Memo [redacted] (George).doc; Topic Memo [redacted] (Watson).DOC; Topic Memo [redacted] (Herrick).DOC; Topic Memo [redacted] (Schulman).DOC; Topic Memo [redacted] (Orji).doc; Topic Memo [redacted] (Hong).DOCX; Topic Memo [redacted] (Flanigan).DOC; Topic Memo [redacted] (Gianturco).doc; Topic Memo [redacted] (Daniels).DOC; Topic Memo [redacted] (Alper).DOC; Topic Memo [redacted] (Cameron and Hirsh).docx

Remaining topic review memos from State Street.& All of these were in work/pending when the case settled.& As I mentioned in an email a couple weeks ago, I asked Todd and his folks to wrap them up as soon as possible in the subsequent days.
&
This is the output of that effort (which was actually completed before the 4th, but I've been out of office on vacation and work-related travel on other matters).
&
Enjoy!& (That's direccted at you, Mike)

&

EXHIBIT 19

From: Michael Lesser
Sent: Tuesday, June 23, 2015 3:45 PM
To: Garrett Bradley
Cc: Michael Thornton; Evan Hoffman
Subject: FW: State Street Memo Topics
Attachments: Reviewer detail projects MAL 62315.docx

FYI: For the last two months we've been using the reviewers on the specific projects I've generated. I've added some from time-to-time.

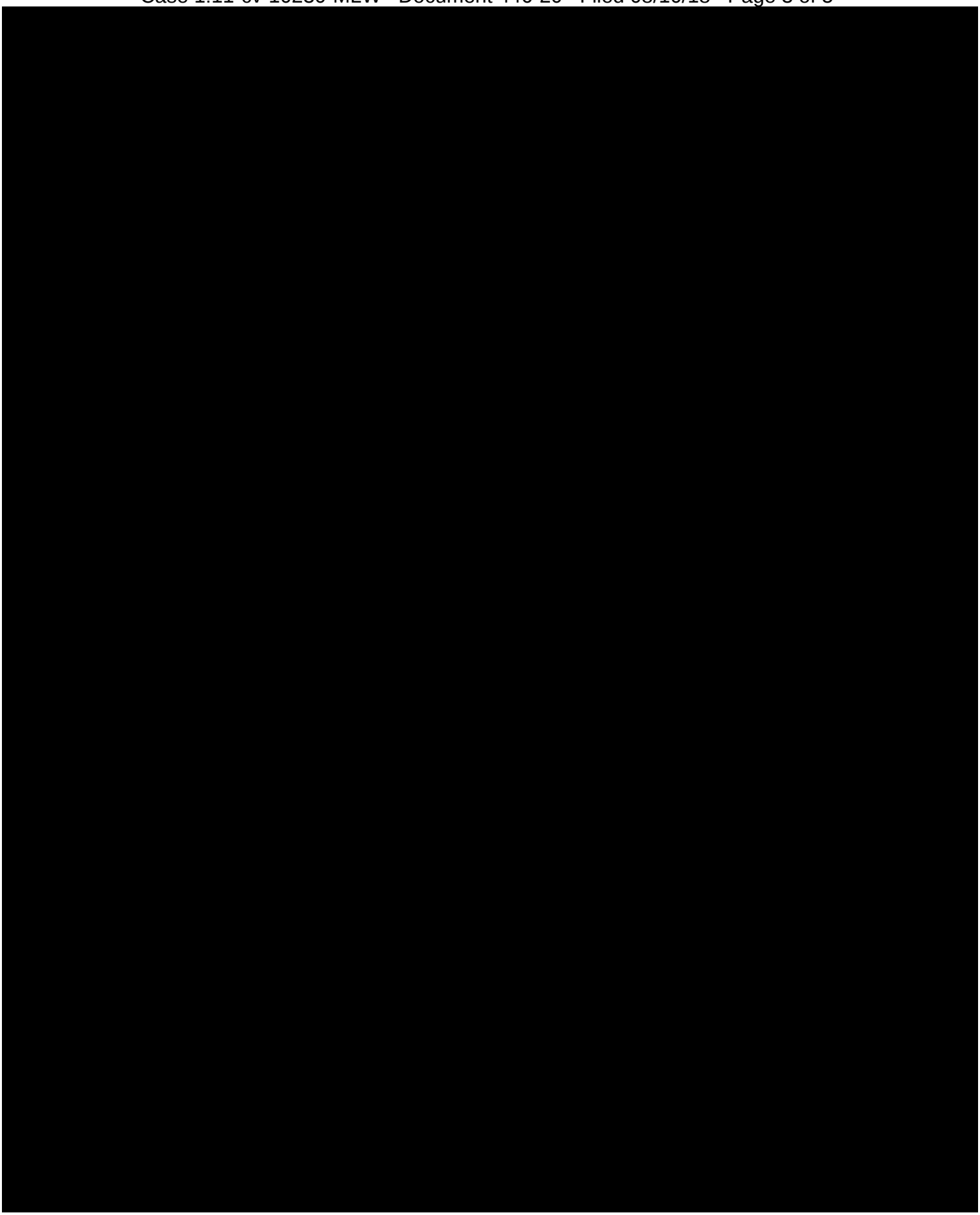
M

From: Michael Lesser
Sent: Tuesday, June 23, 2015 3:41 PM
To: 'Kussin, Todd'; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

Here's four more topics for today. Some are related to areas already covered, so I'll leave it to you to pass on to the people responsible for those areas (or not). I'll have more tomorrow. Pasting the four in but also including the source document with all additions.

6/23/15 Additions

[redacted]



[redacted]

From: Kussin, Todd [mailto:TKussin@labaton.com]
Sent: Tuesday, June 23, 2015 12:16 PM
To: Michael Lesser; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

Great, thanks Mike.

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Tuesday, June 23, 2015 11:52 AM
To: Kussin, Todd; Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock
Subject: RE: State Street Memo Topics

No objection here.

From: Kussin, Todd [mailto:TKussin@labaton.com]
Sent: Tuesday, June 23, 2015 11:51 AM
To: Evan Hoffman; KDugar@lchb.com
Cc: Rogers, Michael H.; Daniel P. Chiplock; Michael Lesser
Subject: State Street Memo Topics

Good Morning,

Unless anybody is opposed, I am going to assign the topic below to one of my reviewers. From my records, it looks like it is still available. Thanks.

Todd

[redacted]

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EXHIBIT 20

From: Michael Lesser <MLesser@tenlaw.com>
Sent: Thursday, June 11, 2015 4:02 PM
To: Brian McTigue; Regina Markey; Lynn Sarko; Kravitz, Carl S.
Subject: FW: ERISA
Attachments: U.S. Custody ERISA Funds 2015.06.11.pdf

FYI

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Thursday, June 11, 2015 4:00 PM
To: Michael Lesser
Subject: RE: ERISA

Settlement Communication

Mike

Here you go. Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Wednesday, June 10, 2015 12:20 PM
To: Halston, Daniel
Subject: RE: ERISA

Dan: Can you break the below numbers down into amounts by year? Just the ERISA SSH and AIR numbers, by year. I regret not asking for this earlier.

Thanks,

Mike

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Monday, March 09, 2015 3:48 PM
To: Michael Lesser
Cc: Lynn Sarko; Paine, William
Subject: RE: ERISA

Confidential Settlement Communication

Mike

The breakdown is as follows:

$74,891,109,811 (SSH) and $5,007,845,178 (AIR). Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Monday, March 09, 2015 11:39 AM

To: Halston, Daniel
Subject: RE: ERISA

Dan: Sorry, just for the sake of consistency, can I also have that breakdown between SSH and AIR? I should have asked that specifically before.

Thanks,

Mike

From: Halston, Daniel [mailto:Daniel.Halston@wilmerhale.com]
Sent: Thursday, March 05, 2015 2:45 PM
To: Michael Lesser
Cc: Lynn Sarko; Paine, William
Subject: RE: ERISA

Mike

It changed just slightly to $79,898,954,988. Dan

From: Michael Lesser [mailto:MLesser@tenlaw.com]
Sent: Wednesday, March 04, 2015 12:35 PM
To: Halston, Daniel
Subject: ERISA

Dan: The last ERISA volume number I had (SSH + AIR) was $79,901,150,487

Have there been any updates to the ERISA volumes?

Thanks,

Mike

Michael A. Lesser, Esq.
Thornton Law Firm LLP
100 Summer St., 30th Floor
Boston, MA 02110
617-720-1333
800-431-4600
mlesser@tenlaw.com

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State Street FX Trading with U.S. Custody ERISA Plans
Number of Trades and Total Value of Trades by Type and Year
January 1, 1998 – December 31, 2009

	SSH		AIR		Total	
Year	**Number of Trades**	**Total Value of Trades ($USD)**	**Number of Trades**	**Total Value of Trades ($USD)**	**Number of Trades**	**Total Value of Trades ($USD)**
1998	33,104	$7,479,466,489	-	-	33,104	$7,479,466,489
1999	32,697	10,554,771,451	3,808	77,739,325	36,505	10,632,510,775
2000	32,007	10,331,622,491	9,697	253,840,004	41,704	10,585,462,495
2001	39,638	8,453,345,452	11,494	282,590,409	51,132	8,735,935,861
2002	45,201	6,582,198,525	11,542	287,460,655	56,743	6,869,659,180
2003	29,317	2,886,419,977	12,653	364,322,705	41,970	3,250,742,681
2004	33,580	4,632,364,474	15,344	452,829,875	48,924	5,085,194,349
2005	30,594	4,347,183,219	16,603	550,235,161	47,197	4,897,418,381
2006	32,625	4,643,423,210	15,568	622,331,978	48,193	5,265,755,188
2007	38,709	5,210,651,802	16,316	701,631,876	55,025	5,912,283,678
2008	54,932	5,344,849,383	17,146	818,090,214	72,078	6,162,939,597
2009	56,434	4,424,813,337	15,882	596,772,978	72,316	5,021,586,315
Total	**458,838**	**$74,891,109,811**	**146,053**	**$5,007,845,178**	**604,891**	**$79,898,954,988**

Notes:

[1] Includes all trade data for funds with a U.S. tax address, with the exception of KRW and TWD subcustodian trading.

Sources:

[A] Trade data provided by State Street via counsel.

EXHIBIT 21

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

Dear all

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

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

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

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

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

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

Lynn

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

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

Thanks,

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

EXHIBIT 22

EXECUTION VERSION

TERM SHEET FOR CUSTOMER AND ERISA CLASS ACTIONS

Customer Class and ERISA Actions (the "Class Actions"):
Arkansas Teacher Retirement System v. State Street Corporation, et al.,
No. 11-cv-10230 MLW (D. Mass.);
Arnold Henriquez, et al. v. State Street Bank and Trust Company, et al.,
No. 11-cv-12049 MLW (D. Mass.);
The Andover Companies Employee Savings and Profit Sharing Plan, et al. v. State Street Bank and Trust Company,
No. 12-cv-11698 MLW (D. Mass.)

1. **Settling Parties**. The Settling Parties include Plaintiffs Arkansas Teacher Retirement System ("ARTRS"), Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland on behalf of themselves and all others similarly situated (collectively, "Plaintiffs") and State Street Bank and Trust Company ("Settling Defendant" or "SSBT," and collectively with Plaintiffs, the "Parties" or "Settling Parties").

2. **Settlement Class**. For purposes of this settlement ("Class Settlement") only, the Settlement Class shall be defined as all custody and trust customers of SSBT, including ERISA Plans, reflected in SSBT's records as having a United States tax address, that executed one or more Indirect FX transactions with SSBT and/or its subcustodians between January 2, 1998 and December 31, 2009, inclusive (the "Class Period"). The Settlement Class does not include CalPERS, CalSTRS and the State of Washington Investment Board. For the avoidance of doubt it is agreed that this definition of the Settlement Class is intended to supersede the class definitions in the complaints described above.

3. **Settlement Amount**. Three Hundred Million United States Dollars ($300,000,000.00) (the "Class Settlement Amount") paid in cash by SSBT into a Class Escrow Account no more than ten (10) calendar days after Preliminary Approval of the Class Settlement.

The Class Escrow Account shall be at a money center bank agreed upon by Labaton Sucharow LLP ("Interim Lead Counsel") and SSBT.

4. **Qualified Settlement Fund**. The Parties agree that the Class Settlement Amount, plus any interest accrued thereon, is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation §1.468B-1.

5. **Confidentiality**. Until such time as an executed Stipulation of Settlement is submitted to the Court for approval, or such earlier date determined by SSBT, the Parties shall use their best efforts to keep the existence and terms of this Term Sheet confidential.

6. **Class Certification**: Defendants will stipulate for settlement purposes only to certification of the Settlement Class defined above.

7. **Dismissal with Prejudice and Releases**: Upon the Effective Date of the Settlement: (i) the Class Actions shall be dismissed with prejudice and Plaintiffs and the Settlement Class, including their past, present, and future heirs, executors, administrators, trustees, predecessors, successors and assigns ("Released Plaintiff Parties"), shall remise, release and forever discharge the Released Defendant Parties of and from the Released Class Claims, except for claims relating to the enforcement of the Class Settlement; and (ii) SSBT, on behalf of the Released Defendant Parties, shall release as against all Released Plaintiff Parties and their respective attorneys, all claims and causes of action of every nature and description, whether known or unknown, whether arising under federal, state, common or foreign law, that arise out of or relate in any way to the institution, prosecution, or settlement of the claims against Released Defendant Parties, except for claims relating to the enforcement of the Class Settlement ("Released Prosecution Claims").

8. **Certain Definitions:**

a. **Class Judgment**. A final judgment of dismissal of the Class Actions, which shall contain customary provisions including: (i) certification of the Settlement Class for settlement purposes only; (ii) a finding that the notice was disseminated consistent with the preliminary approval order, constituted the best notice practicable under the circumstances, and that the form of the notice and the manner of its dissemination was adequate, sufficient, and complied with the requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act, due process and all other applicable laws and rules; (iii) final approval of the Class Settlement, including the Plan of Allocation; (iv) dismissal of the Class Actions with prejudice; (v) the releases described above; (vi) a list of those persons and entities who are excluded from the Settlement Class pursuant to request; (vii) enjoining Plaintiffs, and the other members of the Settlement Class, from pursuing the Released Class Claims against the Released Defendant Parties in any forum, and enjoining the Defendant and Released Defendant Parties from pursuing the Released Prosecution Claims against the Released Plaintiff Parties in any forum; and (viii) providing that the judgment shall be vacated in the event that the SEC Settlement, DOJ Settlement and DOL Settlement do not become final and effective, and that the Court shall retain jurisdiction to do so.

b. **Court.** United States District Court for the District of Massachusetts.

c. **Direct FX Methods.** Methods for submitting, processing, aggregating and/or executing foreign exchange transactions in which the counterparty or its investment manager approves the exchange rate, or a spread from a benchmark, before execution of the trade (including StreetFX Methods and methods used with respect to any other method of execution offered by State Street that are not Indirect FX Methods).

d. **Direct FX Transactions.** Foreign exchange transactions executed with SSBT or SSBT's subcustodians using Direct FX Methods, including all StreetFX Transactions.

e. **DOJ Settlement.** The related settlement being negotiated with the United States Department of Justice concerning Indirect FX.

f. **DOL Settlement.** The related settlement being negotiated with the United States Department of Labor concerning Indirect FX.

g. **Effective Date.** The first date upon which all of the following have occurred: (a) the Court orders preliminary approval of the Class Settlement and directs that a form of notice of the proposed settlement describing the Plan of Allocation shall be provided to the Class in the manner specified in the order of preliminary approval; (b) the Class Settlement Amount has been paid consistent with paragraph 3 above; (c) the Court has entered the Class Judgment; and (d) the DOJ Settlement, DOL Settlement and SEC Settlement are final and effective and either the time for appeal from the Class Judgment has expired and no appeal has been filed, or all appeals from the Class Judgment have been dismissed or resolved, such that the Class Judgment has not been and cannot be altered (provided, that alteration of the amount to be paid to counsel for the Class shall not prevent the Effective Date from occurring).

h. **ERISA**. The Employee Retirement Income Security Act of 1974, as amended.

i. **ERISA Plans.** The employee benefit plans as defined in 29 U.S.C. Section 1002(3) (also referred to as Section 3(3) of ERISA), that are subject to Part 4 of Subtitle B of Title I of ERISA (including master trusts with respect to multiple such plans within the meaning of Department of Labor Regulation Section 2520.103-1(e)), and that were custody or trust customers of SSBT during any part of the Class Period; and group trusts that are exempt from tax pursuant to Internal Revenue Service Revenue Ruling 81-100, as amended ("Group Trusts"), that were custody or trust customers of SSBT during any part of the Class Period.

j. **Indirect FX Methods.** Methods at any time for submitting, processing, pricing, aggregating and/or executing foreign exchange transaction requests pursuant to instructions of custody or trust customers of SSBT (or their investment managers) instructing SSBT or SSBT's subcustodians to execute such transactions at rates or

spreads, which rates or spreads prior to December 2009 were not widely disclosed to the customer or investment manager prior to execution, including, but not limited to, the methods of executing foreign exchange transactions that are or were at any time known as indirect FX, standing instruction foreign exchange, custody FX, Automatic Income Repatriation, Automated Dividend and Interest Income Repatriation Service, Security Settlements and Holdings Foreign Exchange Service or Hourly Pricing Foreign Exchange Service.

k. **Indirect FX Transactions.** Foreign exchange transactions executed with SSBT or SSBT's subcustodians at any time using Indirect FX Methods, including all foreign exchange transactions submitted using Indirect Methods. A transaction submitted or processed using an Indirect Method is an Indirect FX Transaction regardless whether the rate at which the transaction was executed differed from the rates at which other transactions submitted using Indirect Methods were executed.

l. **Investment Company.** A mutual fund, closed-end fund, unit investment trust or other entity that is registered with the SEC as and investment company under the Investment Company Act.

m. **Rate Comparisons**. Comparison of rates at which foreign exchange transactions were executed with rates of any other foreign exchange transaction or transactions (whether executed by SSBT, a subcustodian, or a party unrelated to SSBT), including comparison of rates of Indirect FX Transactions or Direct FX Transactions with rates of any other Indirect FX Transactions, Direct FX Transactions, indicative rate, market rate or benchmark rate.

n. **Plan of Allocation.** The description to be contained in the Notice to the Class of the manner in which the Class Settlement Amount, plus any interest and less all costs (including costs of notice and administration) or expenses (including taxes) and any fees and expenses of Plaintiffs' Counsel, shall be allocated to members of the Class. The Plan of Allocation shall provide for, and contain sufficient flexibility to permit, among other things, the allocation of a portion of the Class Settlement Amount: (i) to ERISA Plans in a manner sufficient to obviate payment by SSBT of $60 million, as contemplated by the DOL Settlement; and (ii) to Investment Companies in a manner sufficient to obviate

payment by SSBT of $75 million in disgorgement, and $15,019,370.68 in interest on disgorgement, as contemplated by the SEC Settlement. Except with respect to notice and administration expenses solely attributable to Group Trusts as provided for below, and with respect to the amount of Plaintiffs' Counsel's attorneys' fees chargeable to the ERISA Plans, as more specifically provided for in paragraph 12, the amount allocated to the ERISA Plans and Investment Companies and other Settlement Class Members shall be increased or decreased, as the case may be, by their proportional share (with respect to the Class Settlement Amount) of any interest, costs (including costs of notice and administration), expenses (including taxes), and fees and expenses of Plaintiffs' Counsel obtained or paid pursuant to permission of the Court. However, notice and administration expenses attributable solely to the claims of Settlement Class Members categorized as Group Trusts shall be paid solely out of the ERISA allocation, and the cost of any ERISA Independent Fiduciary shall be borne solely by SSBT and shall not be paid out of the Class Settlement Amount.

o. **Released Class Claims.** Any and all claims, demands, losses, costs, interest, penalties, fees, attorneys' fees, expenses, rights, rights of recovery, causes of action, duties, obligations, judgments, actions, debts, sums of money, suits, contracts, agreements, promises, damages, and liabilities of every nature and description, whether known or unknown, direct, representative, class, individual or indirect, asserted or unasserted, matured or unmatured, accrued or unaccrued, foreseen or unforeseen, disclosed or undisclosed, contingent or fixed or vested, accrued or not accrued, at law or equity, whether arising under federal, state, local, foreign, statutory, common, administrative or any other law, statute, rule or regulation that Plaintiffs or any other member of the Settlement Class: (i) asserted in the Class Actions; (ii) could have asserted in the Class Actions or any other action or in any forum, that arise from or out of, relate to, or are in connection with the claims, allegations, transactions, alleged or actual prohibited transactions or breaches of duty (including fiduciary duty), facts, events, acts, disclosures, matters or occurrences, statements, representations or omissions or failures to act involved, described, set forth, or referred to in the complaints filed in the Class Actions or that arise from or out of, relate to, or are in connection with Indirect FX

Methods, Indirect FX Transactions, Street FX Methods, StreetFX Transactions, or Rate Comparisons; (iii) or that arise from or out of, relate to, or are in connection with the defense or settlement of the Class Actions, except for claims relating to enforcement of the Settlement.

p. **Released Defendant Parties.** SSBT; its past, present and future parents, subsidiaries, divisions, and affiliates (including State Street Global Markets LLC); the respective past and present officers, directors, trustees, employees, agents, trustees, managers, servants, attorneys, accountants, auditors, underwriters, financial and investment advisors, consultants, representatives, insurers, co-insurers and reinsurers of each of them; and the heirs, successors and assigns of the foregoing.

q. **SEC Settlement.** The related settlement being negotiated with the United States Securities and Exchange Commission concerning Indirect FX.

r. **StreetFX Methods.** Methods for submitting, processing, aggregating and/or executing foreign exchange transactions which were or ultimately became known as StreetFX methods.

s. **StreetFX Transactions.** Foreign exchange transactions submitted at any time to SSBT using StreetFX Methods.

9. **Not a Claims-Made Settlement**. This is not a claims-made settlement; there will be no reversion.

10. **Claims Administration and Plan of Allocation**. The Claims Administrator will be of Plaintiffs' choosing and acceptable to SSBT, subject to Court approval. Defendants will cooperate with and provide the Claims Administrator and/or Interim Lead Counsel with address information, and information about the U.S. dollar-equivalent volume of Indirect FX Transactions executed by members of the Settlement Class, sufficient to provide Notice to the Settlement Class, to administer the Plan of Allocation, and to allow for Plaintiffs' Counsel to develop the Plan of Allocation.

11. **Costs of Notice and Settlement Administration**. Prior to the Effective Date, Plaintiffs' Counsel may pay from the Class Escrow Account the actual costs of notice and settlement administration without further order of the Court. In the event that the Settlement is not consummated, money paid or incurred for this purpose shall not be returned or repaid to Defendants.

12. **Plaintiffs' Counsel's Attorneys' Fees and Expenses**. Plaintiffs' Counsel's attorneys' fees and expenses, as awarded by the Court, shall be paid from the Class Escrow Account immediately upon award by the Court into an escrow account governed by an escrow agreement between Interim Lead Counsel, SSBT and a bank or other institution agreed upon by SSBT and Interim Lead Counsel (the "Interim Lead Counsel Escrow Account"), notwithstanding any appeals of the Settlement or the fee and expense award. Plaintiffs' Counsel may apply for their fees and expenses and any service awards for Plaintiffs against the entire Class Settlement Amount, but in no event shall more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in fees be paid out of the $60 million portion of the Class Settlement Amount allocated to ERISA Plans, as referenced in paragraph 8(n) above. In the event that the Effective Date does not occur or SSBT promptly provides written notice representing in good faith that the Effective Date has not and cannot occur due to developments with the DOJ Settlement, DOL Settlement, and/or SEC Settlement and explaining the grounds for the notice, Plaintiffs' Counsel severally shall be obliged to pay to SSBT all amounts paid to them from the Interim Lead Counsel Escrow Account within fourteen (14) business days. The prevailing party in any action to collect any amount due under this paragraph shall be entitled to recover interest and all of its costs of collection, including attorneys' fees. Should the fee and expense award be reduced by the Court or on appeal, all such fees and expenses received by Plaintiffs' Counsel in excess of

those that are ultimately approved shall be repaid to the Class Escrow Account, along with interest at the Class Escrow Account rate of interest.

13. **Stay of Proceedings**. Upon the execution of this Term Sheet, the Parties shall jointly request that the current proceedings and any litigation deadlines in the Class Actions identified above be suspended and provide the Court with a proposed schedule for effectuating the Settlement.

14. **Rule 11 Compliance**. Defendants and Plaintiffs agree that each has complied fully with the Rule 11 of the Federal Rules of Civil Procedure in connection with the commencement, prosecution, defense, and settlement of these Class Actions, and that the proposed final judgment will contain a statement to reflect this compliance.

15. **Preparation of Final Settlement Documentation**. The Stipulation of Settlement shall contain such additional terms and conditions as are customary in a federal class action settlement, or as may be necessary or appropriate to effectuate the intentions of the Parties with respect to this Term Sheet; and such additional or amended terms and conditions as may be necessary or appropriate to conclude the DOL Settlement, SEC Settlement, and/or DOJ Settlement and acceptable to the Parties. To the extent there is any inconsistency between this Term Sheet and the Stipulation of Settlement, the Stipulation of Settlement shall control. The Parties shall negotiate in good faith to agree upon and execute a final Stipulation of Settlement within fourteen (14) calendar days of executing this Term Sheet (recognizing that formalization of settlements between SSBT and each of the DOJ, DOL and SEC will be necessary before the Stipulation of Settlement can be executed by SSBT). Plaintiffs shall file the final Stipulation of Settlement and motion for preliminary approval with the Court within two (2) business days after execution. The Claims Administrator shall cause the required notice under the Class Action

Fairness Act of 2005 to be served, not later than ten (10) calendar days after the Stipulation of Settlement is filed with the Court.

16. **Termination Provision**. The termination provision of the Stipulation of Settlement shall provide that SSBT and the Plaintiffs shall have the right to terminate the Settlement by providing written notice of their election to do so ("Termination Notice"), through counsel, to counsel for all other Parties to the Settlement within fourteen (14) calendar days of: (i) the District Court's final refusal to provide preliminary approval of the Settlement in any material respect; (ii) the District Court's refusal to enter the Class Judgment or an alternative judgment acceptable to SSBT with respect to the Settlement; (iii) the date upon which the judgment or alternative judgment is modified or reversed in any material respect by a final order of the United States Court of Appeals, or the Supreme Court of the United States; or (iv) SSBT's failure to fund the Class Settlement Amount. For the avoidance of doubt, Plaintiffs shall not have the right to terminate the Settlement due to any decision, ruling, or order respecting the attorney's fees or expenses of counsel for the Class, or terms of the Plan of Allocation not specifically addressed in the Stipulation of Settlement. The Termination Provision shall also provide that SSBT shall also have the right to terminate the Settlement in the event the Settlement Class Termination Threshold (defined below) has been reached. Simultaneously with the execution of the Stipulation of Settlement, SSBT and Interim Lead Counsel will execute a confidential Supplemental Agreement Regarding Requests for Exclusion (the "Supplemental Agreement"). The Supplemental Agreement shall set forth that SSBT shall have the sole option to terminate the Settlement and render it null and void in the event that requests for exclusion from the Settlement Class are submitted by or with respect to custody or trust customers of SSBT whose Indirect FX Transactions together represent more than an agreed percentage of the total

volume of Indirect FX Transactions executed by members of the Settlement Class between January 2, 1998 and December 31, 2009 ("Settlement Class Termination Threshold"). The Parties agree that the District Court's order granting preliminary approval of the Settlement shall require any person or entity requesting exclusion from the Settlement Class to also provide information showing membership in the Settlement Class, and any such request for exclusion that does not provide this information shall be deemed invalid unless State Street (based on its records) informs the Court that such person or entity is a member of the Settlement Class. The Parties agree to maintain the confidentiality of the Termination Threshold as stated in this Term Sheet and the Supplemental Agreement, which, unless otherwise ordered by the District Court, shall not be filed with the District Court, but may be examined in camera, if so requested by the District Court (unless otherwise required by court rule). The Termination Provision shall also provide that SSBT shall also have the right to terminate the Settlement in the event that settlements with the DOJ, DOL, or SEC, or any of them, on terms disclosed in confidence to counsel for the Class prior to execution of the Settlement Agreement, have not become final and effective. After the Effective Date, SSBT shall have no right to terminate the Class Settlement.

17. **Consequences of Termination**. If the Settlement referred to in this Term Sheet is not approved by the Court, or the Settlement is terminated for any reason, the Term Sheet and/or Stipulation of Settlement shall be a nullity, and none of their terms shall be effective or enforceable, and the Class Settlement Amount, plus any accrued interest and less any taxes and notice-related expenses incurred, shall be returned to the persons or entities paying the same. Additionally, the Parties shall revert to their litigation positions immediately prior to the execution of the Term Sheet and the fact and terms of the Settlement, including this Term Sheet

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

20. **Signing in Counterpart**. This Term Sheet may be signed in counterpart, with scanned or emailed signatures carrying the same force as originals.

September 9, 2013

By: _____
Lawrence A. Sucharow
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Tel.: (212) 907-0700

For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: _____
Michael P. Thornton
THORNTON LAW FIRM LLP
100 Summer Street, 30th Floor
Boston, MA 02110
Tel.: (617) 720-1333

For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
Daniel P. Chiplock
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
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By: _____
Lynn Lincoln Sarko
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel.: (206) 623-1900

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

20. **Signing in Counterpart**. This Term Sheet may be signed in counterpart, with scanned or emailed signatures carrying the same force as originals.

By: _____
Lawrence A. Sucharow
LABATON SUCHAROW LLP
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For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: Michael P. Thornton
Michael P. Thornton
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For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
Daniel P. Chiplock
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New York, NY 10013-1413
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By: _____
Lynn Lincoln Sarko
KELLER ROHRBACK LLP
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Seattle, WA 98101
Tel.: (206) 623-1900

and the proposals, negotiations or agreements leading to or arising from it, shall not be admissible in any trial or otherwise used against any party.

18. **Confirmatory Discovery**. The Settlement is not subject to confirmatory discovery.

19. **Plan of Allocation**. The Plan of Allocation shall be proposed by Plaintiffs and approved by the Court. Except for the terms of the Plan of Allocation specifically referred to in the Stipulation of Settlement (including those included in the definition of Plan of Allocation set forth above), which if not finally approved shall be grounds for termination of the Settlement: (i) SSBT will take no position with respect to the proposed Plan of Allocation (or such plan as may be approved by the Court); and (ii) any decision by the Court concerning the Plan of Allocation shall not affect the validity or finality of the proposed Settlement.

20. **Signing in Counterpart**. This Term Sheet may be signed in counterpart, with scanned or emailed signatures carrying the same force as originals.

By: _____
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For Plaintiff ARTRS, and as Interim Lead Counsel for the Proposed Class

By: _____
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For Plaintiff ARTRS, and as Liaison Counsel for the Proposed Class

By: _____
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For Plaintiff ARTRS, and as additional Counsel for the Proposed Class

By: _____
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For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

By: _____
William H. Paine
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60 State Street
Boston, MA 02109
Tel.: (617) 526-6000

For State Street Bank and Trust Company

For Plaintiffs The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland, and as Counsel for ERISA Plaintiffs

By: _____
Carl S. Kravitz
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Tel.: (202) 778-1800

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

For Plaintiff ARTRS, and as additional Counsel for the Proposed Class

By: _____
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Washington, DC 20016
Tel.: (202) 364-6900

For Plaintiffs The Andover Companies Employees Savings and Profit Sharing Plan, Alan Kober, and James Pehoushek-Stangeland, and as Counsel for ERISA Plaintiffs

By: Carl S. Kravitz
Carl S. Kravitz
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Suite 1000
Washington, DC 20036-5807
Tel.: (202) 778-1800

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

By: William H Paine 9/11/15
William H. Paine
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60 State Street
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Tel.: (617) 526-6000

For Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland, and as Counsel for ERISA Plaintiffs

For State Street Bank and Trust Company

EXHIBIT 23

From: Halston, Daniel <Daniel.Halston@wilmerhale.com>
Sent: Friday, February 1, 2013 6:16 PM
To: Michael Lesser; Goldsmith, David (dgoldsmith@labaton.com)
Cc: Mitchell, Nolan J; Hornstine, Adam
Subject: FW: Henriquez v. State Street¸ No. 11-cv-12049; Andover Cos. v. State Street, No. 12-cv-11698
Attachments: 02.01.2013 Ltr to Mr. Bostwick.PDF

From: Mitchell, Nolan J
Sent: Friday, February 01, 2013 2:51 PM
To: Bostwick, Dwight P.
Cc: 'Laura Gerber' (lgerber@KellerRohrback.com); lsarko@kellerrohrback; Brian McTigue (bmctigue@mctiguelaw.com); Halston, Daniel
Subject: Henriquez v. State Street¸ No. 11-cv-12049; Andover Cos. v. State Street, No. 12-cv-11698

Dwight,

Attached please find correspondence in the matters referenced above, which was sent to you today along with a production disk. The password for the disk is: **gh&$T!cv**.

Have a great weekend. Best,

Nolan

Nolan Mitchell | WilmerHale
60 State Street
Boston, MA 02109 USA
+1 617 526 6088 (t)
+1 617 526 5000 (f)
nolan.mitchell@wilmerhale.com

Please consider the environment before printing this email.

WILMERHALE

Nolan Mitchell

+1 617 526 6088(t)
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nolan.mitchell@wilmerhale.com

February 1, 2013

By E-mail and Federal Express

Dwight Bostwick, Esq.
Zuckerman Spaeder LLP
1800 M Street, NW
Suite 1000
Washington DC 20036-5802

Re: *Henriquez v. State Street Bank and Trust Co.*, No. 11-cv-12049 (D. Mass.); *Andover Cos. Emp. Sav. & Profit Sharing Plan v. State Street Bank & Trust Co.*, No. 12-cv-11698 (D. Mass.)

Dear Dwight:

Enclosed please find a disk containing documents responsive to certain requests made by the ERISA plaintiffs, which State Street Bank & Trust Co. ("State Street") has agreed to provide as set forth in the parties' exchange of emails on January 29, 2013 (the "Agreed-Upon Requests"). As we agreed, State Street is providing, on a rolling basis, documents that are responsive to the Agreed-Upon Requests to the extent such documents are readily-identifiable in the materials produced to the ERISA plaintiffs on December 21, 2012 (the "California Production").

Today's production includes the following:

- A sample of Investment Manager Guides ("IM Guides") published during the putative class periods that State Street has identified in the California Production. *See* StateSt_CA_LIT 00336552 – 003366681, StateSt_CA_LIT 00488530 – 00488696, StateSt_CA_LIT 00962678 – 00962807, StateSt_CA_LIT 00989428 – 00989632, StateSt_CA_LIT 01940172 – 01940434, StateSt_CA_LIT 02175580 – 02175715, StateSt_CA_LIT 05073727 – 05073934. The California Production contains other IM Guides, in addition to the sample provided on the enclosed disk, including, but not limited to, documents Bates numbered SST_LIT 5186 – 5317, SST_LIT 5449 – 5710, SST_LIT 5842 – 5972, SST_LIT 7752 – 11405, and SS_CAL_E 38038 – 45142.

- Documents reflecting State Street's policies and procedures regarding foreign exchange trading that State Street has identified in the California Production. *See* SS_CAL 00005 – 00532, SS_CAL 06210 – 06247, SS_CAL 06210 – 06247, SS_CAL 06691 – 07007. There may be additional documents reflecting State Street's foreign exchange policies

and procedures, including emails, in the California Production that State Street has been unable to readily identify.

- Organizational charts for the State Street Global Markets division of State Street ("SSGM") covering the period 2006 through 2012. *See* SS_MA_LIT 00000232 – 00000288. We are producing these separately as an accommodation to the plaintiffs because State Street was unable to readily locate SSGM organizational charts in the California Production.[1]

State Street's efforts to respond to the Agreed-Upon Requests are ongoing. Please let me know if you have any questions.

Sincerely,

Nolan Mitchell

Cc: Laura R. Gerber, Esq. (w/encls.)
Lynn Sarko (via email; w/o encls.)
Keller Rohrback LLP
1201 Third Ave., Ste. 3200
Seattle, WA98101-3052

Brian McTigue, Esq. (via email; w/o encls.)
McTigue Law LLP
4530 Wisconsin Ave., NW
Suite 300
Washington, DC 20016

[1] These materials are being produced subject to the protective order entered on November 19, 2012 in the matters captioned above.

EXHIBIT 24

From: Michael Lesser
Sent: Sunday, August 30, 2015 1:17 PM
To: Michael Thornton
Cc: Garrett Bradley; Evan Hoffman
Subject: Re: State Street

I think that 14 would have been our share of the fee, making some assumptions, and not the actual size of our lodestar.

> On Aug 30, 2015, at 12:44 PM, Michael Thornton <MThornton@tenlaw.com> wrote:
>
> Thank you for the tip Dan. I did say something like that on the call, but preceded it by saying it was a guess and that I would have to ask Mike Lesser for the actual figure at that point which of course is not complete as with the other firms. I appreciate your concern and I guess I can only assure you that it generally our policy to truthful and accurate hour claims.
>
> Original Message
> From: Chiplock, Daniel P.
> Sent: Sunday, August 30, 2015 12:24 PM
> To: Garrett Bradley
> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com
> Subject: RE: State Street
>
> No problem. It may be tomorrow since I have to go back to archives.
>
> In the meantime, while we're on the subject of credibility, I want to point out that we need to be consistent and credible with our lodestar reporting in State Street. We are gathering final lodestar reports now, but I heard third-hand that Mike recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million. That number does not comport with the hours Mike Lesser told me for Thornton as of June 29 (around 12,750), which make more sense given what we know about the work that was done. I am hopeful Mike T. simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf. I would expect that you would object if LCHB or Labaton tried something like that, and ERISA counsel certainly will (and tie up this process as long as possible) if they suspect anything remotely amiss on that front. Let's not make problems for ourselves that we don't need. Also recognize that your reviewers were all housed outside of your firm and their respective overhead and facilities expenses were paid for by others, which we were happy to do as a courtesy. Thanks.
>
> -----Original Message-----
> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
> Sent: Sunday, August 30, 2015 10:43 AM
> To: Chiplock, Daniel P.
> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com
> Subject: Re: State Street
>
> That would be helpful thank you.
>
> Garrett
>
>> On Aug 30, 2015, at 10:30 AM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com> wrote:

>>
>> I don't look past that point, Garrett. But you need to also recognize that you are only in the BNYM class case because of us.
>>
>> I guess I'll gather the emails etc concerning the assignments that were given to your firm. As if that's going to change your position.
>>
>> Sent from my iPhone
>>
>> On Aug 30, 2015, at 10:19 AM, Garrett Bradley <GBradley@tenlaw.com<mailto:GBradley@tenlaw.com>> wrote:
>>
>> Dan,
>>
>> Thanks for the email. I think we will have to agree to disagree as you keep looking past the fact that but for Mike Thornton you would not be in the state street case just like Labaton is not in BONY.
>>
>> Can you clarify what you mean by we did not "get the work done" as you indicated. That has never been specified and really should be to be deemed credible. Thanks.
>>
>> Garrett
>>
>> On Aug 30, 2015, at 9:04 AM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com<mailto:DCHIPLOCK@lchb.com>> wrote:
>>
>> Garrett,
>>
>> Thanks for your email and I actually think it's useful so that Mike and Bob can participate in this.
>>
>> This idea of "protection" in BNYM is where I think we keep talking past each other. The bottom line is that LCHB is the least protected of all in that case. This is the fact that has kept me up at night for 2.5 years while we've continued pouring lodestar into that case (because we had to). We invested the most in order to try to get a class certified there and to sufficiently man 110 depositions, defend counterclaims, etc., but if Judge Kaplan takes a negative view of the value of document review/analysis (our arguments to the contrary notwithstanding), then LCHB will get hit the hardest. You are totally shielded from this because you didn't invest in document review. In other words, LCHB has a real risk of actually losing money in BNYM. You have virtually no risk of that. If Thornton is not treated "fairly" in BNYM by the Court it will be because nobody (least of all LCHB) was treated "fairly." It's not clear to me what it is you expect in that circumstance.
>>
>> The $10 million in State Street that you mention below also does not make up for LCHB's investment in that case. And we've certainly contributed our share to the result in State Street, having litigated BNYM (thus substantially increasing the value of State Street) and developed the ch. 93A theory (the most readily certifiable claim in State Street, and by far the most valuable).
>>
>> Dan
>>
>> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
>> Sent: Friday, August 28, 2015 3:01 PM
>> To: Chiplock, Daniel P.
>> Cc: Lieff, Robert L.; Michael Thornton; rlieff@lieff.com<mailto:rlieff@lieff.com>
>> Subject: Re: State Street
>>
>> Dan,
>>

>> I tried to call you but you are out. I think these things are best discussed rather than emailed so please call my cell when you can 6174134892 as I do not have yours.
>>
>> However a few points. I do not dismiss your efforts in Mellon but your guaranteed percentage was established years prior to a Mellon result. What I am pointing out is the inequities of our different positions. In Mellon, when we had created that case by developing the fx case all that we got was some work that resulted in $1.5 million in time. Also please elaborate on your statement that "the work was not getting done".
>>
>> Now contrast that to state street where you had no client and no concept (and Mellon was years from setting) and Mike Thornton demands that you get a floor of 20% which is probably worth about $10 million.
>>
>> You must agree you are in a much better position in state street than we are in Mellon. As I have said to Bob, we are only looking for a fair outcome in these matters. I think you would agree we have protected you better in state street than we are protected in Mellon. Once we have an idea of what our Mellon number looks like then we can discuss how to approach the balance of the 40% with Labaton .
>>
>> Garrett
>>
>> On Aug 28, 2015, at 2:34 PM, Chiplock, Daniel P. <DCHIPLOCK@lchb.com<mailto:DCHIPLOCK@lchb.com>> wrote:
>> Garrett,
>>
>> I know you didn't really mean to diminish LCHB's role in creating the result in BNY Mellon, at extraordinary risk to itself, which in turn doubled the value of State Street. You need to know that we advocated for you guys too, getting you a role in the BNYM class case (and pushing back against several co-counsel in the process) when you weren't actually owed one. I also gave your firm more assignments than others at the outset in BNYM, until it became clear that the work simply wasn't getting done. In other words, we've each tried to look out for the other in the past. This has been far from a one-way street.
>>
>> As you know, Judge Kaplan controls everyone's fate in BNYM and LCHB has the most risk before him, having invested the most. We asked for a multiplier for your firm that is much larger than anyone else's, and I really, truly hope that he grants that request.
>>
>> Thanks,
>>
>> Dan
>>
>> From: Garrett Bradley [mailto:GBradley@tenlaw.com]
>> Sent: Friday, August 28, 2015 2:18 PM
>> To: Lieff, Robert L.
>> Cc: Michael Thornton; Chiplock, Daniel P.; rlieff@lieff.com<mailto:rlieff@lieff.com>
>> Subject: Re: State Street
>>
>> Bob,
>> I am driving but took a quick look at your email and pulled over to type this. I think you are misunderstood. I have not agreed that it would be equitable to split the balance of the forty percent the way you described below. What I have said is that may be a fair approach depending on the outcome of our fee in the Mellon matter. If we are treated fairly there, then we will do all we can to treat you fairly in the state street matter. As I have said before, because of Mike Thornton's advocacy, you are guaranteed at least 20% of the State Street case in which you have no client and did not develop the concept. Yet, we have no corresponding protection in the Mellon matter. Happy to discuss further at any time.
>>
>> Garrett

>>
>> On Aug 28, 2015, at 2:05 PM, Lieff, Robert L. <RLIEFF@lchb.com<mailto:RLIEFF@lchb.com>> wrote:
>> Garrett,
>>
>> I called and suggested that we have a meeting together with the Labaton people to talk about putting in writing an understanding of the fee division in this case.
>>
>> You, Mike and I have discussed the State Street fee division and have focused on the existing verbal understanding that was reached on November 9, 2010, with Chris Keller. We agreed that among the three firms we will each have a 20% interest in the fee with the balance to be divided later. Of course, we also have to factor in the 9% that ERISA counsel get pursuant to written agreement and a provision for Arkansas local counsel.
>>
>> You and I have agreed that it would be equitable to divide the balance of the fee with Labaton getting 50% and each of our firms 25%. This would result in a fee division as follows:
>>
>> Labaton 33.0 (20 + 13)
>> Thornton 26.5 (20 + 6.5)
>> Lieff Cabraser 26.5 (20 + 6.5)
>> ERISA 9.0
>> Arkansas Local 5.0
>> 100.0%
>>
>> If we put the above into an agreement among the three firms, that would certainly provide protection for everyone.
>>
>> Bob
>>
>> <image001.gif>
>>
>> Robert L. Lieff
>> Of Counsel
>> rlieff@lchb.com<mailto:rlieff@lchb.com>
>> t 415.956.1000
>> f 415.956.1008
>> Lieff Cabraser Heimann & Bernstein, LLP
>> 275 Battery Street, 29th Floor
>> San Francisco, CA 94111-3339
>> www.lieffcabraser.com<http://www.lieffcabraser.com>
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EXHIBIT 25

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF MICHAEL LESSER IN SUPPORT OF THORNTON LAW FIRM LLP'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Michael Lesser, hereby declare as follows:

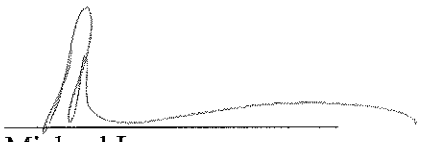
1. I am a partner at the Thornton Law Firm.

2. I submit this declaration in support of the Thornton Law Firm LLP's Objections to the Special Master's Report and Recommendations. I have personal knowledge of the facts set forth in this declaration.

3. Attached as exhibit 20 is a true and correct copy of an email I sent on June 11, 2015.

4. Attached as exhibit 23 is a true and accurate copy of an email I received on February 1, 2013.

Signed under the penalties of perjury this 18 day of June, 2018.



Michael Lesser

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM AMENDING ITS MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS* (DKT. 126)

In accord with the Court's Order dated July 31, 2018 (Dkt. 410), as extended by the Court (Dkt. 432), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") supplements its initial motion to participate (Dkt. 126) to address the current circumstances of the case, nearly 18 months after CCAF filed its motion. CCAF also addresses objections raised by the parties in their filings and orally at the hearing on August 9, 2018.

EXECUTIVE SUMMARY

CCAF agrees that a settlement between the Special Master and Class Counsel (Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff"), and the Thornton Law Firm ("TLF")) *may* be in the best interest of the class, although that of course depends on the substance of such settlement. If such a settlement is reached, CCAF's motion for appointment as guardian *ad litem* may not be necessary—but only if the terms of the deal sufficiently protect the class and the named plaintiffs and Class Counsel agree to waive collateral attacks on the settlement on any ground. If such a settlement is proposed, CCAF recommends that its terms, which will certainly include a reconstituted request for attorneys' fees, be noticed to the class, with an opportunity for objection pursuant to Rule 23(h). In such event, CCAF will respectfully request leave to file an *amicus* brief in advance of the hearing on such a settlement. Just as the Court was not bound by the plaintiffs' initial request, it will not be bound by the proposed settlement reached now. Additionally, the Court should consider non-monetary sanctions to regulate the conduct of counsel before it, even if the parties stipulate to a report devoid of such recommendation.

In the event that counsel does not settle with the Special Master, or if material disagreements remain concerning his Report and Recommendations (Dkt. 357, "Report"), then CCAF and its co-counsel Burch, Porter & Johnson PLLC should be appointed guardian *ad litem* on behalf of the class. As previously described in CCAF's Response to the Court's Order of July 31, 2018 (Dkt. 420, "CCAF Response"), the guardian *ad litem* ought to be paid on an hourly basis. CCAF's proposed rates follow

its co-counsel's Memphis, Tennessee market rates, which represents a significant discount to CCAF attorneys' lodestar rates awarded in other cases, which in turn are lower than the rates most CCAF attorneys billed in previous law-firm practice. CCAF's proposed rates for attorneys in this case range from $200 to $500 per hour, which compares favorably to the staff attorney rates up to $515/hour that Class Counsel charged and that the Special Master did not recommend reducing in his Report, and is, of course, substantially lower than what the partners and associates for class counsel charged the class.

ARGUMENT

I. Regarding Potential Settlement

CCAF has no interest in hindering a settlement that provides class members significant benefits without the uncertainty and additional cost of appeal. But the Court should ensure that any settlement binds the parties to prevent collateral attack. The settlement should also provide at least as much recovery to absent class members as the Report recommends. This is because the Report already balances the interests of class members and Class Counsel; a less favorable departure from these recommendations would suggest that Class Counsel has been able to ratchet up fees because no advocate like CCAF negotiated from the position that the Report does not go far enough.

Presuming the Special Master mediates a thorough and favorable settlement for the class, the Court should treat it as a new fee application and notice absent class members just as it notified them of the appointment of the Special Master. The notice should advise class members of their right to object at a Rule 23(h) hearing. As *amicus*, CCAF would ask for leave to express its views of the settlement should this occur.

Finally, the Court should exercise its inherent authority to govern the conduct of attorneys appearing before it and to deter any similar behavior in future cases. Following final approval of the settlement, if appropriate, the Court should order relevant counsel to show cause why remedial

measures for apparent misconduct should not issue. Although the parties can stipulate that disciplinary findings not appear in an amended Report, the parties cannot waive the Court's inherent authority.

A. Settlement terms needed to protect the class.

Based on their discussion Thursday, the parties and Special Master anticipate that they can negotiate revisions to the Report that will "obviate some or all of" Class Counsel's 300 pages' worth of objections. Tr. 8/9/2018 at 14. Counsel for the Special Master suggested that the Court defer action on CCAF's motion for about three weeks for this process (*id.* at 40), and the parties will file a proposed schedule on August 16. *See* Dkt. 445 at 4.

CCAF agrees that a settlement mediated by the Special Master may lessen the need for a guardian *ad litem*, but the Court should ensure that such settlement includes terms to protect the class. Any settlement should (1) include waiver of counsel's rights to collaterally challenge it and (2) provide the class at least as much relief as the Report recommends.

First, the settlement must be completely airtight given Class Counsel's extraordinary litigation tactics to date—retaining a phalanx of seven experts to rebut one, filing frivolous motions, and lodging an absurd and certain-to-fail mandamus petition. *See* CCAF Response at 17-18. Unless the parties waive all rights to collaterally challenge the settlement and the underlying proceedings, the settlement provides no true peace and must be rejected. To date, it seems as if parties have only agreed that "*discussions relating to settlement* . . . today and in the future will not be a basis for any party to seek the master's disqualification as well as not being a basis to seek my disqualification." Tr. 8/9/2018 at 15 (emphasis added); *see also id.* at 23-24 ("They waived any right to object . . . based on his participation in discussion to try to resolve things as between the master and the lawyers."). From this it seems that plaintiffs and their counsel remain free to seek the Special Master's disqualification provided they do not cite the settlement discussions themselves, which are subject to FRE 408. Without a much broader release, CCAF should be appointed as guardian *ad litem* to protect the class from later collateral attack.

Such appointment is necessary because neither an ordinary *amicus* like CCAF nor the Special Master has the right to submit party briefs and argue on appeal without another order authorizing such participation or the right to engage in motion practice on the class's behalf.[1] That said, CCAF is confident that the Special Master will not agree to a settlement that contains such loopholes.

Second, the terms of the settlement should be at least as favorable to absent class members as the Report recommends. Thus, the Court should expect that the settlement reallocates $7.4 to 8.1 million more to the class relative to the now-vacated original fee order (Dkt. 111), less fees for the Special Master.[2]

Even if the settlement provides the class $8.1 million as recommended, the Court should weigh whether vigorous opposition from a guardian *ad litem* could provide the class even more value. While the class certainly benefits greatly from a final resolution of the fee dispute, the Special Master recognized that his advocacy for the class was constrained by the detailed—and scrupulously balanced—report that he produced. "[W]e are not sure that we are in a position to independently represent and advocate for the class, as at numerous junctures in our Report, we mitigated findings and recommendations as to Labaton's conduct, including in our recommended remedies, leaving

[1] Among the arguments Class Counsel could make: (1) that the Special Master lacks authority to negotiate a settlement because no such power is implied by the orders appointing him, Dkt. 173, (2) that the Special Master's conclusions are tainted as demonstrated by him negotiating as an adversary, (3) that the Special Master could not possibly negotiate on behalf of the class without either a client or appointment, (4) that the Court must recuse due to its alleged bias, and so forth. If Class Counsel does appeal, the class will need representation at the First Circuit to avoid an *ex parte* presentation of the issues.

[2] The $3.4 million inter-firm reallocation of fees is of less interest to class members provided that the settlement provides rough justice to, for example, ERISA counsel (innocent of misconduct) relative to Labaton (which the Special Master found especially culpable). An advocate for the class might well argue that all sums disgorged from Class Counsel revert to class members (rather than ERISA co-counsel) as they were most clearly owed a fiduciary duty from Labaton.

Labaton in a position in which it would, despite its conduct, still retain a multiplier above even its adjusted (post-double-counting and Chargois) lodestar." Dkt. 345-1 at 6.[3] In fact, each of "the Labaton, Lieff and Thornton law firms will still be left with not only their base lodestar claim, but a substantial multiplier." Report at 367. The Report's suggested lodestar multiplier for Class Counsel strikes CCAF as especially astonishing given the above-market leverage that Special Master allowed. The Report declines to adjust staff attorney rates of up to $515/hour even though such attorneys are paid a fraction of what partnership-track associates make. *See* Report at 169 n.134; Dkt. 104-17 at 8 (five staff attorneys with rates of $515/hour billed for over $2 million combined lodestar). The Special Master's failure to accurately price the fair market rate of staff attorneys is among the most conspicuous oversights of his report.[4] In short, the Report already credits Class Counsel's interests—excessively so—and should not be further watered down.

A settlement that materially deviates downward from the Report's recommendations suggests that the Special Master may have negotiated against himself, so to speak, allowing Class Counsel to dilute his carefully considered recommendations. That is exactly the cause for concern of an *ex parte* presentation. A settlement that provides significantly less than the Report, which itself is already a

[3] In their opposition to CCAF's Response, Labaton continues to argue that the Report does not constitute an "impartial opinion," and that the Special Master acted as a partisan for the class. Dkt. 427 at 4. The record shows otherwise, including an unedited version of the quote Labaton cites, which shows the Special Master sought to "balance the interests of the class," *with* "**the law firms**, the legal profession, the public and the institutional needs of the Judiciary." Report at 327 (emphasis added). Labaton does not address CCAF's argument that, in the Special Master's own words, he "mitigated findings and recommendations" whereas an advocate would argue the Report does not go far enough. CCAF Response at 9 (quoting Dkt. 345-1 at 5).

[4] Staff attorneys are paid a fraction of what partnership-track attorneys make, and the market for legal services recognizes this difference with lower rates. While law firms may be entitled to leverage on their permanent attorneys, the market rate for staff attorney time is much lower than the senior associate-level rates approved here. *See*, *e.g.*, Hildebrant Consulting LLC & Citi Private Bank, *2017 Client Advisory* (noting permanent non-partner track attorneys' "rates are lower than associates"), available online at: http://amlawdaily.typepad.com/2017CitiReport.pdf.

compromise, does not adequately protect the class, and should be rejected by the Court in favor of a *de novo* review of the Report where CCAF can act as a full-throated advocate on behalf of the class as guardian *ad litem*.

B. Further notice and a Rule 23(h) hearing is required for any new settlement.

Presuming counsel reaches an adequate settlement with the Special Master, the Court should require class members to be notified of this new settlement and heard pursuant to Rule 23(h).

While the contours of the potential settlement are unclear to CCAF, the result would be some stipulation as to the Special Master's Report on attorneys' fees. Like all attorneys' fee requests following a class action settlement, the parties' forthcoming stipulation falls under Rule 23(h), so requires all of the process of this rule including: (1) reasonable notice to class members, (2) the opportunity for class members to object to the fee award, and (3) a hearing on the fee motion. *See In re Southwest Airlines Voucher Litig.*, 2016 WL 3418565, at *5 (N.D. Ill. Jun 22, 2016); *Jacobson v. Persolve*, 2016 WL 7230873, at *16-17 (N.D. Cal. Dec. 14, 2016).

The Court long ago determined that it would allow class members to object following the release of the Special Master's Report, and for good reason.

> [T]he court will order that class members be sent an additional notice after the Special Master issues his Report and Recommendation, and that any objections or comments by class members be filed in response to that notice. The form of that notice and the procedure for making such objections will be addressed in connection with the submission of the Special Master's Report and Recommendation.

Order dated March 31, 2017, Dkt. 192 at 4. As a general matter, whenever a court is contemplating "material alterations to the settlement," "[c]lass members should be notified." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 176 n.10 (3d Cir. 2013). This principle applies to matters of class counsel's fees as well, because under Rule 23(h), class members are entitled to accurate, complete notice and a fair opportunity to object to counsel's fee requests. *See, e.g., In re Mercury Interactive Secs. Litig.*, 618 F.3d

988, 994 (9th Cir. 2010); *accord Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). Notice allows unopposed fee requests to receive "the closest and most systematic scrutiny before gaining judicial approval." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). "[P]rivate fee agreements cannot substitute for the conscientious application of the court's informed judgment to the lawyers' detailed billing records." *Id.* at 527.

To date, it appears that the Special Master and class counsel have not addressed the form of notice to class members, so it seems efficient for them to stipulate to notice in their settlement. CCAF has some guidance below, which will hopefully assist the parties.

First, direct notice by first-class mail *and* email should be employed. The Court previously determined that mailing to 1300 or so addresses was "reasonable" notice under these circumstances. Dkt. 192 at 4. While Labaton opposed providing email notice and represented to the Court that it "does not have email addresses for class members" (Dkt. 190 at 4), the Court observed that email notice was appropriately provided to 115 email addresses by the settlement administrator pursuant to its order.[5] Such notice should be provided again, supplementing the prior email addresses with additional addresses the administrator may have received through inquiries over the intervening 15 months. *See* Eric Miller (Settlement Administrator) Decl., Dkt. 205-2 at 4. The expense of this supplemental notice to about 1300 addresses should be deducted from class funds, and the Court can decide at a later date exactly which costs should be ultimately borne by Class Counsel. At least some of the additional costs should be deducted from Class Counsel's eventual fee award. "Those who made the misstatements should bear the costs of a notice to correct misstatements." Manual for

[5] The Court ordered Labaton to explain why its representation was not false or misleading. Dkt. 203. Labaton characteristically responded that "[n]either Labaton Sucharow nor its counsel intended or anticipated that the language would be construed to suggest that the Firm had no email addresses for any Class Members." Dkt. 205 at 5.

Complex Litigation (Fourth) § 21.313 (2004). Moreover, by default, plaintiffs generally bear the costs of notifying the class. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974).[6]

Second, the notice should succinctly describe the conclusions and proposed remedies under the settlement, including any material differences between the original Report and the report as modified by the settlement.

Finally, notice should apprise class members of their right to object.

C. CCAF intends to participate as an *amicus* if a settlement is reached that resolves Class Counsel's objections and the Court concludes a guardian *ad litem* is unnecessary.

Even if CCAF's motion to defend class interests as guardian *ad litem* is denied, CCAF intends to assist the Court concerning any settlement between counsel and the Special Master. As the Court outlined (Tr. 8/9/2018 at 41), CCAF may be invited to file an *amicus* brief, or it may file a short motion to file an attached proposed *amicus* brief. If the Court finds CCAF's filings helpful, as it has "several times, last year and recently" (*id.* at 9), the Court can grant CCAF's motion as to the particular *amicus* filing. *Cf.* Dkt. 172.

D. Regardless of any settlement, the Court should sanction misconduct before it.

While the contours of the potential settlement are obscure to CCAF, we anticipate that Class Counsel will agree to return funds to the class in exchange for softening the language of the Special Master's report regarding apparent misconduct. This may be the best solution for the class, as it avoids

[6] Lieff argues that the American Rule means Class Counsel cannot be made to pay for their adversary—i.e. the Special Master following issuance of his Report. Dkt. 418 at 3. Lieff does not say who *should* pay, and the Court need not decide the issue now because at this moment the entire recovery consists of class funds. However, it would be inequitable to make the class bear the full cost of the Special Master's negotiation because Class Counsel's conduct necessitated the expense. *See* CCAF Response, Dkt. 420 at 25-26; *see also Belleville Catering Co. v. Champaign Mkt. Place, LLC,* 350 F.3d 691, 694 (7th Cir. 2003) ("Clients should pay just once for the litigation and should not pay for lawyers' time that has been wasted for reasons beyond the clients' control.") (cleaned up).

the uncertainty and delay of appeal. However, while the Special Master may adeptly mediate the best result for the class, the Court has an independent obligation to sanction misconduct before it.

Therefore, following a decision on any fee request, the Court should make an independent evaluation of whether the non-monetary sanctions originally recommended by the Special Master should be implemented. Regardless of settlement, the Court retains jurisdiction to sanction misconduct that occurred before it. *See Cooter v. Gell & Hartmarx*, 496 U.S. 384, 395 (1990) (district court retains jurisdiction to issue Rule 11 sanctions with respect to misconduct occurring before dismissal); *see also Mellott v. MSN Communications, Inc.*, 492 Fed. Appx. 887, 890 (10th Cir. 2012) (court retains jurisdiction to vindicate its inherent authority). The non-monetary remedies in the original Report include "that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings," Report at 365, and that Labaton and TLF "establish a consulting process that will ensure consistent ethical compliance." *Id.* at 373.

The Court should also consider further remedies regarding the Chargois arrangement, which the Special Master declined to recommend in spite of Labaton erecting "a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." *Id.* at 362. The Special Master declined to make such a recommendation because "formal disciplinary proceedings could spell the end of the firm." *Id.* While sanctions should be proportional, the *de facto* "too big to sanction" approach seems unhelpful to the profession, and more importantly, unhelpful to future absent shareholders at the mercy of their representatives. Labaton has been particularly evasive, and continues to defend its mind-boggling refusal to initially provide any hint of the Chargois arrangement that it orchestrated. Dkt. 359 at 17. Had TLF not appropriately produced emails concerning Chargois, Labaton's dubious referral arrangement would have been completely hidden from the Special Master. One wonders what other facts Labaton has hidden from courts which have not asked, in Labaton's view, sufficiently specific questions. Referral for attorney discipline may be the only way to find out.

Discovery from the investigation further suggests the possible need for law enforcement follow-up, even though the Special Master purposely did not inquire to the ultimate disposition of the millions of dollars paid to Chargois over the years. The Court should consider ordering that certain discovery from this this case be provided to at least the United States Attorney's Offices in the District of Massachusetts, which previously expressed interest in the dealings in this case (Dkt. Dkt. 358 at 39), and the Eastern District of Arkansas, where FBI agents not so long ago interviewed Tim Herron of Chargois & Herron about his free-rent tenant circa 2008, convicted former Arkansas Treasurer and ATRS Trustee Martha Shoffner. *See* Dkt. 420-1, Bednarz Decl. Ex. D (Chad Day, ARK. DEMOCRAT-GAZETTE (May 22, 2013), *Shoffner lived rent-free near the Capitol for most of her first term, landlord says*). Veteran investigators and United States Attorneys are best-positioned to determine whether the facts of Labaton's referral arrangement require further investigation.

II. The Court Should Appoint a Guardian *Ad Litem* to Protect the Class

Several prior filings explain why the Court should appoint a guardian *ad litem* if further advocacy for the class is needed. CCAF Response at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12. In short, "[e]ven the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977). This is especially true during fee setting, where an "acute conflict of interest" exists. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). An independent advocate is even more necessary given the issues that the Special Master uncovered, which would put Class Counsel in the untenable position of vindicating their own questionable conduct while purporting to represent the class. The appointment of a guardian *ad litem* enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

As previously explained, CCAF does not currently have the capacity to serve as guardian *ad litem* alone, nor can it serve *pro bono* at this time. CCAF Response at 23. That said, CCAF could assist

the Court in this capacity with the assistance of Burch, Porter & Johnson, PLLC, and it would do so at comparatively modest rates. Both firms have excellent qualifications, and the costs of such representation "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte*, 376 P.3d at 691 (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)). And if the Court is somehow troubled by the *ad hominems* aimed at CCAF, CCAF would not oppose the Court inviting Burch, Porter & Johnson to serve as GAL alone, independent of CCAF.

A. CCAF and Burch, Porter & Johnson are experienced in efficiently litigating complex cases and have extensive knowledge of the applicable law

1. CCAF

CCAF was founded in 2009 as a 501(c)(3) non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute ("CEI") and became a division within their law and litigation unit. *See generally* Dkt. 125-1 (2017 Frank Declaration), at 2-3.

The Center for Class Action Fairness currently consists of five attorneys who specialize in litigating on behalf of class members against unfair class action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification.)

CCAF has won more than a hundred million dollars for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016). *See also, e.g., McDonough v. Toys "R" Us*,

80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million). CCAF does not object to simply "r[un] up a tab with minimal value added." *See In re Southwest Airline Voucher Litig.*, --F.3d--, 2018 WL 3651028, at *4 (7th Cir. Aug. 2, 2018).

CCAF has received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 (calling CCAF director "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 (calling CCAF director "the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL, including by lead class counsel Lieff).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in sixteen federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees.[7] Several of these appeals centered around excessive fee awards. *E.g., Redman*; *Pearson*; *Bluetooth.*

[7] *In re Southwest Airlines Voucher Litig.*, --- F.3d ----, 2018 WL 3651028 (7th Cir. Aug. 2, 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In*

CCAF currently employs five attorneys including the undersigned. *See* Declaration of Theodore H. Frank ("Frank Decl."), filed with this memorandum, at ¶¶ 7-16. Each of the CCAF attorneys has years of experience representing objectors to class action settlements, and most have years of prior experience in civil litigation. *Id.*.

2. Burch Porter

Burch, Porter & Johnson, PLLC ("Burch Porter") is well-equipped to assist CCAF as guardian *ad litem*. Burch Porter is a leading firm in Memphis, Tennessee, with forty attorneys, about half of whom are litigators. *See* Peeples Decl. (filed contemporaneously with this memorandum). Senior Burch Porter associate Gary S. Peeples would undertake day-to-day responsibility for the case. Mr. Peeples has been following the case for months and has a head-start in the major issues raised by Class Counsel's objections. CCAF and Burch Porter expect that the legal team for this matter will consist of Mr. Peeples, Jef Feibelman, Jennifer S. Hagerman, and William D. Irvine. *See generally*, Declaration of Gary S. Peeples ("Peeples Decl."), filed with this memorandum.

Each attorney on this proposed team has stellar credentials and a background in commercial civil litigation. For example, all four attorneys clerked for federal district court judges. Mr. Peeples and Ms. Hagerman also clerked for Sixth Circuit judges. Additionally, Joseph (Jef) Feibelman, has nearly fifty years of complex business litigation experience. Peeples Decl. at ¶¶ 5-8.

B. CCAF and Burch would litigate on especially efficient terms.

Because of Burch Porter's location in Memphis, Tennessee, its standard billing rates are much lower that the rates sought by Class Counsel in this case, and this benefits the class. In order to undertake the role of guardian *ad litem*, CCAF proposes that Burch attorney time be compensated at

re HP Inkjet Printer Litigation, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

their ordinary billing rates, while CCAF attorney time is substantially discounted to mirror the prevailing rates of its affiliate attorneys in Memphis, Tennessee. The proposed rates are as follows:

Attorney	Position (class year)	Proposed Rate	
Jef Feibelman	Burch Porter member (1969)	**$475/hr**	
Jennifer S. Hagerman	Burch Porter member (1999)	**$375/hr**	
Gary S. Peeples	Burch Porter associate (2010)	**$275/hr**	**Standard CCAF Rates**
William D. Irvine, Jr.	Burch Porter associate (2016)	**$200/hr**	
Theodore H. Frank	CEI director of litigation (1994)	**$475/hr**	$900/hr
Melissa A. Holyoak	CEI senior attorney (2003)	**$365/hr**	$525/hr
Anna St. John	CEI attorney (2006)	**$325/hr**	$475/hr
M. Frank Bednarz	CEI attorney (2009)	**$275/hr**	$375/hr
Adam E. Schulman	CEI attorney (2010)	**$275/hr**	$375/hr

CCAF proposes to set these modest rates to preempt accusations that it is overbilling the class or Class Counsel. By adopting a similar pay scale as its affiliated counsel, neither the Court nor the class would need to worry about the allocation of time among the attorneys, as might otherwise result from the large disparity between Memphis and major metropolitan billing rates; that said, CCAF anticipates that the majority of time will be billed by Burch Porter.

As shown above, CCAF is asking for significantly lower rates than it typically requests—and has been approved—in other cases. CCAF has been awarded attorneys' fees for time at or near the "standard" rates indicated in the table above. *See* Frank Decl. ¶¶ 8, 10, 12, 14, 16. Moreover, the "standard" rates listed above likely already understate CCAF attorneys' market value. For example, Mr. Frank recently turned down work as an expert witness, which would have paid $1800/hr. *See* Frank Decl. ¶ 8. Additionally, attorneys Holyoak, St. John, and Bednarz previously worked at law firms when they were less experienced attorneys than they are today, but where paying clients were billed at *higher* hourly rates than the "standard" rates listed above. (Holyoak as an associate at O'Melveny & Myers LLP, St. John as an associate at Covington & Burling LLP, and Bednarz as an associate at Goodwin Procter LLP. *See* Frank Decl. ¶¶ 9-14.)

Additional guidelines will further control the costs of guardian *ad litem*.

- Midlevel attorneys for CCAF and Burch Porter—Messrs. Bednarz and Peeples, respectively—will spend more time on this matter than more senior attorneys.
- Travel time not spent on substantive legal work will be billed at only one half the proposed hourly rate.
- CCAF and Burch Porter attorneys will bill only for the price of economy flights and reasonable hotel accommodations in connection with their work.

As guardian *ad litem*, CCAF will also avoid pitfalls it criticizes in this and other class action settlements. CCAF discloses that no fee sharing or referral arrangement exists between CCAF, Burch Porter, or any other party concerning this litigation. Should CCAF be appointed guardian *ad litem*, the fee and reimbursement requests it submits for CCAF and Burch time shall be remitted to CCAF and Burch Porter precisely as requested—there is no undisclosed fee split between CCAF and Burch Porter.

Thus, CCAF and Burch Porter would efficiently represent the interests of absent class members due to their familiarity with the case and proposed rates dramatically less extravagant than Class Counsel's.

C. Proposed payment process.

CCAF proposes that attorneys' fees for guardian *ad litem* should be paid in a similar fashion as fees for the Special Master have been paid.

Specifically, the Court should require Labaton to deposit $1,000,000 with the Clerk of the United States District Court for the District of Massachusetts. *Cf.* Dkt. 173 at 6. (Because the fee order was vacated, Dkt. 331, all funds held by Labaton are properly considered class funds, and their transfer to the Clerk obviously does not prejudice counsel's right to contest which party or parties should ultimately bear the cost of the guardian *ad litem*.) The guardian *ad litem* will submit monthly detailed

billing invoices documenting both hours and expenses for reimbursement along with supporting documentation for any expenses to be reimbursed, and the Court will award properly justified hours and costs from the fund. *Cf.* Dkt. 173 at 7. Assuming appeals are taken, the Court retains jurisdiction over these collateral fee awards, so the guardian *ad litem* will have resources necessary to defend the Court's decision on appeal and cross-appeal issues for the benefit of the class.

When the guardian *ad litem* concludes his task defending the interests of absent class members, a final accounting of fees should be filed. Hours spent and reimbursements should also be filed on the public docket with only minimal redactions if absolutely necessary to protect, for example, credit card numbers, and the substance of privileged communication. CCAF expects that any redactions will be minimal. The Court should retain jurisdiction over collateral litigation, including disputes over the guardian *ad litem*'s fees.

Because guardian *ad litem* cannot ethically bill the class for time spent defending its own attorneys' fees, CCAF retains its right to seek a lodestar multiplier under limited circumstances to deter frivolous or harassing challenges to the guardian *ad litem*'s billing. Without such a reservation, Class Counsel would be free to use their superior resources to bully attorneys' fees away from the guardian *ad litem* through collateral attacks on its fees. CCAF reserves the right to seek a lodestar multiplier for its time billed as guardian *ad litem* from any party who unsuccessfully challenges the guardian's fees. Such motion would compensate the guardian *ad litem* for its self-evident risk, and CCAF's reservation to seek a multiplier in this limited situation hopefully deters spiteful multiplication of the proceedings.

CCAF anticipates billing and staffing efficiently; in the event of a challenge by class counsel to claims of overbilling, the guardian ad *litem* intends to subpoena counsels' contemporaneous time records. The guardian would ask the court to Court presume that time submitted by the guardian *ad litem* is reasonable to the extent Class Counsel spends similar amounts of time in opposition.

III. Counsel's Arguments Provide No Reason to Disqualify CCAF as Either Amicus or Guardian *Ad Litem*.

Plaintiffs' counsel advance a large number of arguments that CCAF should not serve as a guardian *ad litem* or even as an *amicus*, but none of these arguments carry weight. First, contrary to Lieff's belief, the silence of absent class members does not indicate that they are adequately represented, much less that they support Class Counsel's bloated fee petition. Dkt. 127 at 9. Second, certain ERISA counsel misunderstand the purpose of appointing guardian *ad litem*: while Rule 53 may indeed permit the Special Master to transform into a zealous advocate on behalf of the class, the lack of controlling authority on the subject suggests this course exposes the Court's ultimate decision to unnecessary risk on appeal should a settlement not fully resolve the matter. Third, CCAF does not have an ideological agenda that should preclude it from representing the class—in fact, CCAF's alleged interest in reducing attorneys' fees is exactly the sort of advocacy the class now needs. Fourth, counsel articulates no reason to disclose CEI's donors given the First Amendment rights of non-profits like CEI, and donors have never influenced CCAF litigation anyway. Fifth, Labaton identifies no intentional misrepresentations by CCAF, and indeed Labaton misrepresented the state of the record in the course of its accusations. Sixth, CCAF's public commentary on the case—including Mr. Frank's use of social media like Twitter—is the ordinary sort of commentary that attorneys engage in, including Labaton. Finally, the Court should disregard the incendiary and false misconduct accusations that Lieff casually hurls. The Court previously indicated that it did not find *ad hominem* attacks persuasive, so CCAF will not waste the Court's time rebutting every speck of mud thrown, but will happily supplement the record if the Court found any of the accusations troubling or in need of detailed refutation. The Court can also skip (or just quickly skim) the remainder of this section if it is has indeed already rejected the abuse thrown at CCAF, as it suggested it had.

Therefore, if Class Counsel and the Special Master cannot reach a settlement resolving the objections, the Court should appoint a guardian *ad litem*, and no good reason exists to reject CCAF's appointment.

A. Silence does not imply adequate representation of the class.

At the August 9 hearing, counsel for Lieff suggested that "not a single class member has come forward to object" because the class of "sophisticated individuals and entities" has "sat silent." Tr. 8/9/2018 at 35. Contrary to Lieff, silence cannot be read as support because individual class members lack the incentive to intervene simply in hopes of a "miniscule *pro rata* gain." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)). It is "naïve" to assume class acquiescence to class-action abuse from the lack of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Only 23% of securities settlements engender any fee objectors at all (Lynn A. Baker, et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class* Actions, 115 COLUM. L. REV. 1371, 1389 (2015)), though, as class counsel's own experts indicate, virtually every fee request in large-scale securities actions engages in abuses similar to the ones the special master identified here. The class members in this case—or rather, the class member funds' directors and trustees—are understandably reluctant to respond to notice at all given that the cost of obtaining an attorney opinion on the 374-page Report and 300+ pages of objections could easily dwarf whatever *pro rata* increase an objector might achieve. "Class members have no real incentive to mount a challenge that would result in only a minuscule pro rata gain from a fee reduction." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

Moreover, class silence does not excuse—in fact it emphasizes the need for—compliance with Rule 23(a) and (b)(3). Neither ATRS nor Class Counsel can be regarded as adequate representatives of the class when their own conduct is at issue. CCAF Response at 14-16; *see also* Dkt. 345-1 (letter from Special Master).

Labaton argues that the conflict of interest between Class Counsel and the class is present in every common fund class action settlement (Dkt. 427 at 1), but the conflict is much more severe in this case where the dispute will have repercussions on Class Counsel's other cases. CCAF agrees that the relationship between class and counsel "turns adversarial" in fee setting, and it discussed this precise phenomenon in its first filing with this Court. Dkt. 127 at 6. The conflict of interest in this case is extraordinary, however, because a decision on the propriety of the Chargois arrangement and bare referral fees, determination of acceptable rates for staff and contract attorneys, and the specific apparent misconduct by certain Class Counsel extend far beyond the boundaries of this case. This is what Labaton in particular has invested so thoroughly in the litigation. *See* CCAF Response at 16-17.

B. The Special Master's authority to act as an advocate is uncertain.

Keller Rohrback L.L.P. ("Keller") and Zuckerman Spaeder LLP ("Zuckerman") argue that the parties need not consent for the Special Master to act as an advocate under Rule 53. Dkt. 430 at 3-4. Perhaps attributing Labaton's argument to CCAF, Keller and Zuckerman misunderstand CCAF's suggestion that consent of the parties is necessary to prevent the uncertain outcome of a later challenge by class counsel. CCAF agrees that Class Counsel's objections are properly resubmitted to the Special Master (CCAF Response at 6), and the Court has since ordered the Special Master to prepare a supplemental report (to the extent that settlement does not moot it). Dkt. 445.

Other activity by the Special Master is much less certain under the thin case law. For example, case law provides no firm answer as to whether the Special Master may appropriately defend the district court's decision on appeal, or move for substitution of lead counsel or the named representative. The Court should only rely on the Special Master to act in this way if the parties agree to waive arguments challenging his neutrality in writing the Report or his authority to act as a *de facto* guardian *ad litem*. If the Court can avoid it, class members' rights should not be wagered on future First Circuit decisions on matters of first impression.

C. CCAF's alleged ideological agenda perfectly aligns with the class's interest.

Labaton rehashes argument it briefed in 2017, that partisan *amici* are allegedly forbidden (Dkt. 427 at 11), but CCAF anticipated this argument in its very first filing. There are two approaches to *amicus* filings, one that disfavors such filings, and the majority rule which tends to permit them. Dkt. 127 at 4-7. Even under the restrictive minority rule, which Labaton cites, CCAF's *amici* filings are properly allowed. The suitability of amicus briefs turns on "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.) (cited by Labaton at Dkt. 427 at 11). The Court discussed this precedent Thursday. Tr. 8/9/2018 at 41. Here, CCAF's briefs offer unique arguments, insights, and facts—in fact, Labaton *criticizes* CCAF for bringing up topics not addressed prior to its filing on August 6. Dkt. 427 at 7.

Labaton, Keller, and Zuckerman further argue that CCAF should be barred from participating in this case due to CEI's alleged bias against class action firms. Dkt. 427 at 11-12; 430 at 5; Tr. 8/9/2018 at 30, 36. Plaintiffs' counsel dramatically overstate their argument because neither Mr. Frank nor CCAF is biased against class actions or class action firms. In fact, Mr. Frank is lead plaintiff in a TCPA class action being litigated by a prolific plaintiffs' frim. *See* Frank Decl. ¶ 4. In any event, the First Amendment protects cause-driven litigation, including that brought by an organization serving as litigation counsel. *E.g., NAACP v. Button*, 371 U.S. 415, 420, 429-31 (1963). Even if, *arguendo*, CCAF did endeavor to eliminate class action litigation, such advocacy is protected expressive activity, particularly where there is no allegation that the litigation positions are unsupported by law.

Even if such anti-class action attorney prejudice existed, which it does not, the alleged prejudice perfectly align with class interests at the fee-setting stage. CCAF seeks to trim excessive attorneys' fees, which returns millions of dollars to class members. CCAF's interest in the case better

serves the class than Class Counsel's overriding interest to avoid sanctions and secure attorneys' fees they applied for in 2016 with incomplete and inaccurate declarations.

D. CEI need not disclose its donors, who in any event had no role in CCAF's selection and participation in this case.

Keller and Zuckerman further argue that CEI should be compelled to disclose its donors "so that Court can consider whether CEI's impartiality would be compromised as a result of any of those major funding relationships." Dkt. 430 at 6; Tr. 8/9/2018 at 30.

Counsel fail to provide any precedent for the proposition that a donor's identity would be remotely relevant to a non-profit's ability to advocate on behalf of a class. After all, CCAF seeks to be appointed guardian *ad litem*, an expressly partisan appointment—not a neutral special master or court-appointed expert. Do Keller and Zuckerman submit full rosters of past clients whenever they move to be appointed class counsel for the purpose of verifying that it is not compromised to act on the class's behalf? We think not.

Moreover, counsel failed to identify any grounds for relevance that offset the core First Amendment associational rights implicated by this harassing request. *NAACP v. Alabama*, 357 U.S. 449 (1958) ("overriding valid interest of the State" is required for compelled disclosure of membership lists). At the hearing Thursday, counsel had no response to this well-known precedent taught in law school, except to suggest that CEI's tax forms were somehow unusual for not disclosing its donors. They're not; after all, the NAACP litigated for the right not to disclose donor information on government forms, and the NAACP Legal Defense Fund's tax forms are exactly like CEI's—with donor identities left blank. *See* Frank Decl. ¶ 26 and Ex. B.

This is not the first time Keller in particular has attempted to harass CCAF by seeking to discover donors to CCAF's relatively shoe-string operation. Apparently a six-digit sanction for serving harassing subpoenas on CCAF was insufficient to stem Keller's curiosity. *See In re Classmates.com Consol.*

Litig., No. C09-45RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012) (reducing attorneys' fees by $100,000 or 10% of the total fee request).

In any event, CEI's donors had no role in CCAF's effort to defend the class in this case, and Mr. Frank has no idea whether any donor even has a position in the underlying litigation. *See* Frank Decl. ¶ 25. CCAF retains independence from its donors and is indeed litigating multiple appeals directly adverse to corporate donors. *Id.* ¶ 24.

E. CCAF did not mislead the Court.

Finally, Labaton argues that CCAF's Response attempted to mislead the Court. Dkt. 427 at 14-17. In fact, CCAF accurately characterized the facts available to it, and Labaton's attempt to shoot the messenger provides no reason to deny CCAF's motion.

First, CCAF accurately characterized the Court's vacatur of the initial fee award. Dkt. 331. While the Court's grant of Rule 60 relief did not itself disgorge money from Class Counsel, CCAF accurately stated that the original fee order has been vacated, as the Court itself has now confirmed. Dkt. 455 at 3 n.2. Labaton, of course, prefers not to be called out for "baldly misrepresent[ing] the procedural state of affairs to the First Circuit" (Dkt. 420 at 4 n.2), but attacking CCAF for its accurate statement does not rehabilitate Labaton's candor. Even if it were credible for Labaton to have believed the fee award was not "vacated," the omission of the order granting Labaton's own Rule 60 motion created an incomplete and misleading picture of the procedural posture before the First Circuit. CCAF contends that a guardian *ad litem* would be especially helpful given what the Special Master called a "troubling disdain for candor and transparency that at times crossed the line into outright concealment of important material facts, including the payment of an enormous amount of money from class funds to a lawyer who never appeared in the case, did no work on the case, and whose identity was intentionally hidden from the clients, the class, co-counsel and the Court." Report at 7.

Second, Labaton attacks CCAF's presentation of its connections to convicted former Arkansas Treasurer Martha Shoffner. Labaton does not deny that Shoffner, as a trustee of ATRS, was a member of the only body empowered to approve or terminate Labaton's role as monitoring counsel. It simply quibbles that the campaign contributions from Labaton partners, including Eric Belfi and Thomas Dubbs, were made "a full year *after* the ATRS Board of Trustees approved Labaton's application to become monitoring counsel." Dkt. 427 at 15. Labaton does not address the free rent that their referral affiliate Chargois & Herron provided to Shoffner continuously throughout the time that Labaton and Chargois' submitted a joint application to ATRS (SM Ex. 128)[8] until the application was approved by the Board of Trustees. While trustees do not direct the day-to-day operation of ATRS, their ability to *rescind* agreements is potent, so Labaton's New Yorker partners' otherwise inexplicable interest in the Arkansas Treasurer election is suggestive. Labaton claims that "CCAF does not attempt to connect these contributions to anything related to issues in this case," but in fact they show that Labaton yet again attempted to mislead the Court by falsely stating it had given no such contributions. CCAF Response at 19. Labaton's candor (or stunning lack thereof) is a central issue in this case in so far as it bears on their ability to represent the class and the ultimate fee they should receive.[9]

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[8] "SM Ex." refers to exhibits to the Special Master's Report and Recommendations, the public versions of which are available at Dkt. 401. CCAF does not currently have access to unredacted versions of any documents that remain under seal, and its response here is limited by what is publicly available.

[9] Labaton also takes exception to CCAF's argument that George Hopkins' ostrich-like supervision of attorneys' fees makes him ill-suited to represent the class in deciding the propriety of attorneys' fees. CCAF does not suggest that Hopkins was an unsuitable representative for the merits of the underlying suit, but the underlying suit is resolved and the class now needs assistance resolving attorneys' fees, which is the exact topic Mr. Hopkins has abdicated and on which further investigation might cause embarrassment or political controversy to Mr. Hopkins or ATRS. Similarly, CCAF does not object to Labaton's administration of the settlement. Dkt. 427 at 9. Instead, Labaton inadequately represents the class *with respect to Labaton's fee request*. CCAF Response at 14-15.

Finally, Labaton expresses umbrage that CCAF suggested it failed to disclose the Chargois arrangement to *Facebook IPO* class members. Dkt. 427 at 17. If in fact Labaton never intended to pay Chargois from the *Facebook IPO* fee award, a fact on which their declaration (Dkt. 428) is conspicuously silent, then CCAF regrets the error. But Labaton's assertion that no "factual basis" existed to believe Chargois would be paid from the *Facebook IPO* settlement is wrong. Both Mr. Chargois and counterparties at Labaton testified their arrangement applied to any case where Labaton was "selected to represent any institutional investor that I [Chargois] facilitated an introduction." SM Ex. 125, at 50. Labaton partner Eric Belfi did not disagree that this obligation applied "[e]ven if Chargois was not involved specifically as a referring attorney and even if Chargois did no work on the case[.]" SM Ex. 122, at 19. In fact, evidence suggest that *Facebook IPO* was consciously covered by the Chargois arrangement because Labaton partners sent Mr. Chargois updates on the case. SM Exhs. 134 & 135. Thus, the Special Master surmised that *Facebook IPO* was among the cases falling under the Chargois arrangement. Report at 102. Labaton points to nothing in the record showing a reasonable observer should have believed otherwise, and instead James Johnson filed a declaration that says only "no referral fee has been paid or will be paid to Damon Chargois in the Facebook case." Dkt. 428 at 1. The declaration does not say that *Facebook IPO* was *never* covered by the Chargois arrangement, and it raises questions about the arrangement that the Court should ask. When and why was it decided to not pay referral fees in *Facebook IPO*? Is the Chargois arrangement no longer in effect, or was the decision made only for *Facebook IPO*? Why?

In any event, CCAF has not attempted to mislead the Court, and Labaton instead accuses others of behavior it engages in itself.

F. CCAF's public commentary on the case is unremarkable.

Labaton contends that CCAF's participation in the case should be rejected because it is "self-serving," "self-promoting," and "self-aggrandizing." Dkt. 427 at 12-14. As evidence of this, Labaton cited Mr. Frank's correspondence with the *Boston Globe* reporter whose story inspired the appointment of a special master. Feb. 6, 2017 Order, Dkt. 117, Exhibit B. Labaton condemns the

Boston Globe correspondence as part of a "pattern of interjecting new facts." Dkt. 427 at 13. Apparently, Labaton believes illuminating relevant facts is a bad thing—or that Frank was supposed to hang up when the *Boston Globe* called him first to ask him to help interpret the fee application in this case. *See* Frank Decl. ¶ 22.

Labaton also cites two tweets (Twitter social-media messages) made by Theodore H. Frank regarding the case. The complaint—and the fact that Labaton paid for attorneys to research and write it—is absurd, as is the false characterization by Labaton's counsel that Frank ridiculed a Choate associate, and CCAF will not waste the Court's time with it, but to the extent the Court cares, a detailed, if similarly absurd, explanation of the social-media commentary is provided in Frank Decl. ¶¶ 27-34 & Ex. C.

Labaton does not cite any other examples of supposed self-promotion. Class counsel's narrative under which CCAF inserted itself into this case in an effort to seek fees and self-promotion is belied by the course of proceedings, not to mention CCAF's busy schedule. CCAF Response at 23. Indeed, Frank recently turned down an offer to act as a consulting expert witness in his private practice for $1800/hour. Because Frank realizes no personal profit from any fees CCAF receives, he would have been much better off financially if CCAF's August 5 filing simply stated "We are too busy to serve as guardian *ad litem*" and he used the time to instead accept the offer to consult on another case. Frank Decl. ¶ 8.

While CEI highlights the work of its attorneys with press highlights and news releases, and social-media commentary, other firms do the same, including Labaton. In fact, the legal profession virtually *requires* some degree of self-promotion. Attorneys necessarily describe their past experience when seeking new clients, and CCAF admits it does this. And of course, so does Class Counsel. While counsel for Lieff complained that "the press picks up on" CCAF filings, it certainly picks up on Class Counsel's filings and statements as well. Labaton maintains an entire archive of press releases for this

very purpose. *See* Labaton Press Room, https://www.labaton.com/en/about/press/News-and-Press.cfm.

Labaton and the other counsel have engaged in extensive out-of-court commentary on this case, far more extensive—and inflammatory!—than a few flame emojis. For example, Labaton provided a "lengthy statement" to American Lawyer (Law.com) reporter Scott Flaherty.[10] Labaton said that the Special Master's Report was "wholly unmoored from the relevant law and the actual facts." *Id.* Labaton told the press that the Special Master acted inappropriately as an adversary seeking to impugn Labaton:

> "The master could have concluded his endless and costly investigation long ago once he verified that the double-counting was, indeed, inadvertent," the firm said. "Instead, he opted to go down the rabbit hole chasing the scent of an 'improper' referral payment because he believed it should have been disclosed to the court. In doing so, he elected not to act as a neutral fact-finder (as was his stated charge) but rather as an adversary seeking to impugn Labaton and customer class counsel for making a referral payment that was entirely legal, ethical and appropriate under Massachusetts law. Judge Rosen may be offended by a 'bare referral' fee—one where the referring attorney does not have to do any work in order to receive the referral fee, but it is the law in Massachusetts."

Id. And, of course, Labaton sought to distract from the important news of its odd referral fees to a politically-connected Texas law firm that has led to an investigation by the Arkansas legislature with a patently meritless motion for recusal and even more meritless mandamus petition, each of which generated its own headlines.

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[10] Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton* (Frank Decl. Ex. F), available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/.

If the Court accepts Labaton's position that self-serving out-of-court statements somehow disqualify advocacy for absent class members, it is only a further reason that Labaton cannot continue representing the class in fee proceedings.

G. Lieff's insinuations about CCAF only support the utility of appointing a guardian *ad litem* who cannot settle class claims for private gain.

Finally, Lieff expressly incorporates the "matters set forth in the Surreply by Lieff Cabraser Heimann & Bernstein, LLP to Competitive Enterprise Institute's Motion for Leave to File *Amicus Curiae* . . . (ECF No. 168)." Dkt. 426. The Court may not recall the Surreply, and CCAF did not previously respond to it because the Court mooted the underlying motion two days after it was filed, on March 8, 2017, by granting CCAF's motion to file its *amicus* brief. Dkt. 172.

In the Surreply (Dkt. 168), Lieff accuses Mr. Frank of "misconduct" relating to the cash buy out of objections Lieff and other counsel made to objectors in *In re Capital One TCPA Litigation*, MDL No. 2416 (N.D. Ill.). Lieff filed its hair-curling Surreply in response to this footnote in CCAF's reply:

> As discussed in the Frank Memo, Lieff Cabraser once persuaded a CCAF client to instruct CCAF to dismiss his appeal seeking to reduce fees by $10 million in exchange for a personal $25,000 payment. In the absence of a court injunction or other rule precluding such payment offers or acceptances, class counsel can always buy off individual class members who have less at stake than the class counsel—an advantage to appointing a guardian *ad litem* who will not have that conflict.

Dkt. 154 at 11 n.5.

Lieff did not and cannot refute the underlying point of the footnote: that class counsel can and has successfully evaded appellate review by offering money to objectors, instead Lieff provides an avalanche of disingenuous characterizations and personal attacks to bury this central point. (With notable chutzpah, Lieff complained about CCAF's *ad hominem* attacks at the hearing. Tr. 8/9/2018 at 35. Again, the pattern and practice of class counsel has been to levy allegations against the Court, the Special Master, and CCAF that are better aimed at Class Counsel and the class representative.) But

Lieff's filings admit that they indeed paid $25,000 to Mr. Collins personally (and unknown amounts to other objectors) to end the *Capital One TCPA* appeal. *See* Dkt. 166-4 at 39 of 73, ¶¶ 13-15 (Selbin Decl., detailing settlement offer to Mr. Collins); *see also* 166-6 (2015 Frank Decl.). CCAF will be happy to provide additional detail rebutting Lieff's attacks if the Court wishes, but the point of this proceeding is not Lieff's and CCAF's litigation in another case, nor undisclosed expert opinions that Lieff did not even feel confident enough to submit to the Seventh Circuit, much less be tested by discovery and cross-examination, but that it seeks this Court to rely upon.

CONCLUSION

Any settlement between Class Counsel and the Special Master should provide at least as much relief to class members as the Report does, and such settlement should unambiguously waive counsel's ability to collaterally attack the settlement in the future. If these conditions are not met, the Court should appoint a guardian *ad litem* for the class (and it should consider the potential benefits of appointing a guardian even if a minimally acceptable settlement is reached).

If no settlement is reached, given the certainty of appellate challenges to any adverse ruling against Class Counsel, the Court should appoint an independent and separate guardian *ad litem* if any party objects to the Special Master serving in that role. CCAF is well-positioned to serve in this role with the assistance of Burch, Porter & Johnson, PLLC. All CCAF and Burch Porter attorneys have suitable experience to act as guardian *ad litem*, and their proposed rates are modest, especially compared to Class Counsel.

The Court should compensate guardian *ad litem* in a similar manner as it paid the Special Master—by holding class funds in trust and paying the guardian *ad litem* based on regularly-submitted detailed contemporaneous hours. However, to discourage frivolous disputes over billing, CCAF reserves its right to seek a fee multiplier from parties who unsuccessfully challenges the guardian's eminently reasonable rates and attorneys' fees.

Respectfully submitted,

Dated: August 13, 2018

/s/ M. Frank Bednarz

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Center for Class Action Fairness

CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: August 13, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

DECLARATION OF THEODORE H. FRANK IN SUPPORT OF THE CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS*

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as witness, could and would testify competently thereto.

2. I previously filed a declaration in this case which describes my professional experience and background founding the Center for Class Action Fairness ("CCAF"), which is now a part of the Competitive Enterprise Institute ("CEI"). *See* Dkt. 125-1 ("2017 Frank Declaration").

3. Among the topics I previously addressed were *ad hominem* attacks frequently hurled against me and CCAF by class counsel. I correctly anticipated some of Class Counsel's recent attacks nearly 18 months ago. In particular, I explained that I am not ideologically opposed to class actions, but just abusive class action practices. "That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food." *Id.* at 5.

4. I am often accused of being an "ideological objector," but the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, counsel for Thornton has asserted that CCAF seeks to attack the entire "class action industry" (Tr. 8/9/2018 at 36). The accusation—aside from being utterly irrelevant to the legal merits of CCAF's participation in this case—has no basis in reality. Since submitting my 2017 declaration, I have become the class representative in a pending federal class action, represented by a prominent plaintiffs' firm, seeking class-wide recovery for spam telephone calls under the TCPA. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.). I absolutely oppose the overbilling windfalls sought by class-action firms at the expense of class members, but that is exactly the sort of representation the class needs and has not been given by the compromised class representative in this case.

ATTORNEY EXPERIENCE AND RATES

5. Attorneys at CCAF have outstanding experience in class actions and complex civil litigation, and the rates we propose in this case are significantly lower than those that similarly experienced Class Counsel attorneys have requested.

6. CCAF attorneys have billed thousands of hours in dozens of cases where no fees were paid to CCAF, even in cases where CCAF was successful on appeal. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates*, for example, CCAF did not make a fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012).

7. As for my own background and experience, I graduated from University of Chicago Law School in 1994 with high honors and as a member of Order of the Coif and Law Review, where I had an Olin Fellowship in Law & Economics and Public Service Scholarship. I clerked for the Honorable Frank H. Easterbrook of the Seventh Circuit. I worked in prominent "Big Law" firms in Washington, DC, and Los Angeles for ten years, handling complex litigation for plaintiffs and defendants. I then served as the first head of the AEI Legal Center for the Public Interest and as an attorney for the McCain-Palin campaign, and have testified before federal and state legislative subcommittees about class actions, class action settlements, and *cy pres*. I founded CCAF in 2009, and have won national acclaim for its work from the *New York Times*, *Wall Street Journal*, *Forbes*, the *ABA Journal*, and several other legal publications. I have spoken about class action settlements across the country, including, *inter alia*, to the ABA Annual National Institute on Class Actions; to the Federalist Society National Lawyers Convention; to the DRI Corporate Counsel Roundtable; to numerous law firms and student groups at law schools; and in television and radio appearances.

8. My standard requested rate for CCAF work is currently $900/hour, which is what I last billed to a paying client in private practice in 2015. In fact, this month, I turned down an offer to serve as a non-testifying expert witness at $1800/hour. (Indeed, since I realize no personal profit from any fees CCAF receives, I would have been much better off financially if CCAF's August 5 filing simply stated "We are too busy to serve as guardian *ad litem*" and I used the time to instead accept the offer to consult on another case.) My standard rate is lower than the $925-$1000/hour billed by seven senior partners for Class Counsel and is likely lower than senior defense counsel rates. *See* Dkts. 114-15

at 7 (Labaton); Dkt. 114-17 at 8 (Lieff); Dkt. 357 at 167 (noting that WilmerHale bills similar rates). Courts have previously awarded $750/hour for my work, not including risk multiplier. *Edwards v. Nat'l Milk Producers Federation*, No. 4:11-cv-04766-JSW, 2017 WL 4581926 (N.D. Cal. Sept. 13, 2017) (awarding full attorneys' fee request with 1.6 lodestar multiplier).

9. Senior attorney Melissa Holyoak graduated Order of the Coif from the University of Utah S.J. Quinney College of Law in May 2003. In the fall of 2003, she began working as an associate in the Washington, DC, office of O'Melveny & Myers LLP. While at O'Melveny, she managed complex commercial and financial services litigation, argued before the Fifth Circuit Court of Appeals and other federal and state courts, deposed witnesses, and authored various motions and briefs in state and federal trial and appellate courts. From 2008 until the present, she has been engaged as a consultant by professional services firms relating to strategic planning, as well as financial services-related projects. In addition, from December 2010 through April 2012, she worked as a contract attorney for Gunster, Yoakley & Stewart, P.A., in West Palm Beach, FL, on complex financial services matters. She was engaged to analyze contracts, develop defenses, and draft responses relating to secondary mortgage market investor repurchase demands for large financial services clients involving origination, servicing, and fraud allegations. She also assisted in federal litigation involving allegations of fraudulent practices relating to foreclosure proceedings. Ms. Holyoak joined CCAF in July 2012. Since joining CCAF, both Ms. Holyoak and I have authored numerous district court and appellate briefs, reviewed and analyzed numerous settlements, reviewed and edited objections and other briefs, and appeared on behalf of CCAF in federal district and appellate courts in multiple cases, including successful arguments of a Seventh and Eighth Circuit appeal and is scheduled to argue a Ninth Circuit and D.C. Circuit appeal later this year.

10. The standard rate for Ms. Holyoak is currently $525/hour. It is my understanding and belief that her $525/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates and partners with similar

experience at $600-725/hour). Courts have previously awarded $475/hour for Ms. Holyoak's work, not including risk multiplier. *See*, *e.g.*, *Edwards*, 2017 WL 4581926.

11. Anna St. John is a 2006 graduate of Columbia Law School, where she was a James Kent Scholar. After law school, she served as a law clerk for the Honorable Rhesa H. Barksdale on the U.S. Court of Appeals for the Fifth Circuit, and she worked as an associate in the Washington, DC, office of Covington & Burling LLP. While at Covington, she managed complex insurance litigation on behalf of policyholders and white collar investigations, in connection with which she engaged in nearly all forms of written and document discovery, deposed and defended dozens of witnesses, and authored various motions and briefs in state and federal courts. She also has served as Deputy General Counsel to The Washington Ballet since October 2014. In March 2015, she joined CCAF.

12. I understand that when Ms. St. John left Covington in 2014, her billing rate exceeded the $450 to $475 rate we generally seek—and have been awarded—for her work with CCAF. *See*, *e.g.*, *In re Citigroup Inc. Securities Litig.*, No. 07-CV-9901, 2017 WL 3842601 (S.D.N.Y. Sept. 1, 2017); *Edwards*, 2017 WL 4581926. It is my understanding and belief that her $475/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates and junior partners with similar experience at $500-590/hour).

13. M. Frank Bednarz is a 2009 graduate of the University of Chicago Law School. He worked from 2010 to 2016 as an associate at Goodwin Procter LLP, where he practiced patent litigation including Hatch-Waxman litigation and litigation before the International Trade Commission. Mr. Bednarz joined CEI in May 2016 and is based in Chicago.

14. I understand that when Mr. Bednarz left Goodwin in 2016, his billing rate exceeded the $375 rate we generally seek—and have been awarded—for his work with CCAF. *See*, *e.g.*, *In re Southwest Airlines Voucher Litig.*, No. 17-3541, --- F.3d ---, 2018 WL 3651028 (7th Cir. Aug. 2, 2018) (reversing denial of CCAF's modest $80,000 fee request as compared to $1.8 million for class counsel

given that CCAF's involvement tripled relief to the class). It is my understanding and belief that his standard $375/hour billing rate is less than the billing rate for attorneys with comparable skill and experience in this case, and likely below what defense counsel bills for its attorneys of comparable skill and experience. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates with similar experience at $425-460/hour).

15. Adam Schulman is a 2010 graduate of Georgetown University Law Center who has worked for CCAF since 2011. Unlike many attorneys of his seniority, he has made first-chair court appearances in the U.S. Court of Appeals for the Third, Sixth, and Eleventh Circuits, as well as numerous such appearances in district court. *See, e.g.*, *In re Dry Max Pampers Litig.*, 713 F.3d 724 (6th Cir. 2013).

16. It is my understanding and belief that the $375/hour rate for Mr. Schulman's work is below rates charged by attorneys with similar skills and experience in this case. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing associates with similar experience at $425-460/hour). This rate has been approved courts in past fee requests by CCAF. *See, e.g.*, *Citigroup Inc. Securities Litig.*, 2017 WL 3842601; *Edwards*, 2017 WL 4581926.

17. All of these rates are further discounted to correspond to the rates of Burch, Porter & Johnson, PLLC.

18. Attached as **Exhibit A** are true and correct copies of the attorney profile pages available from the CEI website as they appeared on August 10, 2018.

19. CCAF proposes to serve as guardian *ad litem* with affiliated counsel at Burch, Porter & Johnson, PLLC ("Burch Porter"). The attorneys at Burch Porter have phenomenal experience in complex civil litigation, and are especially attractive from the perspective of the class because their normal Memphis, Tennessee rates are about 40-50% less than the rates Class Counsel seeks to charge the class for.

20. Given the excellent qualifications Burch Porter attorneys, and to promote a cohesive team between CCAF and Burch Porter, CCAF has agreed it will seek rates in this case comparable to

the prevailing Memphis rates reflected by Burch Porter's standard rates. For this case, I would bill $500/hour, Melissa Holyoak at $365/hour, Anna St. John at $325/hour, and Frank Bednarz and Adam Schulman each at $275/hour. These proposed rates are approximately *half* what Class Counsel billed for comparable attorneys. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing junior associates $340-380/hour and senior partners $925-1000/hour).

21. I cold-called Burch Porter attorney Gary Peeples with the offer to act as our co-counsel because I knew CCAF would not be able to adequately serve as GAL by itself; because I was familiar with Mr. Peeples's excellent work on short notice as a *pro bono* counsel for a friend of mine on a Supreme Court *amicus* brief; because I had been discussing the possibility with Mr. Peeples of him helping CCAF do an *amicus* brief in a different case in the Sixth Circuit that we had both been following; and because Mr. Peeples had been corresponding with me about this case since 2017, and I knew he had been following this litigation (in some ways closer than I had since the special master had been appointed), and would need much less time to come up to speed than a newly appointed attorney. I also knew that his firm was both large enough to handle the task of assisting us, while small and nimble enough that it would be less likely to be conflicted out. Burch Porter did not solicit us for this assignment.

22. *Boston Globe* reporter Andrea Estes left me a voice-mail about this case on November 4, 2016, and I called her back from my cell-phone while I was in the parking lot of a Wegman's supermarket in Fairfax, Virginia. Prior to her phone call, I had never heard of this case, and certainly did not suspect or anticipate that it would lead to a request for a paying guardian *ad litem* position. My concern is solely that the class is adequately represented, and I would be perfectly happy if Burch Porter was appointed as GAL without CCAF involvement.

THE LIMITED ROLE OF CEI DONORS

23. Plaintiffs' counsel assert that CCAF is somehow unfit to assist the Court because of unspecified biases it may have from CEI donors. Dkt. 427 at 11-12; 430 at 5; Tr. 8/9/2018 at 30, 37. This argument is fundamentally implausible. Even if it were true that CEI donors had directed me to

reduce fees to Class Counsel (and they have not), CCAF's supposed ideological bias aligns with class interests in this case. CCAF seeks appointment as guardian *ad litem* so that it can reduce unjustified fees from Class Counsel and distribute these fund to the class.

24. In any event, CCAF is not influenced by CEI donors, most of whom I am perfectly ignorant of. I previously described the operational independence of CCAF decisions in my 2017 declaration. Donors do not interfere with the selection of CCAF cases. In fact, we have filed objections and litigated appeals in opposition to CEI corporate donors, including in the pending Supreme Court case of *Frank v. Gaos*, where CEI donor Google has fervently opposed us at substantially more expense than it has provided CEI in funding. Dkt. 125-1 at 5-6.

25. As with the corporate donors discussed in my 2017 declaration, I am unaware of any individual donor who takes a position on the underlying litigation in this case. Because no interest has been communicated to me or other CCAF attorneys, we could not possibly be acting in this case at the behest of donors. Moreover, CEI pays me (and all CCAF attorneys) on a salary basis that does not vary with the result in any case. We do not receive a contingent bonus based on success in any case, a structure that would be contrary to the I.R.S. restrictions on public interest law firms.

26. Finally, contrary to counsel, there is nothing unusual, let alone sinister, about omitting the names of individual donors in CEI's tax forms. At the August 9 hearing, ERISA counsel compared us unfavorably to the NAACP on the grounds that the NAACP discloses its donors while CEI does not, but the NAACP honors its donors' privacy as much as CCAF does. The NAACP Legal Defense Fund's tax form indicates undisclosed individual donors contributed up to $1.5 million to that (c)(3) group in Tax Year 2016, the most recent publicly available filing. Attached as **Exhibit B** is a true and correct copy of the NAACP's legal defense fund's 2016 tax year form 990 filing, available from its website: http://www.naacpldf.org/files/about-us/PublicV2016%20LDF990.pdf.

TWITTER

27. At the hearing, Joan Lukey for Labaton attacked CCAF for social-media conduct she falsely attributed to me: "I'm not sure it's appropriate for someone to be a friend of the Court, so-

called -- it has meaning, amicus curiae, as you know -- who ridicules a young associate for working through the night to meet a 24-hour deadline. I was surprised by that conduct." Tr. 8/9/2018 at 36-37.

28. Ms. Lukey's accusation is false.

29. Attached as **Exhibit C** is a true and correct copy of a public Twitter exchange between me and Jared Cook (an employment attorney who is unaffiliated with CCAF), available online at https://twitter.com/tedfrank/status/1027589524245897217; this is apparently the exchange Ms. Lukey was complaining about, as it is the only one mentioning one of her associates.

30. As Exhibit C shows, on August 8, 2018, I tweeted (*i.e.*, posted on the social-media application Twitter) a screenshot of the section of Labaton's brief criticizing my earlier Twitter commentary, adding the comment "Pour one out for the poor Choate associate who went to law school for 3 years so he can bill a client $500/hour to read all my tweets in case I say something about his client's shady practices, and will now stay up late tonight to do a supplemental filing about this tweet." "Pour one out" is slang for the practice of pouring an alcoholic drink on the ground as a sign of reverence for a compatriot who cannot be with his friends who are drinking.

31. This was meant to be humorous because:

a. the Labaton brief's claim that my innocuous tweets have legal implications is an absurd argument on its face;

b. the juxtaposition of the informal slang "Pour one out" with the solemnity of a court filing, which in turn is juxtaposed with the silliness of the discussion in that court filing explaining fire emojis;

c. the ironic fact that "Pour one out" is usually slang reserved for a compatriot who is incarcerated or has been slain in gang combat, rather than simply working for a large firm where he makes a materially larger salary than I do;

d. a number of my attorney friends and followers would understand and sympathize with the plight of a large law-firm associate staying up late to perform an unpleasant task;

e. the ironic and self-deprecating suggestion that having to read my tweets was such an unpleasant task, as well as the absurdity of a highly-trained and highly-paid associate at a top law firm using his skills to bill a client for such a task (other attorneys responded to my tweet with humorous theories of what the billing entry would look like for reading tweets, or speculating what the ABA billing code is for reading tweets); and

f. the absurd suggestion that my tweet about complaints about tweets would itself somehow result in an emergency filing complaining about a tweet commenting about complaints about tweets—an absurdity that somehow became true at the August 9, 2018 hearing, and is now compounded with the most absurd series of paragraphs and sub-paragraphs I have ever filed in a declaration. To maximize the humorous recursion, I will likely tweet a screenshot of this paragraph 31 at some point this week.

Of course, as Mark Twain once commented, dissecting humor is like dissecting a frog; it can be done, but the subject usually dies in the process.

32. Attorney Jared Cook, whom to my knowledge I have never met, responded to my tweet with a series of tweets of his own complaining about the quality of the writing in the posted excerpt. As Exhibit C shows, on August 9, 2018, I defended the associate in question from this criticism, which I thought was unfair, given the circumstances in which the brief was written. While the brief's argument was a silly argument (which in turn was simply a function of the fact that Labaton did not have any meritorious arguments to make against CCAF), I did not ridicule the associate, and defended the associate from others' ridicule.

33. Attached as **Exhibit D** is a true and correct copy of the public August 6, 2018 "flame emoji" tweet that Labaton references in their opposition to CCAF (Dkt. 427 at 13), available online at https://twitter.com/tedfrank/status/1026519707229335552. This "self-aggrandizing" tweet was meant as praise for the fine work of my associate M. Frank Bednarz, who wrote 90% of an excellent

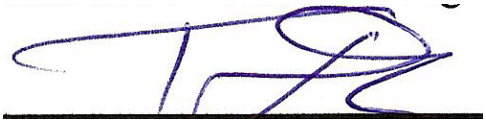
brief on very short notice, and then rewrote it and filed an additional supporting motion when, at the last minute, it turned out we were able to find a law firm to serve as our co-counsel. Mr. Bednarz took a paycut of over 60% to work for me at CCAF, and is dramatically underpaid, even compared to other attorneys of his experience at other public-interest law firms in Washington, D.C. Publicly praising his good work on Twitter with fire emojis he will find humorous is the least I can do to thank him (and again, the humor comes from the juxtaposition of a balding middle-aged man using teenage emoji slang), and when I say "least," I literally mean "least." But it's in the hope that if a plaintiffs' law firm realizes that they could do a lot more damage to me by poaching Mr. Bednarz with a $500,000/year job offer than spending similar amounts on BigLaw firms to attack my tweets, he might still want to work for me anyway.

34. Attached as **Exhibit E** is a true and correct copy of the public June 28, 2018 tweet that Labaton references in their opposition to CCAF (Dkt. 427 at 13), available online at https://twitter.com/tedfrank/status/1012397562987536385. Labaton's brief omits the fact that the actual tweet includes a screenshot from the court's recusal opinion directly referencing the decision and argument Labaton made for appointing the special master whose investigation Labaton is now criticizing as too thorough.

35. Attached as **Exhibit F** is a true and correct copy of Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton*, available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/. It demonstrates that Labaton is perfectly happy to make inflammatory comments about this case to the public when it serves its purposes. Labaton has repeatedly misrepresented this case and the Court's order as being about inadvertent duplicative billing, rather than the much more odious practices identified by the Court in its 2017 order.

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

Executed on August 13, 2018, in Washington, D.C..



Theodore H. Frank

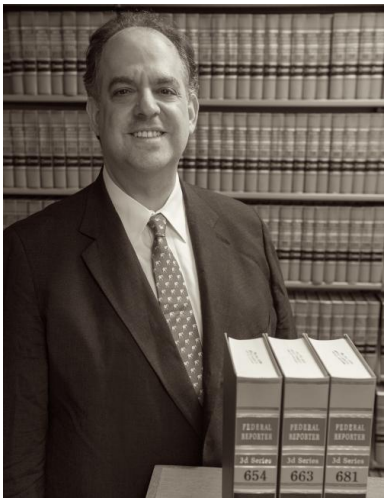
Frank Decl.

EXHIBIT A

COMPETITIVE ENTERPRISE INSTITUTE

Ted Frank

Director of Litigation and Senior Attorney



Theodore H. Frank is director of litigation and the director of the Center for Class Action Fairness at the Competitive Enterprise Institute. Before it merged with CEI in October 2015, he founded and ran CCAF as a non-profit, public interest law firm in 2009.

Frank has won several landmark appeals and tens of millions of dollars for consumers and other plaintiffs through his class action work. Adam Liptak of The New York Times calls Frank "the leading critic of abusive class action settlements" and the American Lawyer Litigation Daily referred to him as "the indefatigable scourge of underwhelming class action settlements."

Previously, Frank clerked for the Honorable Frank H. Easterbrook on the Seventh Circuit Court of Appeals, and was a litigator for 10 years until winning a sizable windfall from the 2004 World Series of Poker. He also served as the first director of the American Enterprise Institute's Legal Center for the Public Interest. Frank is a frequent public speaker and has testified before Congress multiple times on legal issues. He has been profiled by The Wall Street Journal, Forbes, GQ, and the ABA Journal, among other publications.

In 2008, Frank was elected to membership in the American Law Institute. He also serves on the Executive Committee of the Federalist Society Litigation Practice Group. Frank graduated from The University of Chicago Law School in 1994 with high honors and as a member of the Order of the Coif and the Law Review. He is a member of the District of Columbia Bar and the state bars of California and Illinois.

He is played by a much more handsome Gentile in a HBO docudrama based on a book that mentions Mr. Frank once on page 362.

For more information about the Center for Class Action Fairness and its work click here.

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Publications by Ted Frank

View All Material by Ted Frank

Op-Eds and Articles

For Some Class-Action Lawyers, Charity Begins and Ends at Home
The Wall Street Journal
Ted Frank | March 23, 2018

Where Was CFPB While Wells Fargo Plundered?
Wall Street Journal
Ted Frank | September 22, 2017

Congress Can Rescind the CFPB's Gift to Trial Lawyers
Wall Street Journal
Ted Frank | September 6, 2017

More Op-Eds and Articles

Citations

Critical Mass: Roundup Trial Goes to Jury | New Expert Standard in New Jersey | 7th Circuit Fee Focus
Law.com
Melissa A. Holyoak, Ted Frank | August 8, 2018

State AGs, ABA Press High Court Over Google Privacy Deal
Law360
Ted Frank, Melissa A. Holyoak | July 17, 2018

'Fool for a client'? Ted Frank Goes Pro Se at SCOTUS to Pan Cy Pres Settlements
Westlaw
Ted Frank, Melissa A. Holyoak | July 12, 2018

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Olive Oil Settlement Uses Slippery Tactics to Reward Attorneys at Consumers' Expense
Ted Frank, Will Chamberlain | May 22, 2017

Center for Class Action Fairness Changes Landscape of 'Cy Pres' Settlements
Ted Frank, Frank Bednarz | May 16, 2017

A Rose by Any Other Name Would Smell Just as Sweet, but These Flower-Delivery Settlement Coupons Are Noisome Even When You Call Them “E-Credits”
Ted Frank, Adam Schulman | May 15, 2017

More Blog Posts

COMPETITIVE ENTERPRISE INSTITUTE

Melissa A. Holyoak

Senior Attorney

Melissa A. Holyoak is a senior attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. She joined the center as senior counsel in July 2012, and also served as the organization's corporate secretary until October 2015.

Holyoak is a former prosecutor and attorney with O'Melveny & Myers LLP, and has extensive experience as a class action litigator, arguing in district and appellate courts.

She graduated from the University of Utah S.J. Quinney College of Law in 2003 as a member of the Order of the Coif and the Law Review. Holyoak is a member of the District of Columbia Bar and the state bars of Missouri and Utah (inactive).

She is the mother of four small children and stays sane with soccer, tennis, and ballet classes.

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Publications by Melissa A. Holyoak

View All Material by Melissa A. Holyoak

Citations

Critical Mass: Roundup Trial Goes to Jury | New Expert Standard in New Jersey | 7th Circuit Fee Focus
Law.com
Melissa A. Holyoak, Ted Frank | August 8, 2018

State AGs, ABA Press High Court Over Google Privacy Deal
Law360
Ted Frank, Melissa A. Holyoak | July 17, 2018

'Fool for a client'? Ted Frank Goes Pro Se at SCOTUS to Pan Cy Pres Settlements
Westlaw
Ted Frank, Melissa A. Holyoak | July 12, 2018

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Google Settlement: How Class Action Abuse Gives Money to Attorneys and Third Parties, Leaving Consumers with Nothing

Melissa A. Holyoak | January 3, 2018

Class Action Lawyers in Target Case Hoard the Settlement Pie

Melissa A. Holyoak | April 24, 2017

Landmark Ruling for Shareholders in Walgreens Class Action Lawsuit

Melissa A. Holyoak | August 11, 2016

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COMPETITIVE ENTERPRISE INSTITUTE

Anna St. John

Attorney

Anna St. John is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. She began working with the center in March 2015.

St. John also serves as deputy general counsel for The Washington Ballet. Previously, she was an attorney with Covington & Burling LLP and clerked for the Honorable Rhesa H. Barksdale on the Fifth Circuit Court of Appeals.

She is a graduate of Columbia Law School, where she was named a James Kent Scholar. St. John is a member of the state bars of New York and Louisiana and the District of Columbia Bar.

She resides in New Orleans, Louisiana.

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Publications by Anna St. John

View All Material by Anna St. John

Citations

Google Privacy Case To Test Limits Of Novel Settlements
Law360
Anna St. John, Ted Frank | April 30, 2018

Shift to E-Commerce Is Saving Time, Creating Jobs
Washington Examiner
Anna St. John | July 10, 2017

Facebook User Says Privacy Deal Gives Class Nothing
Law360
Anna St. John | June 27, 2017

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Coupon Settlements: Two Steps Forward, One Step Back
Anna St. John | September 27, 2017

Metropolitan Museum of Art Class Action Ends in Counter-Productive Settlement
Anna St. John | June 30, 2017

CEI Seeks to Extend Landmark Walgreen Ruling in Favor of Shareholder Class Members
Anna St. John | June 12, 2017

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COMPETITIVE ENTERPRISE INSTITUTE

Frank Bednarz

Attorney

M. Frank Bednarz is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. He returned to the Center in July 2016 after interning there during its inaugural year of existence, 2009-2010.

Previously, he was an attorney with Goodwin Procter LLP, where he practiced patent litigation including Hatch-Waxman litigation and litigation before the International Trade Commission. He also contributed to Goodwin's Digital Currency Perspectives Blog on bitcoin and the law.

Before joining Godwin Procter, Bednarz worked as an attorney for the University of Chicago Exoneration Project, representing wrongfully convicted individuals. He helped write a post-conviction petition for Eric Caine in 2009, which eventually led to Mr. Caine's release after nearly 25 years of wrongful imprisonment.

Bednarz is a graduate of University of Chicago Law School and holds a degree in chemistry from the University of Utah. He is a member of the state bars of Massachusetts and Illinois. He resides in Chicago, where he homebrews and participates in the sharing economy.

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Publications by Frank Bednarz

View All Material by Frank Bednarz

Citations

A Tale Of Two Decisions: Trump Administration Got Antitrust Wrong, But Net Neutrality Right
Investor's Business Daily
Frank Bednarz | November 22, 2017

AT&T-Time Warner Merger: Does the DOJ Have a Case?
Variety
Ted Frank, Frank Bednarz | November 21, 2017

Blog Posts

CEI Appeal May Be the Cy Pres Case Supreme Court is Looking for
Frank Bednarz | February 21, 2018

Court Appoints Special Master to Investigate Overbilling in Anthem Class Action
Frank Bednarz | February 5, 2018

Trump the Hipster? AT&T, Time Warner, and Hipster Antitrust
Frank Bednarz | November 13, 2017

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COMPETITIVE ENTERPRISE INSTITUTE

Adam Schulman

Attorney

Adam Schulman is an attorney with the Center for Class Action Fairness at the Competitive Enterprise Institute. Schulman has been working with the center since March 2011.

In August 2013, he won his first appellate oral argument in the Sixth Circuit case In re Dry Max Pampers Litigation, 724 F.3d 713 (6th Cir. 2013). Schulman is a graduate of Georgetown University Law Center. He is a member of the District of Columbia Bar and the state bar of Pennsylvania (non-resident, active status).

Schulman resides in Alexandria, Virginia, with his wife and son.

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Publications by Adam Schulman

View All Material by Adam Schulman

Op-Eds and Articles

Footlong Subs and Other Frivolous Lawsuits
Real Clear Policy
Adam Schulman | September 17, 2016

Citations

DOJ's Mixed Result in Class Case Still a Win for Business
Bloomberg Law
Adam Schulman | April 26, 2018

Court's New Math in Subway Foot-Long Sub Lawsuit: Zero + Zero = Zero
USA Today
Adam Schulman, Ted Frank | August 29, 2017

Public-interest firm calls $5.5 million settlement with Google over privacy settings 'unacceptable'
Legal NewsLine

Adam Schulman | January 3, 2017

More Citations

Blog Posts

Attorneys and the Pretense of Knowledge
Adam Schulman | December 20, 2017

A Rose by Any Other Name Would Smell Just as Sweet, but These Flower-Delivery Settlement Coupons Are Noisome Even When You Call Them "E-Credits"
Ted Frank, Adam Schulman | May 15, 2017

Separating Financial Interest from Clients Backfires for Class Action Attorneys
Adam Schulman | April 19, 2017

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EXHIBIT B

** PUBLIC DISCLOSURE COPY **

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

▶ Do not enter social security numbers on this form as it may be made public.

▶ Information about Form 990 and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

A For the 2015 calendar year, or tax year beginning JUL 1, 2015 and ending JUN 30, 2016

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Final return/ termin-ated
- ☐ Amended return
- ☐ Applica-tion pending

C Name of organization
NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Doing business as

Number and street (or P.O. box if mail is not delivered to street address) 40 Rector Street

Room/suite 5th Fl

City or town, state or province, country, and ZIP or foreign postal code New York, NY 10006

F Name and address of principal officer: Sherrilyn A. Ifill
40 Rector St. Fl 5, New York, NY 10006

D Employer identification number 13-1655255

E Telephone number 212/965-2200

G Gross receipts $ 24623513.

H(a) Is this a group return for subordinates? ☐ Yes ☒ No

H(b) Are all subordinates included? ☐ Yes ☐ No

If "No," attach a list. (see instructions)

H(c) Group exemption number ▶

I Tax-exempt status: ☒ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ▶ www.naacpldf.org

K Form of organization: ☒ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation: 1939 M State of legal domicile: NY

Part I Summary

Activities & Governance	1 Briefly describe the organization's mission or most significant activities: NAACP LDF's primary purpose is to support litigation in the areas of poverty and justice,		
	2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.		
	3 Number of voting members of the governing body (Part VI, line 1a)	3	29
	4 Number of independent voting members of the governing body (Part VI, line 1b)	4	28
	5 Total number of individuals employed in calendar year 2015 (Part V, line 2a)	5	77
	6 Total number of volunteers (estimate if necessary)	6	74
	7a Total unrelated business revenue from Part VIII, column (C), line 12	7a	0.
	b Net unrelated business taxable income from Form 990-T, line 34	7b	0.

		Prior Year	Current Year
Revenue	8 Contributions and grants (Part VIII, line 1h)	15682220.	11450575.
	9 Program service revenue (Part VIII, line 2g)	1955956.	693232.
	10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	1018071.	428488.
	11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	-176126.	-466077.
	12 Total revenue - add lines 8 through 11 (must equal Part VIII, column (A), line 12)	18480121.	12106218.
Expenses	13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)	2077500.	1596600.
	14 Benefits paid to or for members (Part IX, column (A), line 4)	0.	0.
	15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	6326553.	7676871.
	16a Professional fundraising fees (Part IX, column (A), line 11e)	941035.	403964.
	b Total fundraising expenses (Part IX, column (D), line 25) ▶ 1943028.		
	17 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24e)	5547450.	5547827.
	18 Total expenses. Add lines 13-17 (must equal Part IX, column (A), line 25)	14892538.	15225262.
	19 Revenue less expenses. Subtract line 18 from line 12	3587583.	-3119044.

		Beginning of Current Year	End of Year
Net Assets or Fund Balances	20 Total assets (Part X, line 16)	54303424.	52266314.
	21 Total liabilities (Part X, line 26)	7312078.	9583268.
	22 Net assets or fund balances. Subtract line 21 from line 20	46991346.	42683046.

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

▶ Signature of officer — Date 2/2/17

▶ Sherrilyn A. Ifill, President & Director-Counsel
Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name FREDERICK E. DAVIS, JR.	Preparer's signature	Date 2/2/17	Check ☐ if self-employed	PTIN P00446023
Firm's name ▶ Mitchell & Titus, LLP			Firm's EIN ▶	13-2781641
Firm's address ▶ One Battery Park Plaza New York, NY 10004			Phone no. (212) 709-4500	

May the IRS discuss this return with the preparer shown above? (see instructions) ☒ Yes ☐ No

See Schedule O for Organization Mission Statement Continuation

Part III Statement of Program Service Accomplishments

Check if Schedule O contains a response or note to any line in this Part III ..... [X]

1 Briefly describe the organization's mission:
The NAACP Legal Defense and Educational Fund is America's legal counsel on issues of race. Through advocacy and litigation, LDF focuses on issues of education, voter protection, economic justice and criminal justice. We encourage students to embark on careers in the

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? ..... [ ] Yes [X] No
If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? ..... [ ] Yes [X] No
If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ 8377315. including grants of $ 1336600.) (Revenue $ 693232.)
Legal Program provides legal assistance in connection with civil and human rights covering voting, fair employment, education, housing, health, environmental problems and capital punishment.

4b (Code:) (Expenses $ 2954387. including grants of $) (Revenue $)
Thurgood Marshall Institute allows the NAACP LDF to holistically address civil rights matters through an engaged collaboration with social scientists, demographers, political scientists, labor economists and other scholars; increase LDF's communication capacity, allowing the organization to shape and frame the debate on race and civil rights. Key to the work of the Institute is strategic communications using poll and focus-group tested messages, dynamic social media and collaborative communications with civil rights partners. This will increase LDF's voice and influence, and allow us to create new narratives and collaborative initiatives that can bring a sense of dynamism and possibility to civil rights advocacy.

4c (Code:) (Expenses $ 365966. including grants of $ 260000.) (Revenue $)
The Herbert Lehman Program offers grants, generally of $2,000 annually to undergraduates and of $3,000 annually to law students. Preference is given to US citizens who are entering the first year of full-time study.

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶ 11697668.

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	X	
2	Is the organization required to complete *Schedule B, Schedule of Contributors*?	2	X	
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		X
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4	X	
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		X
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		X
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		X
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		X
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		X
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10	X	
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a	X	
b	Did the organization report an amount for investments - other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		X
c	Did the organization report an amount for investments - program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		X
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		X
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e	X	
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f	X	
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a		X
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b	X	
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		X
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		X
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		X
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		X
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		X
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I*	17	X	
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18	X	
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		X

Part IV Checklist of Required Schedules *(continued)*

			Yes	No
20a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		X
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21	X	
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22	X	
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23	X	
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No", go to line 25a*	24a		X
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		X
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		X
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? *If "Yes," complete Schedule L, Part II*	26		X
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		X
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		X
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		X
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		X
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29	X	
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		X
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		X
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		X
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		X
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34	X	
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a	X	
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b	X	
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		X
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		X
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O	38	X	

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a	30		
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b	0		
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?	1c		X	
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	2a	77		
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?	2b		X	
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?	3a			X
b	If "Yes," has it filed a Form 990-T for this year? *If "No," to line 3b, provide an explanation in Schedule O*	3b			
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?	4a			X
b	If "Yes," enter the name of the foreign country: ▶				
	See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?	5a			X
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?	5b			X
c	If "Yes," to line 5a or 5b, did the organization file Form 8886-T?	5c			
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?	6a			X
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	6b			
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?	7a		X	
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?	7b		X	
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?	7c			X
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?	7e			X
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?	7f			X
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?	7g			
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?	7h			
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?	8			
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the sponsoring organization make any taxable distributions under section 4966?	9a			
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?	9b			
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	10b			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?	12a			
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state?	13a			
	Note. See the instructions for additional information the organization must report on Schedule O.				
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?	14a			X
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*	14b			

Part VI Governance, Management, and Disclosure *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response or note to any line in this Part VI X

Section A. Governing Body and Management

				Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year ..... If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	1a	29		
b	Enter the number of voting members included in line 1a, above, who are independent	1b	28		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2			X
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person?	3			X
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4			X
5	Did the organization become aware during the year of a significant diversion of the organization's assets?	5			X
6	Did the organization have members or stockholders?	6			X
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a			X
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b			X
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:				
a	The governing body?	8a		X	
b	Each committee with authority to act on behalf of the governing body?	8b		X	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	9			X

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a	X	
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b	X	
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	X	
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	X	
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	X	
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	X	
13	Did the organization have a written whistleblower policy?	13	X	
14	Did the organization have a written document retention and destruction policy?	14	X	
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	X	
b	Other officers or key employees of the organization ..... If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions).	15b		X
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		X
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ See Schedule O

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

X Own website ☐ Another's website X Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records: ▶

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40 RECTOR STREET, FL 5, NEW YORK, NY 10006

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors; institutional trustees; officers; key employees; highest compensated employees; and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1) Sherrilyn A. Ifill	59.00									
President & Director-Couns	1.00	X		X				335554.	0.	35570.
(2) Gerald S. Adolph	8.00									
Chairman of the Board	1.00	X		X				0.	0.	0.
(3) David W. Mills	8.00									
Chairman of the Board	1.00	X		X				0.	0.	0.
(4) Patrick A. Bradford	4.00									
Secretary of the Board	1.00	X		X				0.	0.	0.
(5) Clifford P. Case	4.00									
Treasurer of the Board	1.00	X		X				0.	0.	0.
(6) William J. Bynum	1.50									
Board Member	1.00	X						0.	0.	0.
(7) Judith I. Byrd	1.50									
Board Member	1.00	X						0.	0.	0.
(8) James Castillo	1.50									
Board Member	1.00	X						0.	0.	0.
(9) Robyn Coles	1.50									
Board Member	1.00	X						0.	0.	0.
(10) Damien Dwin	1.50									
Board Member	1.00	X						0.	0.	0.
(11) Gregory Evans	1.50									
Board Member	1.00	X						0.	0.	0.
(12) Toni G. Fay	1.50									
Board Member	1.00	X						0.	0.	0.
(13) Henry Louis Gates, Jr.	1.50									
Board Member	1.00	X						0.	0.	0.
(14) Laurie Robinson Haden	1.50									
Board Member	1.00	X						0.	0.	0.
(15) Eric H. Holder Jr.	1.50									
Board Member	1.00	X						0.	0.	0.
(16) David E. Kendall	1.50									
Board Member	1.00	X						0.	0.	0.
(17) Michael R. Klein	1.50									
Board Member	1.00	X						0.	0.	0.

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(18) Kim Koopersmith	1.50									
Board Member	1.00	X						0.	0.	0.
(19) Tonya Lewis Lee	1.50									
Board Member	1.00	X						0.	0.	0.
(20) William Lighten	1.50									
Board Member	1.00	X						0.	0.	0.
(21) Cecilia S. Marshall	1.50									
Board Member	1.00	X						0.	0.	0.
(22) Gabriella E. Morris	1.50									
Board Member	1.00	X						0.	0.	0.
(23) Adebayo Ogunlesi	1.50									
Board Member	1.00	X						0.	0.	0.
(24) Luis Penalver	1.50									
Board Member	1.00	X						0.	0.	0.
(25) Steven B. Pfeiffer	1.50									
Board Member	1.00	X						0.	0.	0.
(26) Michele Roberts	1.50									
Board Member	1.00	X						0.	0.	0.
1b Sub-total ▶								335554.	0.	35570.
c Total from continuation sheets to Part VII, Section A ▶								1383848.	0.	138070.
d Total (add lines 1b and 1c) ▶								1719402.	0.	173640.

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶ 10

		Yes	No
3 Did the organization list any former officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3		X
4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4	X	
5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*	5		X

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
Sanky Communications, Inc., 599 11th Avenue, 6th Floor, New York, NY 10036	Direct Mail Consultant	242000.
Netology Technology Services 1200 Summer Street, Stamford, CT 06095	IT Consultant	217154.
Millennium Technology Group 325 Broadway, Suite 505, New York, NY 10007	IT Consultant	146650.

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶ 3

See Part VII, Section A Continuation sheets

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below line)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(27) Judith McCartin Scheide	1.50									
Board Member	1.00	X						0.	0.	0.
(28) Jonathan Soros	1.50									
Board Member	1.00	X						0.	0.	0.
(29) Angela Vallot	1.50									
Board Member	1.00	X						0.	0.	0.
(30) Kevin C. Thomson	39.50									
Chief Financial Officer	0.50			X				169287.	0.	5579.
(31) Janai Nelson	39.50									
Associate Director-Counsel	0.50				X			206608.	0.	7831.
(32) Kevin M. Keenan	39.50									
COO/General Counsel	0.50				X			191521.	0.	2647.
(33) Christina Swarns	40.00									
Director of Litigation	0.00				X			163194.	0.	26023.
(34) Leslie Proll	40.00									
Policy Director, DC Office	0.00				X			152068.	0.	20723.
(35) Monica Madrazo	40.00									
Director, HR & Administrat	0.00					X		130756.	0.	23179.
(36) Jin Hee Lee	40.00									
Deputy Director of Litigat	0.00					X		126305.	0.	25409.
(37) Monique Dixon	40.00									
Deputy Policy Director & Sr. Counsel	0.00					X		124967.	0.	12521.
(38) Donna S. Gloeckner	40.00									
Director, Information Serv	0.00					X		119142.	0.	14158.
Total to Part VII, Section A, line 1c								1383848.		138070.

Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512 - 514
Contributions, Gifts, Grants and Other Similar Amounts	1a Federated campaigns	1a	203459.				
	b Membership dues	1b					
	c Fundraising events	1c	2056123.				
	d Related organizations	1d					
	e Government grants (contributions)	1e					
	f All other contributions, gifts, grants, and similar amounts not included above	1f	9190993.				
	g Noncash contributions included in lines 1a-1f: $ 129618.						
	h Total. Add lines 1a-1f ▶			11450575.			
Program Service Revenue		Business Code					
	2a Program Revenue	541100		593232.	593232.		
	b Court Fees	541100		100000.	100000.		
	c						
	d						
	e						
	f All other program service revenue						
	g Total. Add lines 2a-2f ▶			693232.			
Other Revenue	3 Investment income (including dividends, interest, and other similar amounts) ▶			674836.			674836.
	4 Income from investment of tax-exempt bond proceeds ▶						
	5 Royalties ▶						
		(i) Real	(ii) Personal				
	6a Gross rents	2925.					
	b Less: rental expenses	0.					
	c Rental income or (loss)	2925.					
	d Net rental income or (loss) ▶			2925.			2925.
		(i) Securities	(ii) Other				
	7a Gross amount from sales of assets other than inventory	11508449					
	b Less: cost or other basis and sales expenses	11754797					
	c Gain or (loss)	-246348.					
	d Net gain or (loss) ▶			-246348.			-246348.
	8a Gross income from fundraising events (not including $ 2056123. of contributions reported on line 1c). See Part IV, line 18 a	293496.					
	b Less: direct expenses b	762498.					
	c Net income or (loss) from fundraising events ▶			-469002.			-469002.
	9a Gross income from gaming activities. See Part IV, line 19 a						
	b Less: direct expenses b						
	c Net income or (loss) from gaming activities ▶						
	10a Gross sales of inventory, less returns and allowances a						
	b Less: cost of goods sold b						
	c Net income or (loss) from sales of inventory ▶						
	Miscellaneous Revenue	Business Code					
	11a						
	b						
	c						
	d All other revenue						
	e Total. Add lines 11a-11d ▶						
	12 Total revenue. See instructions. ▶			12106218.	693232.	0.	-37589.

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns. All other organizations must complete column (A).

Check if Schedule O contains a response or note to any line in this Part IX ☐

Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1 Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21	1335100.	1335100.		
2 Grants and other assistance to domestic individuals. See Part IV, line 22	261500.	261500.		
3 Grants and other assistance to foreign organizations, foreign governments, and foreign individuals. See Part IV, lines 15 and 16				
4 Benefits paid to or for members				
5 Compensation of current officers, directors, trustees, and key employees	1231509.	818442.	304054.	109013.
6 Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7 Other salaries and wages	4070999.	3254080.	402122.	414797.
8 Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9 Other employee benefits	2029361.	1565052.	266574.	197735.
10 Payroll taxes	345002.	255844.	51190.	37968.
11 Fees for services (non-employees):				
a Management	43728.		19245.	24483.
b Legal	371709.	371709.		
c Accounting	65943.		65943.	
d Lobbying				
e Professional fundraising services. See Part IV, line 17	403964.			403964.
f Investment management fees	100598.		100598.	
g Other. (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Sch O.)	869789.	738338.	9930.	121521.
12 Advertising and promotion	48003.			48003.
13 Office expenses	900767.	465697.	84356.	350714.
14 Information technology	314160.	219335.	48466.	46359.
15 Royalties				
16 Occupancy	701046.	605608.	55555.	39883.
17 Travel	825478.	779578.	17638.	28262.
18 Payments of travel or entertainment expenses for any federal, state, or local public officials				
19 Conferences, conventions, and meetings	228970.	228970.		
20 Interest	125517.	89336.	20628.	15553.
21 Payments to affiliates				
22 Depreciation, depletion, and amortization	742321.	528668.	121810.	91843.
23 Insurance	109999.	81869.	16038.	12092.
24 Other expenses. Itemize expenses not covered above. (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a Court Costs	29713.	29713.		
b Photos/Press Release	25499.	24242.	419.	838.
c Bar Association Dues	19881.	19881.		
d Library	18040.	18040.		
e All other expenses	6666.	6666.		
25 **Total functional expenses.** Add lines 1 through 24e	15225262.	11697668.	1584566.	1943028.
26 **Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☐ if following SOP 98-2 (ASC 958-720)				

Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash - non-interest-bearing	1482564.	1	1026882.
	2	Savings and temporary cash investments	5688649.	2	8252695.
	3	Pledges and grants receivable, net	5956531.	3	3132020.
	4	Accounts receivable, net	82552.	4	41051.
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L	3760.	5	0.
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instr). Complete Part II of Sch L		6	
	7	Notes and loans receivable, net		7	
	8	Inventories for sale or use		8	
	9	Prepaid expenses and deferred charges	285756.	9	314211.
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D — 10a: 17810710.			
	b	Less: accumulated depreciation — 10b: 2504726.	15573433.	10c	15305984.
	11	Investments - publicly traded securities	23658615.	11	22717095.
	12	Investments - other securities. See Part IV, line 11		12	
	13	Investments - program-related. See Part IV, line 11		13	
	14	Intangible assets		14	
	15	Other assets. See Part IV, line 11	1571564.	15	1476376.
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)	54303424.	16	52266314.
Liabilities	17	Accounts payable and accrued expenses	3583106.	17	5966696.
	18	Grants payable		18	
	19	Deferred revenue		19	
	20	Tax-exempt bond liabilities		20	
	21	Escrow or custodial account liability. Complete Part IV of Schedule D		21	
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L		22	
	23	Secured mortgages and notes payable to unrelated third parties	3725549.	23	3613149.
	24	Unsecured notes and loans payable to unrelated third parties		24	
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17-24). Complete Part X of Schedule D	3423.	25	3423.
	26	**Total liabilities.** Add lines 17 through 25	7312078.	26	9583268.
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ [X] and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets	14579094.	27	11773985.
	28	Temporarily restricted net assets	14412784.	28	13004781.
	29	Permanently restricted net assets	17999468.	29	17904280.
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds		30	
	31	Paid-in or capital surplus, or land, building, or equipment fund		31	
	32	Retained earnings, endowment, accumulated income, or other funds		32	
	33	Total net assets or fund balances	46991346.	33	42683046.
	34	Total liabilities and net assets/fund balances	54303424.	34	52266314.

Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI X

1	Total revenue (must equal Part VIII, column (A), line 12)	1	12106218.
2	Total expenses (must equal Part IX, column (A), line 25)	2	15225262.
3	Revenue less expenses. Subtract line 2 from line 1	3	-3119044.
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	46991346.
5	Net unrealized gains (losses) on investments	5	-179217.
6	Donated services and use of facilities	6	
7	Investment expenses	7	
8	Prior period adjustments	8	
9	Other changes in net assets or fund balances (explain in Schedule O)	9	-1010039.
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	42683046.

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII X

			Yes	No
1	Accounting method used to prepare the Form 990: ☐ Cash ☒ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		X
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both: ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	X	
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both: ☐ Separate basis ☒ Consolidated basis ☐ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c	X	
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		X
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits	3b		

SCHEDULE A (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.

▶ **Attach to Form 990 or Form 990-EZ.**

▶ **Information about Schedule A (Form 990 or 990-EZ) and its instructions is at** *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part I Reason for Public Charity Status (All organizations must complete this part.) See instructions.

The organization is not a private foundation because it is: (For lines 1 through 11, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990 or 990-EZ).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state: _____

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170(b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☒ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

9 ☐ An organization that normally receives: (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions - subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

10 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

11 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box in lines 11a through 11d that describes the type of supporting organization and complete lines 11e, 11f, and 11g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations .....

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1-9 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	(iv) No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
Total						

Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**

(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge						
4 **Total.** Add lines 1 through 3	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						21096299.
6 **Public support.** Subtract line 5 from line 4						37149993.

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
7 Amounts from line 4	14091387.	7461310.	9560800.	15682220.	11450575.	58246292.
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources	629921.	543360.	675383.	628503.	677761.	3154928.
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)	323111.	-105163.	12858.	-176126.	-465002.	-410322.
11 **Total support.** Add lines 7 through 10						60990898.

12 Gross receipts from related activities, etc. (see instructions) ▶ 12 5430230.

13 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

14 Public support percentage for 2015 (line 6, column (f) divided by line 11, column (f))	14	60.91 %
15 Public support percentage from 2014 Schedule A, Part II, line 14	15	59.01 %

16a **33 1/3% support test - 2015.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☒

b **33 1/3% support test - 2014.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

17a **10% -facts-and-circumstances test - 2015.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

b **10% -facts-and-circumstances test - 2014.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions ▶ ☐

Part III Support Schedule for Organizations Described in Section 509(a)(2)

(Complete only if you checked the box on line 9 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")						
2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose						
3 Gross receipts from activities that are not an unrelated trade or business under section 513						
4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
5 The value of services or facilities furnished by a governmental unit to the organization without charge						
6 **Total.** Add lines 1 through 5						
7a Amounts included on lines 1, 2, and 3 received from disqualified persons						
b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year						
c Add lines 7a and 7b						
8 **Public support.** (Subtract line 7c from line 6.)						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2011	(b) 2012	(c) 2013	(d) 2014	(e) 2015	(f) Total
9 Amounts from line 6						
10a Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975						
c Add lines 10a and 10b						
11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on						
12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.)						
13 **Total support.** (Add lines 9, 10c, 11, and 12.)						

14 **First five years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** ▶ ☐

Section C. Computation of Public Support Percentage

15 Public support percentage for 2015 (line 8, column (f) divided by line 13, column (f))	15	%
16 Public support percentage from 2014 Schedule A, Part III, line 15	16	%

Section D. Computation of Investment Income Percentage

17 Investment income percentage for **2015** (line 10c, column (f) divided by line 13, column (f))	17	%
18 Investment income percentage from **2014** Schedule A, Part III, line 17	18	%

19a **33 1/3% support tests - 2015.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

b **33 1/3% support tests - 2014.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3%, and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions ▶ ☐

Part IV Supporting Organizations

(Complete only if you checked a box in line 11 on Part I. If you checked 11a of Part I, complete Sections A and B. If you checked 11b of Part I, complete Sections A and C. If you checked 11c of Part I, complete Sections A, D, and E. If you checked 11d of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No" describe in Part VI how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509(a)(1) or (2)? *If "Yes," explain in Part VI how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer (b) and (c) below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in Part VI when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in Part VI what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes," and if you checked 11a or 11b in Part I, answer (b) and (c) below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in Part VI how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in Part VI what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer (b) and (c) below (if applicable). Also, provide detail in Part VI, including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action; (iii) the authority under the organization's organizing document authorizing such action; and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in Part VI.*	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described in line 7? *If "Yes," complete Part I of Schedule L (Form 990 or 990-EZ).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in Part VI.*	9a		
b	Did one or more disqualified persons (as defined in line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in Part VI.*	9b		
c	Did a disqualified person (as defined in line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in Part VI.*	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings.)*	10b		

Part IV Supporting Organizations *(continued)*

			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described in (b) and (c) below, the governing body of a supported organization?	11a		
b	A family member of a person described in (a) above?	11b		
c	A 35% controlled entity of a person described in (a) or (b) above? *If "Yes" to a, b, or c, provide detail in Part VI.*	11c		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in Part VI how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year.*	1		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in Part VI how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised, or controlled the supporting organization.*	2		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in Part VI how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	1		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	1		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization(s) or (ii) serving on the governing body of a supported organization? *If "No," explain in Part VI how the organization maintained a close and continuous working relationship with the supported organization(s).*	2		
3	By reason of the relationship described in (2), did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in Part VI the role the organization's supported organizations played in this regard.*	3		

Section E. Type III Functionally-Integrated Supporting Organizations

1 *Check the box next to the method that the organization used to satisfy the Integral Part Test during the yea(see instructions):*

a ☐ The organization satisfied the Activities Test. *Complete line 2 below.*

b ☐ The organization is the parent of each of its supported organizations. *Complete line 3 below.*

c ☐ The organization supported a governmental entity. *Describe in Part VI how you supported a government entity (see instructions).*

			Yes	No
2	Activities Test. ***Answer (a) and (b) below.***			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in **Part VI identify those supported organizations and explain** how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities.*	2a		
b	Did the activities described in (a) constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in Part VI the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement.*	2b		
3	Parent of Supported Organizations. ***Answer (a) and (b) below.***			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations? Provide details in *Part VI.*	3a		
b	Did the organization exercise a substantial degree of direction over the policies, programs, and activities of each of its supported organizations? If "Yes," describe in *Part VI the role played by the organization in this regard.*	3b		

Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970. **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E.

Section A - Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1 Net short-term capital gain	1		
2 Recoveries of prior-year distributions	2		
3 Other gross income (see instructions)	3		
4 Add lines 1 through 3	4		
5 Depreciation and depletion	5		
6 Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7 Other expenses (see instructions)	7		
8 **Adjusted Net Income** (subtract lines 5, 6 and 7 from line 4)	8		

Section B - Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1 Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):			
a Average monthly value of securities	1a		
b Average monthly cash balances	1b		
c Fair market value of other non-exempt-use assets	1c		
d **Total** (add lines 1a, 1b, and 1c)	1d		
e **Discount** claimed for blockage or other factors (explain in detail in **Part VI**):			
2 Acquisition indebtedness applicable to non-exempt-use assets	2		
3 Subtract line 2 from line 1d	3		
4 Cash deemed held for exempt use. Enter 1-1/2% of line 3 (for greater amount, see instructions).	4		
5 Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6 Multiply line 5 by .035	6		
7 Recoveries of prior-year distributions	7		
8 **Minimum Asset Amount** (add line 7 to line 6)	8		

Section C - Distributable Amount			Current Year
1 Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2 Enter 85% of line 1	2		
3 Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4 Enter greater of line 2 or line 3	4		
5 Income tax imposed in prior year	5		
6 **Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions)	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally-integrated Type III supporting organization (see instructions).

Part V Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations *(continued)*

Section D - Distributions		Current Year
1	Amounts paid to supported organizations to accomplish exempt purposes	
2	Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	
3	Administrative expenses paid to accomplish exempt purposes of supported organizations	
4	Amounts paid to acquire exempt-use assets	
5	Qualified set-aside amounts (prior IRS approval required)	
6	Other distributions (describe in Part VI). See instructions.	
7	**Total annual distributions.** Add lines 1 through 6.	
8	Distributions to attentive supported organizations to which the organization is responsive (provide details in Part VI). See instructions.	
9	Distributable amount for 2015 from Section C, line 6	
10	Line 8 amount divided by Line 9 amount	

Section E - Distribution Allocations (see instructions)		(i) Excess Distributions	(ii) Underdistributions Pre-2015	(iii) Distributable Amount for 2015
1	Distributable amount for 2015 from Section C, line 6			
2	Underdistributions, if any, for years prior to 2015 (reasonable cause required-see instructions)			
3	Excess distributions carryover, if any, to 2015:			
a				
b				
c				
d	From 2013			
e	From 2014			
f	**Total** of lines 3a through e			
g	Applied to underdistributions of prior years			
h	Applied to 2015 distributable amount			
i	Carryover from 2010 not applied (see instructions)			
j	Remainder. Subtract lines 3g, 3h, and 3i from 3f.			
4	Distributions for 2015 from Section D, line 7: $			
a	Applied to underdistributions of prior years			
b	Applied to 2015 distributable amount			
c	Remainder. Subtract lines 4a and 4b from 4.			
5	Remaining underdistributions for years prior to 2015, if any. Subtract lines 3g and 4a from line 2 (if amount greater than zero, see instructions).			
6	Remaining underdistributions for 2015. Subtract lines 3h and 4b from line 1 (if amount greater than zero, see instructions).			
7	**Excess distributions carryover to 2016.** Add lines 3j and 4c.			
8	Breakdown of line 7:			
a				
b				
c	Excess from 2013			
d	Excess from 2014			
e	Excess from 2015			

Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c; Part IV, Section B, lines 1 and 2; Part IV, Section C, line 1; Part IV, Section D, lines 2 and 3; Part IV, Section E, lines 1c, 2a, 2b, 3a and 3b; Part V, line 1; Part V, Section B, line 1e; Part V, Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6. Also complete this part for any additional information. (See instructions.)

Schedule B (Form 990, 990-EZ, or 990-PF)
Department of the Treasury
Internal Revenue Service

Schedule of Contributors

▶ Attach to Form 990, Form 990-EZ, or Form 990-PF.
▶ Information about Schedule B (Form 990, 990-EZ, or 990-PF) and its instructions is at *www.irs.gov/form990* .

OMB No. 1545-0047

2015

Name of the organization

NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number

13-1655255

Organization type (check one):

Filers of:	Section:
Form 990 or 990-EZ	[X] 501(c)(3) (enter number) organization
	[ ] 4947(a)(1) nonexempt charitable trust **not** treated as a private foundation
	[ ] 527 political organization
Form 990-PF	[ ] 501(c)(3) exempt private foundation
	[ ] 4947(a)(1) nonexempt charitable trust treated as a private foundation
	[ ] 501(c)(3) taxable private foundation

Check if your organization is covered by the **General Rule** or a **Special Rule.**
Note. Only a section 501(c)(7), (8), or (10) organization can check boxes for both the General Rule and a Special Rule. See instructions.

General Rule

[ ] For an organization filing Form 990, 990-EZ, or 990-PF that received, during the year, contributions totaling $5,000 or more (in money or property) from any one contributor. Complete Parts I and II. See instructions for determining a contributor's total contributions.

Special Rules

[X] For an organization described in section 501(c)(3) filing Form 990 or 990-EZ that met the 33 1/3% support test of the regulations under sections 509(a)(1) and 170(b)(1)(A)(vi), that checked Schedule A (Form 990 or 990-EZ), Part II, line 13, 16a, or 16b, and that received from any one contributor, during the year, total contributions of the greater of **(1)** $5,000 or **(2)** 2% of the amount on (i) Form 990, Part VIII, line 1h, or (ii) Form 990-EZ, line 1. Complete Parts I and II.

[ ] For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, total contributions of more than $1,000 *exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. Complete Parts I, II, and III.

[ ] For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, contributions *exclusively* for religious, charitable, etc., purposes, but no such contributions totaled more than $1,000. If this box is checked, enter here the total contributions that were received during the year for an *exclusively* religious, charitable, etc., purpose. Do not complete any of the parts unless the **General Rule** applies to this organization because it received *nonexclusively* religious, charitable, etc., contributions totaling $5,000 or more during the year ..... ▶ $ _____

Caution. An organization that is not covered by the General Rule and/or the Special Rules does not file Schedule B (Form 990, 990-EZ, or 990-PF), but it **must** answer "No" on Part IV, line 2, of its Form 990; or check the box on line H of its Form 990-EZ or on its Form 990-PF, Part I, line 2, to certify that it does not meet the filing requirements of Schedule B (Form 990, 990-EZ, or 990-PF).

Name of organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
1		$ 1000000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
2		$ 1500000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
3		$ 1070000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
4		$ 269420.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
5		$ 394900.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
6		$ 400000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)

Name of organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
7		$ 302250.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
8		$ 500000.	Person [X] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)
		$	Person [ ] Payroll [ ] Noncash [ ] (Complete Part II for noncash contributions.)

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part II **Noncash Property** (see instructions). Use duplicate copies of Part II if additional space is needed.

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

(a) No. from Part I	(b) Description of noncash property given	(c) FMV (or estimate) (see instructions)	(d) Date received
		$	

Schedule B (Form 990, 990-EZ, or 990-PF) (2015) Page 4

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part III *Exclusively* religious, charitable, etc., contributions to organizations described in section 501(c)(7), (8), or (10) that total more than $1,000 for the year from any one contributor. Complete columns (a) through (e) and the following line entry. For organizations completing Part III, enter the total of exclusively religious, charitable, etc., contributions of $1,000 or less for the year. (Enter this info. once.) ▶ $

Use duplicate copies of Part III if additional space is needed.

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

(a) No. from Part I	(b) Purpose of gift	(c) Use of gift	(d) Description of how gift is held

(e) Transfer of gift

Transferee's name, address, and ZIP + 4	Relationship of transferor to transferee

SCHEDULE C (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Political Campaign and Lobbying Activities

For Organizations Exempt From Income Tax Under section 501(c) and section 527

▶ **Complete if the organization is described below.** ▶ **Attach to Form 990 or Form 990-EZ.**

▶ **Information about Schedule C (Form 990 or 990-EZ) and its instructions is at *www.irs.gov/form990*.**

OMB No. 1545-0047

2015

Open to Public Inspection

If the organization answered "Yes," on Form 990, Part IV, line 3, or Form 990-EZ, Part V, line 46 (Political Campaign Activities), then

- Section 501(c)(3) organizations: Complete Parts I-A and B. Do not complete Part I-C.
- Section 501(c) (other than section 501(c)(3)) organizations: Complete Parts I-A and C below. Do not complete Part I-B.
- Section 527 organizations: Complete Part I-A only.

If the organization answered "Yes," on Form 990, Part IV, line 4, or Form 990-EZ, Part VI, line 47 (Lobbying Activities), then

- Section 501(c)(3) organizations that have filed Form 5768 (election under section 501(h)): Complete Part II-A. Do not complete Part II-B.
- Section 501(c)(3) organizations that have NOT filed Form 5768 (election under section 501(h)): Complete Part II-B. Do not complete Part II-A.

If the organization answered "Yes," on Form 990, Part IV, line 5 (Proxy Tax) (see separate instructions) or Form 990-EZ, Part V, line 35c (Proxy Tax) (see separate instructions), then

- Section 501(c)(4), (5), or (6) organizations: Complete Part III.

Name of organization	Employer identification number
NAACP LEGAL DEFENSE & EDUC. FUND, INC.	13-1655255

Part I-A Complete if the organization is exempt under section 501(c) or is a section 527 organization.

1 Provide a description of the organization's direct and indirect political campaign activities in Part IV.

2 Political expenditures ▶ $

3 Volunteer hours

Part I-B Complete if the organization is exempt under section 501(c)(3).

1 Enter the amount of any excise tax incurred by the organization under section 4955 ▶ $

2 Enter the amount of any excise tax incurred by organization managers under section 4955 ▶ $

3 If the organization incurred a section 4955 tax, did it file Form 4720 for this year? ☐ Yes ☐ No

4a Was a correction made? ☐ Yes ☐ No

b If "Yes," describe in Part IV.

Part I-C Complete if the organization is exempt under section 501(c), except section 501(c)(3).

1 Enter the amount directly expended by the filing organization for section 527 exempt function activities ▶ $

2 Enter the amount of the filing organization's funds contributed to other organizations for section 527 exempt function activities ▶ $

3 Total exempt function expenditures. Add lines 1 and 2. Enter here and on Form 1120-POL, line 17b ▶ $

4 Did the filing organization file **Form 1120-POL** for this year? ☐ Yes ☐ No

5 Enter the names, addresses and employer identification number (EIN) of all section 527 political organizations to which the filing organization made payments. For each organization listed, enter the amount paid from the filing organization's funds. Also enter the amount of political contributions received that were promptly and directly delivered to a separate political organization, such as a separate segregated fund or a political action committee (PAC). If additional space is needed, provide information in Part IV.

(a) Name	(b) Address	(c) EIN	(d) Amount paid from filing organization's funds. If none, enter -0-.	(e) Amount of political contributions received and promptly and directly delivered to a separate political organization. If none, enter -0-.

Part II-A **Complete if the organization is exempt under section 501(c)(3) and filed Form 5768 (election under section 501(h)).**

A Check ▶ [X] if the filing organization belongs to an affiliated group (and list in Part IV each affiliated group member's name, address, EIN, expenses, and share of excess lobbying expenditures).

B Check ▶ [ ] if the filing organization checked box A and "limited control" provisions apply.

Limits on Lobbying Expenditures (The term "expenditures" means amounts paid or incurred.)	(a) Filing organization's totals	(b) Affiliated group totals
1a Total lobbying expenditures to influence public opinion (grass roots lobbying)	42265.	42265.
b Total lobbying expenditures to influence a legislative body (direct lobbying)	154822.	154822.
c Total lobbying expenditures (add lines 1a and 1b)	197087.	197087.
d Other exempt purpose expenditures	15028175.	15028175.
e Total exempt purpose expenditures (add lines 1c and 1d)	15225262.	15225262.
f Lobbying nontaxable amount. Enter the amount from the following table in both columns.	911263.	911263.
g Grassroots nontaxable amount (enter 25% of line 1f)	227816.	227816.
h Subtract line 1g from line 1a. If zero or less, enter -0-	0.	0.
i Subtract line 1f from line 1c. If zero or less, enter -0-	0.	0.

If the amount on line 1e, column (a) or (b) is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e.
Over $500,000 but not over $1,000,000	$100,000 plus 15% of the excess over $500,000
Over $1,000,000 but not over $1,500,000	$175,000 plus 10% of the excess over $1,000,000
Over $1,500,000 but not over $17,000,000	$225,000 plus 5% of the excess over $1,500,000
Over $17,000,000	$1,000,000.

j If there is an amount other than zero on either line 1h or line 1i, did the organization file Form 4720 reporting section 4911 tax for this year? [ ] Yes [ ] No

4-Year Averaging Period Under section 501(h)

(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the separate instructions for lines 2a through 2f.)

Lobbying Expenditures During 4-Year Averaging Period

Calendar year (or fiscal year beginning in)	(a) 2012	(b) 2013	(c) 2014	(d) 2015	(e) Total
2a Lobbying nontaxable amount	921518.	804224.	894627.	911263.	3531632.
b Lobbying ceiling amount (150% of line 2a, column(e))					5297448.
c Total lobbying expenditures	207198.	225101.	222907.	197087.	852293.
d Grassroots nontaxable amount	230380.	201056.	223657.	227816.	882909.
e Grassroots ceiling amount (150% of line 2d, column (e))					1324364.
f Grassroots lobbying expenditures	3711.	8174.	59990.	42265.	114140.

Part II-B **Complete if the organization is exempt under section 501(c)(3) and has NOT filed Form 5768 (election under section 501(h)).**

For each "Yes," response on lines 1a through 1i below, provide in Part IV a detailed description of the lobbying activity.	(a) Yes	(a) No	(b) Amount
1 During the year, did the filing organization attempt to influence foreign, national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of:			
a Volunteers?			
b Paid staff or management (include compensation in expenses reported on lines 1c through 1i)?			
c Media advertisements?			
d Mailings to members, legislators, or the public?			
e Publications, or published or broadcast statements?			
f Grants to other organizations for lobbying purposes?			
g Direct contact with legislators, their staffs, government officials, or a legislative body?			
h Rallies, demonstrations, seminars, conventions, speeches, lectures, or any similar means?			
i Other activities?			
j Total. Add lines 1c through 1i			
2a Did the activities in line 1 cause the organization to be not described in section 501(c)(3)?			
b If "Yes," enter the amount of any tax incurred under section 4912			
c If "Yes," enter the amount of any tax incurred by organization managers under section 4912			
d If the filing organization incurred a section 4912 tax, did it file Form 4720 for this year?			

Part III-A **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6).**

			Yes	No
1	Were substantially all (90% or more) dues received nondeductible by members?	1		
2	Did the organization make only in-house lobbying expenditures of $2,000 or less?	2		
3	Did the organization agree to carry over lobbying and political expenditures from the prior year?	3		

Part III-B **Complete if the organization is exempt under section 501(c)(4), section 501(c)(5), or section 501(c)(6) and if either (a) BOTH Part III-A, lines 1 and 2, are answered "No," OR (b) Part III-A, line 3, is answered "Yes."**

1	Dues, assessments and similar amounts from members	1	
2	Section 162(e) nondeductible lobbying and political expenditures (do not include amounts of political expenses for which the section 527(f) tax was paid).		
a	Current year	2a	
b	Carryover from last year	2b	
c	Total	2c	
3	Aggregate amount reported in section 6033(e)(1)(A) notices of nondeductible section 162(e) dues	3	
4	If notices were sent and the amount on line 2c exceeds the amount on line 3, what portion of the excess does the organization agree to carryover to the reasonable estimate of nondeductible lobbying and political expenditure next year?	4	
5	Taxable amount of lobbying and political expenditures (see instructions)	5	

Part IV **Supplemental Information**

Provide the descriptions required for Part I-A, line 1; Part I-B, line 4; Part I-C, line 5; Part II-A (affiliated group list); Part II-A, lines 1 and 2 (see instructions); and Part II-B, line 1. Also, complete this part for any additional information.

Part IV Supplemental Information *(continued)*

Schedule C — **Affiliated Group Lobbying Expenditures Part II-A**

Name of Affiliated Group Member
EARL WARREN LEGAL TRAINING PROGRAM

Employer ID Number
13-2695683

Affiliated Group Member Address
40 RECTOR STREET, 5TH FLOOR
NEW YORK, NY 10006

Electing Member
NO

Limits on Lobbying Expenditures:		Line
Total lobbying expenditures to influence public opinion (grassroots lobbying)	0.	1a
Total lobbying expenditures to influence a legislative body (direct lobbying)	0.	b
Total lobbying expenditures (add lines 1a and 1b)	0.	c
Other exempt purpose expenditures	0.	d
Total exempt purpose expenditures (add lines 1c and 1d)	0.	e

Lobbying nontaxable amount.
Enter the amount from the following table:

If the amount on line e is:	The lobbying nontaxable amount is:
Not over $500,000	20% of the amount on line 1e
> 500,000 <= 1,000,000	100,000 + 15% > 500,000
> 1,000,000 <= 1,500,000	175,000 + 10% > 1,000,000
> 1,500,000 <= 17,000,000	225,000 + 5% > 1,500,000
Over $17,000,000	$1,000,000

	0.	f
Grassroots nontaxable amount (enter 25% of line 1f)	0.	g
Subtract line 1g from line 1a (limit to zero)	0.	h
Subtract line 1f from line 1c (limit to zero)	0.	i
Member's share of excess lobbying expenditures	0.	

SCHEDULE D (Form 990)

Department of the Treasury
Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Information about Schedule D (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts. Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? ☐ Yes ☐ No

Part II Conservation Easements. Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply).
- ☐ Preservation of land for public use (e.g., recreation or education)
- ☐ Preservation of a historically important land area
- ☐ Protection of natural habitat
- ☐ Preservation of a certified historic structure
- ☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

		Held at the End of the Tax Year
a	Total number of conservation easements 2a	
b	Total acreage restricted by conservation easements 2b	
c	Number of conservation easements on a certified historic structure included in (a) 2c	
d	Number of conservation easements included in (c) acquired after 8/17/06, and not on a historic structure listed in the National Register 2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ _____

4 Number of states where property subject to conservation easement is located ▶ _____

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ _____

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ _____

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement, and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements.

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under SFAS 116 (ASC 958), not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide, in Part XIII, the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under SFAS 116 (ASC 958), to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 ▶ $ _____

(ii) Assets included in Form 990, Part X ▶ $ _____

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under SFAS 116 (ASC 958) relating to these items:

a Revenue included on Form 990, Part VIII, line 1 ▶ $ _____

b Assets included in Form 990, Part X ▶ $ _____

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that are a significant use of its collection items (check all that apply):

a ☐ Public exhibition
b ☐ Scholarly research
c ☐ Preservation for future generations
d ☐ Loan or exchange programs
e ☐ Other _____

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection? ☐ Yes ☐ No

Part IV Escrow and Custodial Arrangements. Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII and complete the following table:

		Amount
c Beginning balance	1c	
d Additions during the year	1d	
e Distributions during the year	1e	
f Ending balance	1f	

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? ☐ Yes ☐ No

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided on Part XIII ☐

Part V Endowment Funds. Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

	(a) Current year	(b) Prior year	(c) Two years back	(d) Three years back	(e) Four years back
1a Beginning of year balance	22258708.	23471686.	22124511.	20758852.	23881401.
b Contributions		108.			
c Net investment earnings, gains, and losses	150872.	-1536.	3638135.	1812314.	-1002.
d Grants or scholarships					
e Other expenditures for facilities and programs	1245010.	1211550.	2290960.	446655.	3121547.
f Administrative expenses					
g End of year balance	21164570.	22258708.	23471686.	22124511.	20758852.

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as:

a Board designated or quasi-endowment ▶ 4.74 %
b Permanent endowment ▶ 84.59 %
c Temporarily restricted endowment ▶ 10.67 %

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i) unrelated organizations	3a(i)	X	
(ii) related organizations	3a(ii)		X
b If "Yes" on line 3a(ii), are the related organizations listed as required on Schedule R?	3b		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI Land, Buildings, and Equipment.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

Description of property	(a) Cost or other basis (investment)	(b) Cost or other basis (other)	(c) Accumulated depreciation	(d) Book value
1a Land				
b Buildings		16031320.	1835026.	14196294.
c Leasehold improvements		11389.	5125.	6264.
d Equipment		1738001.	656575.	1081426.
e Other		30000.	8000.	22000.
Total. Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10c.)* ▶				15305984.

Part VII Investments - Other Securities.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11b. See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely-held equity interests		
(3) Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. (Col. (b) must equal Form 990, Part X, col. (B) line 12.) ▶		

Part VIII Investments - Program Related.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
Total. (Col. (b) must equal Form 990, Part X, col. (B) line 13.) ▶		

Part IX Other Assets.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col. (B) line 15.)* ▶	

Part X Other Liabilities.

Complete if the organization answered "Yes" on Form 990, Part IV, line 11e or 11f. See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
(2) FUNDS HELD IN TRUST FOR OTHERS	3423.
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col. (B) line 25.)* ▶	3423.

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FIN 48 (ASC 740). Check here if the text of the footnote has been provided in Part XIII [X]

Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.

Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	12330500.
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12:				
a	Net unrealized gains (losses) on investments	2a	-179217.		
b	Donated services and use of facilities	2b			
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines 2a through 2d			2e	-179217.
3	Subtract line 2e from line 1			3	12509717.
4	Amounts included on Form 990, Part VIII, line 12, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a	100598.		
b	Other (Describe in Part XIII.)	4b	-504097.		
c	Add lines 4a and 4b			4c	-403499.
5	Total revenue. Add lines 3 and 4c. *(This must equal Form 990, Part I, line 12.)*			5	12106218.

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.

Complete if the organization answered "Yes" on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	15628761.
2	Amounts included on line 1 but not on Form 990, Part IX, line 25:				
a	Donated services and use of facilities	2a			
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d	504097.		
e	Add lines 2a through 2d			2e	504097.
3	Subtract line 2e from line 1			3	15124664.
4	Amounts included on Form 990, Part IX, line 25, but not on line 1:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a	100598.		
b	Other (Describe in Part XIII.)	4b			
c	Add lines 4a and 4b			4c	100598.
5	Total expenses. Add lines 3 and 4c. *(This must equal Form 990, Part I, line 18.)*			5	15225262.

Part XIII Supplemental Information.

Provide the descriptions required for Part II, lines 3, 5, and 9; Part III, lines 1a and 4; Part IV, lines 1b and 2b; Part V, line 4; Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

Part V, line 4:

Earnings from the Herbert Lehman Endowment are used to support scholarships.

Part X, Line 2:

NAACP LDF qualifies as a charitable organization as defined by IRC Section 501(c)(3) and, accordingly, are exempt from federal income tax under IRC Section 501(a). Additionally, since it is publicly supported, contributions qualify for the maximum charitable contribution deduction under the IRC. NAACP LDF is also exempt from state and local income taxes.

Part XIII Supplemental Information *(continued)*

Management has analyzed the tax positions taken by this entity and has concluded that as of June 30, 2016, there were no uncertain tax positions taken or expected to be taken. Accordingly, no interest or penalties related to uncertain tax positions have been accrued in the accompanying combined financial statements.

NAACP LDF is subject to audit by taxing jurisdictions; however, no audits for any tax periods are currently in progress. Management believes that the entity is no longer subject to income tax examinations for years ended on or prior to June 30, 2013 under federal and New York tax jurisdictions.

Part XI, Line 4b - Other Adjustments:

Direct Special Event Expenses

Part XII, Line 2d - Other Adjustments:

Direct Special Event Expenses

SCHEDULE G (Form 990 or 990-EZ)

Department of the Treasury
Internal Revenue Service

Supplemental Information Regarding Fundraising or Gaming Activities

Complete if the organization answered "Yes" on Form 990, Part IV, lines 17, 18, or 19, or if the organization entered more than $15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Information about Schedule G (Form 990 or 990-EZ) and its instructions is at www.irs.gov/form990.

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Fundraising Activities. Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

1 Indicate whether the organization raised funds through any of the following activities. Check all that apply.

a [X] Mail solicitations
b [X] Internet and email solicitations
c [X] Phone solicitations
d [ ] In-person solicitations
e [X] Solicitation of non-government grants
f [ ] Solicitation of government grants
g [X] Special fundraising events

2 a Did the organization have a written or oral agreement with any individual (including officers, directors, trustees or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services? [X] Yes [ ] No

b If "Yes," list the ten highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions? Yes	(iii) No	(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col. (i)	(vi) Amount paid to (or retained by) organization
Gabrielle Gilliam - 338 Fenmore Street, Brooklyn, NY	Corporate/Foundation Consultant		X	4233345.	60019.	4173326.
Dwight Johnson Design - 276 Fifth Ave, Suite 703, New	Special Events Consultant (NEJAD)		X	2299758.	34173.	2265585.
Sanky Communications, Inc. - 599 11th Avenue, 6th Floor,	Direct Mail and Web Gift Consultant		X	1082340.	242000.	840340.
Enrique Ball - 80 Carroll Street, Brooklyn, NY 11231	Development Consultant		X	35954.	17308.	18646.
Total ▶				7651397.	353500.	7297897.

3 List all states in which the organization is registered or licensed to solicit contributions or has been notified it is exempt from registration or licensing.

AZ,AR,CA,CO,CT,DC,FL,GA,IL,KS,KY,IN,ME,MD,MI,MA,MN,MS,MO,ND,NE,NV,NH,NJ,NM
NY,NC,OH,OK,OR,PA,RI,SC,TN,UT,VA,WA,WV,WI

See Part IV for continuations

Part II Fundraising Events. Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than $15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than $5,000.

		(a) Event #1 NEJAD (event type)	(b) Event #2 LDF Alumni Reunion (event type)	(c) Other events 2 (total number)	(d) Total events (add col. (a) through col. (c))
Revenue	1 Gross receipts	2299758.	30161.	19700.	2349619.
	2 Less: Contributions	2006262.	30161.	19700.	2056123.
	3 Gross income (line 1 minus line 2)	293496.			293496.
Direct Expenses	4 Cash prizes				
	5 Noncash prizes				
	6 Rent/facility costs	41650.	0.	6810.	48460.
	7 Food and beverages	172281.	0.	2545.	174826.
	8 Entertainment	12600.	0.		12600.
	9 Other direct expenses	485080.	20351.	21181.	526612.
	10 Direct expense summary. Add lines 4 through 9 in column (d) ▶				762498.
	11 Net income summary. Subtract line 10 from line 3, column (d) ▶				-469002.

Part III Gaming. Complete if the organization answered "Yes" on Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

		(a) Bingo	(b) Pull tabs/instant bingo/progressive bingo	(c) Other gaming	(d) Total gaming (add col. (a) through col. (c))
Revenue	1 Gross revenue				
Direct Expenses	2 Cash prizes				
	3 Noncash prizes				
	4 Rent/facility costs				
	5 Other direct expenses				
	6 Volunteer labor	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	☐ Yes ____ % ☐ No	
	7 Direct expense summary. Add lines 2 through 5 in column (d) ▶				
	8 Net gaming income summary. Subtract line 7 from line 1, column (d) ▶				

9 Enter the state(s) in which the organization conducts gaming activities: _____

a Is the organization licensed to conduct gaming activities in each of these states? ☐ Yes ☐ No

b If "No," explain: _____

10a Were any of the organization's gaming licenses revoked, suspended or terminated during the tax year? ☐ Yes ☐ No

b If "Yes," explain: _____

11 Does the organization conduct gaming activities with nonmembers? ☐ Yes ☐ No

12 Is the organization a grantor, beneficiary or trustee of a trust or a member of a partnership or other entity formed to administer charitable gaming? ☐ Yes ☐ No

13 Indicate the percentage of gaming activity conducted in:

a The organization's facility 13a %

b An outside facility 13b %

14 Enter the name and address of the person who prepares the organization's gaming/special events books and records:

Name ▶

Address ▶

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue? ☐ Yes ☐ No

b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ _____ and the amount of gaming revenue retained by the third party ▶ $ _____ .

c If "Yes," enter name and address of the third party:

Name ▶

Address ▶

16 Gaming manager information:

Name ▶

Gaming manager compensation ▶ $ _____

Description of services provided ▶

☐ Director/officer ☐ Employee ☐ Independent contractor

17 Mandatory distributions:

a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license? ☐ Yes ☐ No

b Enter the amount of distributions required under state law to be distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $

Part IV **Supplemental Information.** Provide the explanations required by Part I, line 2b, columns (iii) and (v); and Part III, lines 9, 9b, 10b, 15b, 15c, 16, and 17b, as applicable. Also provide any additional information (see instructions).

Schedule G, Part I, Line 2b, List of Ten Highest Paid Fundraisers:

(i) Name of Fundraiser: Gabrielle Gilliam

(i) Address of Fundraiser: 338 Fenmore Street, Brooklyn, NY 11225

(i) Name of Fundraiser: Dwight Johnson Design

(i) Address of Fundraiser: 276 Fifth Ave, Suite 703, New York, NY 10001

(i) Name of Fundraiser: Sanky Communications, Inc.

Part IV Supplemental Information *(continued)*

(i) Address of Fundraiser: 599 11th Avenue, 6th Floor, New York, NY 10036

SCHEDULE I (Form 990)

Department of the Treasury
Internal Revenue Service

Grants and Other Assistance to Organizations, Governments, and Individuals in the United States

Complete if the organization answered "Yes" on Form 990, Part IV, line 21 or 22.

▶ Attach to Form 990.

▶ Information about Schedule I (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization
NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number
13-1655255

Part I General Information on Grants and Assistance

1 Does the organization maintain records to substantiate the amount of the grants or assistance, the grantees' eligibility for the grants or assistance, and the selection criteria used to award the grants or assistance? ..... [X] Yes [ ] No

2 Describe in Part IV the organization's procedures for monitoring the use of grant funds in the United States.

Part II Grants and Other Assistance to Domestic Organizations and Domestic Governments. Complete if the organization answered "Yes" on Form 990, Part IV, line 21, for any recipient that received more than $5,000. Part II can be duplicated if additional space is needed.

1 (a) Name and address of organization or government	(b) EIN	(c) IRC section if applicable	(d) Amount of cash grant	(e) Amount of non-cash assistance	(f) Method of valuation (book, FMV, appraisal, other)	(g) Description of non-cash assistance	(h) Purpose of grant or assistance
ACLU Racial Social Justice 125 Broad Street, 18th Floor New York, NY 10004	13-6213516	501(c)(4)	150000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
ACLU Northern California 39 Drumm Street San Francisco, CA 94111	94-0279770	501(c)(4)	106250.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Advocates for Children of New York 151 West 30th Street, 5th Floor New York, NY 10001	11-2247307	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Charles Hamilton Houston Institute 1557 Massachusetts Avenue, Lewis Ha Cambridge, MA 02138	04-2103580	501(c)(3)	25000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Education Law Center 1315 Walnut Street, Suite 400 PhiladelphiA, PA 19107	23-2581102	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Just Children Legal Aid Justice Center - 1000 Preston Avenue, Suite A - Charlottesville, VA 22903	54-0884513	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or

2 Enter total number of section 501(c)(3) and government organizations listed in the line 1 table ..... ▶ 12.

3 Enter total number of other organizations listed in the line 1 table ..... ▶ 2.

LHA For Paperwork Reduction Act Notice, see the Instructions for Form 990.

Schedule I (Form 990) (2015)

See Part IV for Column (h) descriptions

532101
10-28-15

Part II Continuation of Grants and Other Assistance to Governments and Organizations in the United States (Schedule I (Form 990), Part II.)

(a) Name and address of organization or government	(b) EIN	(c) IRC section if applicable	(d) Amount of cash grant	(e) Amount of non-cash assistance	(f) Method of valuation (book, FMV, appraisal, other)	(g) Description of non-cash assistance	(h) Purpose of grant or assistance
Juvenile Justice Project of Louisiana - 1820 St. Charles Avenue, Suite 205 - New Orleans, LA 70130	20-5961971	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Advocates for Children's Services - Legal Aid of NC - P. O. Box 2101 - Durham, NC 27702	31-1784161	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
National Center for Youth Law 405 14th Street, 15th Floor' Oakland, CA 94612	94-2506933	501(c)(3)	60000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
New York Civil Liberties Union 125 Broad Street New York, NY 10004	90-0808294	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Texas Appleseed 1609 Shoal Creek Boulevard, Suite 2 Austin, TX 78701	74-2804268	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
The Regents of The University of California - 11000 Kinross Avenue, Suite 211 - Los Angeles, CA 90095	95-6006143	501(c)(3)	120000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Kentucky Youth Advocates 11001 Bluegrass Parkway, Suite 100 Jeffersontown, KY 40299	61-0929390	501(c)(3)	70000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or
Public Counsel Law Center 610 South Ardmore Avenue Los Angeles, CA 90005	23-7105149	501(c)(3)	100000.	0.			To provide data analyses, litigation, policy advocacy, direct representation, and/or

Part III Grants and Other Assistance to Domestic Individuals. Complete if the organization answered "Yes" on Form 990, Part IV, line 22. Part III can be duplicated if additional space is needed.

(a) Type of grant or assistance	(b) Number of recipients	(c) Amount of cash grant	(d) Amount of non-cash assistance	(e) Method of valuation (book, FMV, appraisal, other)	(f) Description of non-cash assistance
Scholarship Grants	105	261500.	0.		

Part IV Supplemental Information. Provide the information required in Part I, line 2, Part III, column (b), and any other additional information.

Part I, Line 2:

The Herbert Lehman Scholarship program obtains documentation from every student receiving scholarship aid which indicates that he/she remains in good standing with the university or college he/she is attending.

Part II, line 1, Column (h):

Name of Organization or Government: ACLU Racial Social Justice

(h) Purpose of Grant or Assistance: To provide data analyses,

Part IV Supplemental Information

litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race gender responsiveness education policies.

Name of Organization or Government: ACLU Northern California

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Advocates for Children of New York

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform race and gender responsive education policies.

Name of Organization or Government: Charles Hamilton Houston Institute

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Education Law Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Part IV Supplemental Information

Name of Organization or Government:

Just Children Legal Aid Justice Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race zn gender responsive education policies.

Name of Organization or Government: Juvenile Justice Project of Louisiana

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government:

Advocates for Children's Services - Legal Aid of NC

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: National Center for Youth Law

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: New York Civil Liberties Union

(h) Purpose of Grant or Assistance: To provide data analyses,

Part IV Supplemental Information

litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Texas Appleseed

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government:
The Regents of The University of California

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Kentucky Youth Advocates

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

Name of Organization or Government: Public Counsel Law Center

(h) Purpose of Grant or Assistance: To provide data analyses, litigation, policy advocacy, direct representation, and/or technical assistance to promote school discipline reform and race and gender responsive education policies.

SCHEDULE J (Form 990)

Department of the Treasury
Internal Revenue Service

Compensation Information

For certain Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

▶ **Complete if the organization answered "Yes" on Form 990, Part IV, line 23.**
▶ **Attach to Form 990.**
▶ **Information about Schedule J (Form 990) and its instructions is at *www.irs.gov/form990.***

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Questions Regarding Compensation

			Yes	No
1a	Check the appropriate box(es) if the organization provided any of the following to or for a person listed on Form 990, Part VII, Section A, line 1a. Complete Part III to provide any relevant information regarding these items.			
	☐ First-class or charter travel	☒ Housing allowance or residence for personal use		
	☐ Travel for companions	☐ Payments for business use of personal residence		
	☐ Tax indemnification and gross-up payments	☐ Health or social club dues or initiation fees		
	☐ Discretionary spending account	☐ Personal services (e.g., maid, chauffeur, chef)		
b	If any of the boxes on line 1a are checked, did the organization follow a written policy regarding payment or reimbursement or provision of all of the expenses described above? If "No," complete Part III to explain	1b	X	
2	Did the organization require substantiation prior to reimbursing or allowing expenses incurred by all directors, trustees, and officers, including the CEO/Executive Director, regarding the items checked in line 1a?	2	X	
3	Indicate which, if any, of the following the filing organization used to establish the compensation of the organization's CEO/Executive Director. Check all that apply. Do not check any boxes for methods used by a related organization to establish compensation of the CEO/Executive Director, but explain in Part III.			
	☒ Compensation committee	☐ Written employment contract		
	☒ Independent compensation consultant	☒ Compensation survey or study		
	☒ Form 990 of other organizations	☒ Approval by the board or compensation committee		
4	During the year, did any person listed on Form 990, Part VII, Section A, line 1a, with respect to the filing organization or a related organization:			
a	Receive a severance payment or change-of-control payment?	4a		X
b	Participate in, or receive payment from, a supplemental nonqualified retirement plan?	4b		X
c	Participate in, or receive payment from, an equity-based compensation arrangement?	4c		X
	If "Yes" to any of lines 4a-c, list the persons and provide the applicable amounts for each item in Part III.			
	Only section 501(c)(3), 501(c)(4), and 501(c)(29) organizations must complete lines 5-9.			
5	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the revenues of:			
a	The organization?	5a		X
b	Any related organization?	5b		X
	If "Yes" to line 5a or 5b, describe in Part III.			
6	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the net earnings of:			
a	The organization?	6a		X
b	Any related organization?	6b		X
	If "Yes" on line 6a or 6b, describe in Part III.			
7	For persons listed on Form 990, Part VII, Section A, line 1a, did the organization provide any non-fixed payments not described on lines 5 and 6? If "Yes," describe in Part III	7		X
8	Were any amounts reported on Form 990, Part VII, paid or accrued pursuant to a contract that was subject to the initial contract exception described in Regulations section 53.4958-4(a)(3)? If "Yes," describe in Part III	8		X
9	If "Yes" to line 8, did the organization also follow the rebuttable presumption procedure described in Regulations section 53.4958-6(c)?	9		

Part II **Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees.** Use duplicate copies if additional space is needed.

For each individual whose compensation must be reported on Schedule J, report compensation from the organization on row (i) and from related organizations, described in the instructions, on row (ii). Do not list any individuals that are not listed on Form 990, Part VII.

Note: The sum of columns (B)(i)-(iii) for each listed individual must equal the total amount of Form 990, Part VII, Section A, line 1a, applicable column (D) and (E) amounts for that individual.

(A) Name and Title		(B) Breakdown of W-2 and/or 1099-MISC compensation			(C) Retirement and other deferred compensation	(D) Nontaxable benefits	(E) Total of columns (B)(i)-(D)	(F) Compensation in column (B) reported as deferred on prior Form 990
		(i) Base compensation	(ii) Bonus & incentive compensation	(iii) Other reportable compensation				
(1) Sherrilyn A. Ifill	(i)	300554.	0.	35000.	0.	35570.	371124.	0.
President & Director-Couns	(ii)	0.	0.	0.	0.	0.	0.	0.
(2) Kevin C. Thomson	(i)	169287.	0.	0.	0.	5579.	174866.	0.
Chief Financial Officer	(ii)	0.	0.	0.	0.	0.	0.	0.
(3) Janai Nelson	(i)	206608.	0.	0.	0.	7831.	214439.	0.
Associate Director-Counsel	(ii)	0.	0.	0.	0.	0.	0.	0.
(4) Kevin M. Keenan	(i)	191521.	0.	0.	0.	2647.	194168.	0.
COO/General Counsel	(ii)	0.	0.	0.	0.	0.	0.	0.
(5) Christina Swarns	(i)	163194.	0.	0.	0.	26023.	189217.	0.
Director of Litigation	(ii)	0.	0.	0.	0.	0.	0.	0.
(6) Leslie Proll	(i)	152068.	0.	0.	0.	20723.	172791.	0.
Policy Director, DC Office	(ii)	0.	0.	0.	0.	0.	0.	0.
(7) Monica Madrazo	(i)	130756.	0.	0.	0.	23179.	153935.	0.
Director, HR & Administrat	(ii)	0.	0.	0.	0.	0.	0.	0.
(8) Jin Hee Lee	(i)	126305.	0.	0.	0.	25409.	151714.	0.
Deputy Director of Litigat	(ii)	0.	0.	0.	0.	0.	0.	0.
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							
	(i)							
	(ii)							

Part III Supplemental Information

Provide the information, explanation, or descriptions required for Part I, lines 1a, 1b, 3, 4a, 4b, 4c, 5a, 5b, 6a, 6b, 7, and 8, and for Part II. Also complete this part for any additional information.

Part I, Line 1a:

The President and Director-Counsel, Sherrilyn A. Ifill receives a housing allowance approved by the Compensation Board. This amount is included in her taxable income.

SCHEDULE M (Form 990)

Department of the Treasury
Internal Revenue Service

Noncash Contributions

- Complete if the organizations answered "Yes" on Form 990, Part IV, lines 29 or 30.
- Attach to Form 990.
- Information about Schedule M (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open To Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

Part I Types of Property

		(a) Check if applicable	(b) Number of contributions or items contributed	(c) Noncash contribution amounts reported on Form 990, Part VIII, line 1g	(d) Method of determining noncash contribution amounts
1	Art - Works of art				
2	Art - Historical treasures				
3	Art - Fractional interests				
4	Books and publications				
5	Clothing and household goods				
6	Cars and other vehicles				
7	Boats and planes				
8	Intellectual property				
9	Securities - Publicly traded	X	40	127618.	MV at close of busin
10	Securities - Closely held stock				
11	Securities - Partnership, LLC, or trust interests				
12	Securities - Miscellaneous				
13	Qualified conservation contribution - Historic structures				
14	Qualified conservation contribution - Other				
15	Real estate - Residential				
16	Real estate - Commercial				
17	Real estate - Other				
18	Collectibles				
19	Food inventory				
20	Drugs and medical supplies				
21	Taxidermy				
22	Historical artifacts				
23	Scientific specimens				
24	Archeological artifacts				
25	Other ▶ (Alcoholic Bev)	X	1	2000.	FMV
26	Other ▶ ( )				
27	Other ▶ ( )				
28	Other ▶ ( )				

29 Number of Forms 8283 received by the organization during the tax year for contributions for which the organization completed Form 8283, Part IV, Donee Acknowledgement 29

			Yes	No
30a	During the year, did the organization receive by contribution any property reported in Part I, lines 1 through 28, that it must hold for at least three years from the date of the initial contribution, and which is not required to be used for exempt purposes for the entire holding period?	30a		X
b	If "Yes," describe the arrangement in Part II.			
31	Does the organization have a gift acceptance policy that requires the review of any non-standard contributions?	31		X
32a	Does the organization hire or use third parties or related organizations to solicit, process, or sell noncash contributions?	32a		X
b	If "Yes," describe in Part II.			
33	If the organization did not report an amount in column (c) for a type of property for which column (a) is checked, describe in Part II.			

Part II **Supplemental Information.** Provide the information required by Part I, lines 30b, 32b, and 33, and whether the organization is reporting in Part I, column (b), the number of contributions, the number of items received, or a combination of both. Also complete this part for any additional information.

SCHEDULE O (Form 990 or 990-EZ)
Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ
Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.
▶ Attach to Form 990 or 990-EZ.
▶ Information about Schedule O (Form 990 or 990-EZ) and its instructions is at www.irs.gov/form990.

OMB No. 1545-0047
2015
Open to Public Inspection

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.
Employer identification number: 13-1655255

Form 990, Part I, Line 1, Description of Organization Mission:
education, voting rights, fair employment, capital punishment, administration of criminal justice, and to increase educational opportunities through scholarships.

Form 990, Part III, Line 1, Description of Organization Mission:
public interest through scholarship and internship programs. LDF pursues racial justice to move our nation toward a society that fulfills the promise of equality for all Americans.

Form 990, Part VI, Section B, line 11:
A draft of form 990 is prepared by the Finance Department and reviewed by the CFO. Copies are then sent to Mitchell & Titus LLP for their review and comments. Once this is done, the Board of Directors receives a copy of the 990. The final draft is then filed.

Form 990, Part VI, Section B, Line 12c:
The Conflict of Interest Policy provides that the Board members and Officers complete a questionnaire and forward the completed document to the Office of the President & Director-Counsel (CEO). The President reviews the completed questionnaires for completeness, responsiveness and potential conflicts of interest. The President seeks the advice and counsel of the General Counsel with respect to further steps necessary to apprise the Board of potential conflicts of interest relating to any disclosed potential conflicts of interest appearing on the questionnaires. In the event of recognized conflicts of interest, the President contacts the

Name of the organization NAACP LEGAL DEFENSE & EDUC. FUND, INC. | Employer identification number 13-1655255

involved board member to assure his or her compliance with recusal requirements prior to any action affected by such conflict of interest. The LDF By-laws reserve authority for the Board to review the questionnaires annually.

Form 990, Part VI, Section B, Line 15a:

LDF By-laws permit payment of reasonable compensation for services rendered by officers and employees of the corporation. Pursuant to this authority, the Board created a Compensation Committee with the express purpose to review, on behalf of the Board, the compensation of the President & Director-Counsel (CEO). The Compensation Committee retained independent experts to prepare a formal study and recommendation of the reasonableness of the President's compensation. The report was received by the Committee and a determination was made that the study supported the reasonableness of the President's compensation. The Compensation Committee reported the results of the study and its determination to the Board in an executive session held in late 2012, with a quorum present. After discussion and consensus reached, the Board concurred with the recommendation and took informal action to express its favorable opinion of the compensation, without a vote. A copy of the independent study was mailed to all board members. Since the study has been completed the President and Director-Counsel has not received an increase.

Form 990, Part VI, Line 17, List of States receiving copy of Form 990:

AZ,AR,CA,CO,CT,DC,FL,GA,IL,KS,KY,IN,ME,MD,MA,MI,MN,MS,MO,ND,NE,NH,NJ,NM,NY NC,NV,OH,OK,OR,PA,RI,SC,TN,UT,VA,WA,WV,WI,HI,TX

Form 990, Part VI, Section C, Line 18:

Name of the organization: NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number: 13-1655255

NAACP Legal Defense & Educational Fund, Inc. makes the 990 available on its website under the "About Us" tab.

Form 990, Part VI, Section C, Line 19:

LDF does not make its governance documents, conflict of interest policy and financial statements readily available upon request, but will also do so based upon a discretionary determination by its CFO and/or General Counsel of the requesting individual's or entity's "need to know" such information. For example, upon request, financial statements are routinely made available to vendors, potential funders and entities with which LDF will have common business and/or public interest relationships requiring demonstration of the organization's sound fiscal status.

Form 990, Part XI, line 9, Changes in Net Assets:

Charges for Pension Benefit other than net periodic pension cost -1010039.

Form 990, Part XII, Line 2c:

The process has not changed from prior years.

SCHEDULE R (Form 990)

Department of the Treasury
Internal Revenue Service

Related Organizations and Unrelated Partnerships

▶ Complete if the organization answered "Yes" on Form 990, Part IV, line 33, 34, 35b, 36, or 37.

▶ Attach to Form 990.

▶ Information about Schedule R (Form 990) and its instructions is at *www.irs.gov/form990.*

OMB No. 1545-0047

2015

Open to Public Inspection

Name of the organization

NAACP LEGAL DEFENSE & EDUC. FUND, INC.

Employer identification number

13-1655255

Part I **Identification of Disregarded Entities** Complete if the organization answered "Yes" on Form 990, Part IV, line 33.

(a) Name, address, and EIN (if applicable) of disregarded entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Total income	(e) End-of-year assets	(f) Direct controlling entity

Part II **Identification of Related Tax-Exempt Organizations** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related tax-exempt organizations during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Exempt Code section	(e) Public charity status (if section 501(c)(3))	(f) Direct controlling entity	(g) Section 512(b)(13) controlled entity? Yes	(g) No
EARL WARREN LEGAL TRAINING PROGRAM - 13-2695683, 40 Rector Street, 5th Floor, New York, NY 10006	PROVIDE SCHOLARSHIPS TO LAW STUDENTS	New York	501(c)(3)	7	NAACP Legal Defense and Educational Fund,	X	

See Part VII for Continuations

Part III **Identification of Related Organizations Taxable as a Partnership** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a partnership during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Predominant income (related, unrelated, excluded from tax under sections 512-514)	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V-UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) No	(k) Percentage ownership

Part IV **Identification of Related Organizations Taxable as a Corporation or Trust** Complete if the organization answered "Yes" on Form 990, Part IV, line 34 because it had one or more related organizations treated as a corporation or trust during the tax year.

(a) Name, address, and EIN of related organization	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Direct controlling entity	(e) Type of entity (C corp, S corp, or trust)	(f) Share of total income	(g) Share of end-of-year assets	(h) Percentage ownership	(i) Section 512(b)(13) controlled entity? Yes	(i) No

Part V **Transactions With Related Organizations** Complete if the organization answered "Yes" on Form 990, Part IV, line 34, 35b, or 36.

Note. Complete line 1 if any entity is listed in Parts II, III, or IV of this schedule.

			Yes	No
1	During the tax year, did the organization engage in any of the following transactions with one or more related organizations listed in Parts II-IV?			
a	Receipt of (i) interest, (ii) annuities, (iii) royalties, or (iv) rent from a controlled entity	1a		X
b	Gift, grant, or capital contribution to related organization(s)	1b		X
c	Gift, grant, or capital contribution from related organization(s)	1c		X
d	Loans or loan guarantees to or for related organization(s)	1d		X
e	Loans or loan guarantees by related organization(s)	1e		X
f	Dividends from related organization(s)	1f		X
g	Sale of assets to related organization(s)	1g		X
h	Purchase of assets from related organization(s)	1h		X
i	Exchange of assets with related organization(s)	1i		X
j	Lease of facilities, equipment, or other assets to related organization(s)	1j		X
k	Lease of facilities, equipment, or other assets from related organization(s)	1k		X
l	Performance of services or membership or fundraising solicitations for related organization(s)	1l		X
m	Performance of services or membership or fundraising solicitations by related organization(s)	1m		X
n	Sharing of facilities, equipment, mailing lists, or other assets with related organization(s)	1n	X	
o	Sharing of paid employees with related organization(s)	1o	X	
p	Reimbursement paid to related organization(s) for expenses	1p		X
q	Reimbursement paid by related organization(s) for expenses	1q	X	
r	Other transfer of cash or property to related organization(s)	1r		X
s	Other transfer of cash or property from related organization(s)	1s		X

2 If the answer to any of the above is "Yes," see the instructions for information on who must complete this line, including covered relationships and transaction thresholds.

	(a) Name of related organization	(b) Transaction type (a-s)	(c) Amount involved	(d) Method of determining amount involved
(1)	Earl Warren Legal Training Program	N	5700.	Past usage
(2)	Earl Warren Legal Training Program	O	30000.	Past usage
(3)	Earl Warren Legal Training Program	Q	35700.	FMV
(4)				
(5)				
(6)				

Part VI **Unrelated Organizations Taxable as a Partnership** Complete if the organization answered "Yes" on Form 990, Part IV, line 37.

Provide the following information for each entity taxed as a partnership through which the organization conducted more than five percent of its activities (measured by total assets or gross revenue) that was not a related organization. See instructions regarding exclusion for certain investment partnerships.

(a) Name, address, and EIN of entity	(b) Primary activity	(c) Legal domicile (state or foreign country)	(d) Predominant income (related, unrelated, excluded from tax under sections 512-514)	(e) Are all partners sec. 501(c)(3) orgs.? Yes	(e) No	(f) Share of total income	(g) Share of end-of-year assets	(h) Disproportionate allocations? Yes	(h) No	(i) Code V-UBI amount in box 20 of Schedule K-1 (Form 1065)	(j) General or managing partner? Yes	(j) NO	(k) Percentage ownership

Part VII Supplemental Information

Provide additional information for responses to questions on Schedule R (see instructions).

Part II, Identification of Related Tax-Exempt Organizations:

Name of Related Organization:

EARL WARREN LEGAL TRAINING PROGRAM

Direct Controlling Entity: NAACP Legal Defense and Educational Fund, Inc.

Department of Treasury
Internal Revenue Service
Ogden UT 84201

Notice	CP211A
Tax period	June 30, 2016
Notice date	November 7, 2016
Employer ID number	13-1655255
To contact us	Phone 1-877-829-5500 FAX 801-620-5555

019998.558014.142035.30131 1 AV 0.376 373

N A A C P LEGAL DEFENSE AND
EDUCATIONAL FUND INC
40 RECTOR STREET
NEW YORK NY 10006-1705

019998

Important information about your June 30, 2016 Form 990

We approved your Form 8868, Application for Extension of Time To File an Exempt Organization Return

We approved the Form 8868 for your June 30, 2016 Form 990.

Your new due date is February 15, 2017.

What you need to do

File your June 30, 2016 Form 990 by February 15, 2017. We encourage you to use electronic filing—the fastest and easiest way to file.

Visit www.irs.gov/charities to learn about approved e-File providers, what types of returns can be filed electronically, and whether you are required to file electronically.

Additional information

- Visit www.irs.gov/cp211a.
- For tax forms, instructions, and publications, visit www.irs.gov or call 1-800-TAX-FORM (1-800-829-3676).
- Keep this notice for your records.

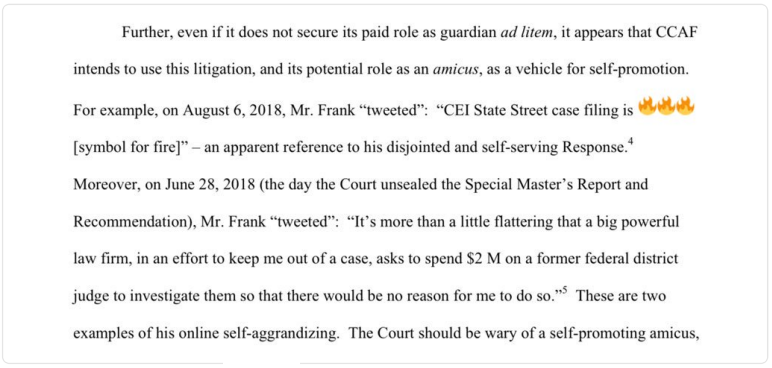
If you need assistance, please don't hesitate to contact us.

Frank Decl.

EXHIBIT C

(((tedfrank))) @tedfrank · Aug 8

Pour one out for the poor Choate associate who went to law school for 3 years so he can bill a client $500/hour to read all my tweets in case I say something about his client's shady practices, and will now stay up late tonight to do a supplemental filing about this tweet.



Further, even if it does not secure its paid role as guardian *ad litem*, it appears that CCAF intends to use this litigation, and its potential role as an *amicus*, as a vehicle for self-promotion. For example, on August 6, 2018, Mr. Frank "tweeted": "CEI State Street case filing is 🔥🔥🔥 [symbol for fire]" – an apparent reference to his disjointed and self-serving Response.[4] Moreover, on June 28, 2018 (the day the Court unsealed the Special Master's Report and Recommendation), Mr. Frank "tweeted": "It's more than a little flattering that a big powerful law firm, in an effort to keep me out of a case, asks to spend $2 M on a former federal district judge to investigate them so that there would be no reason for me to do so."[5] These are two examples of his online self-aggrandizing. The Court should be wary of a self-promoting amicus,

9 6 67

Jared Cook @jkimballcook · 9h

The bracketed emoji explanation comes off as pretentious, and putting tweet in quotation marks comes off as even more pretentious.

If you're going to be pretentious, your writing needs to be beyond reproach. Inconsistent italics on "amicus" doesn't help.

1 1

Jared Cook @jkimballcook · 9h

Also: "self-promotion," "self-serving," "self-aggrandizing," and "self-promoting" all in a single paragraph. Laying it on a bit thick, aren't we?

1 2

(((tedfrank)))
@tedfrank

Follow

Replying to @jkimballcook

Yes, would love to see what @legalwritingpro software thought of that, though, to be fair, they wrote that within a week, with only ~30 hours to adjust to our filing. I've had more embarrassing typos on briefs I filed 16 hours after starting writing them.

9:16 AM - 9 Aug 2018

2 Likes

2

Frank Decl.

EXHIBIT D

(((tedfrank)))
@tedfrank

Follow

CEI State Street case filing is 🔥 🔥 🔥

cei.org/sites/default/ ...

10:25 AM - 6 Aug 2018

1 Retweet **2** Likes

1 2

Frank Decl.

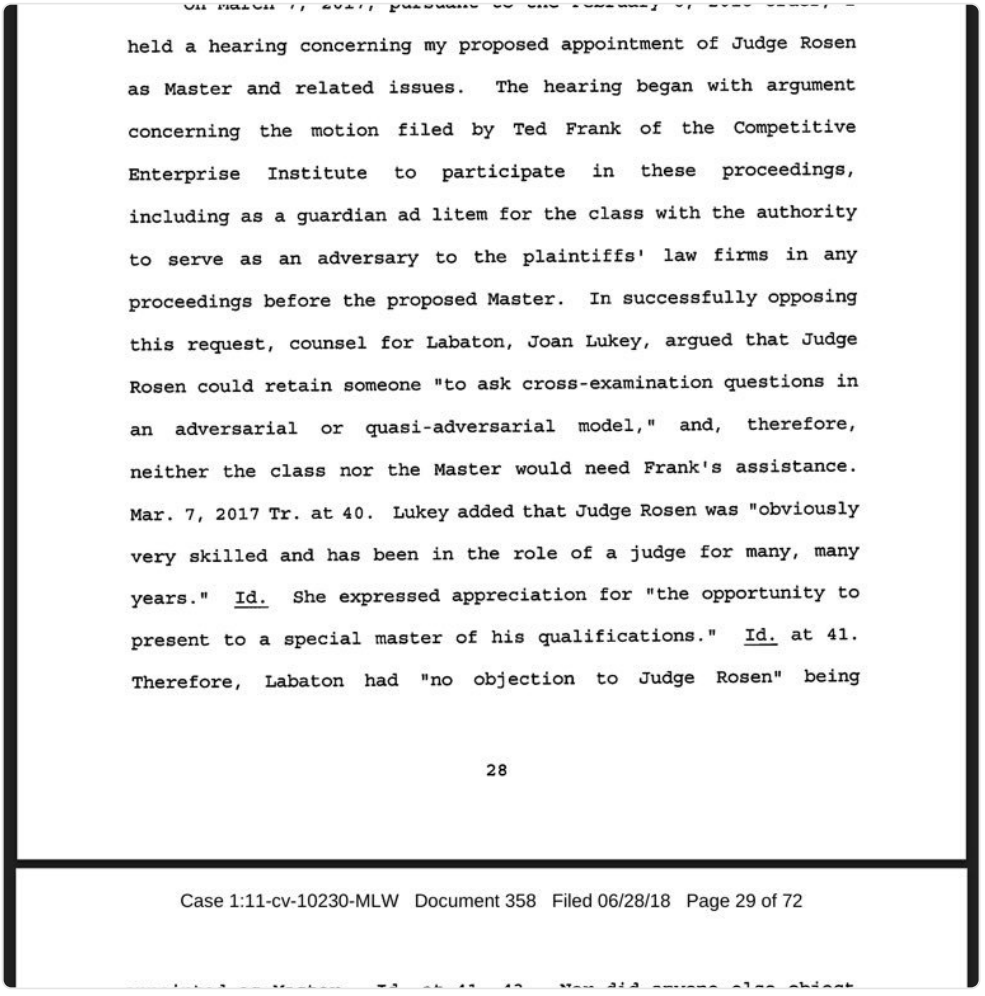
EXHIBIT E

(((tedfrank)))

@tedfrank

Follow

It's more than a little flattering that a big powerful law firm, in an effort to keep me out of a case, asks to spend $2M on a former federal district judge to investigate them so that there would be no reason for me to do so.



held a hearing concerning my proposed appointment of Judge Rosen as Master and related issues. The hearing began with argument concerning the motion filed by Ted Frank of the Competitive Enterprise Institute to participate in these proceedings, including as a guardian ad litem for the class with the authority to serve as an adversary to the plaintiffs' law firms in any proceedings before the proposed Master. In successfully opposing this request, counsel for Labaton, Joan Lukey, argued that Judge Rosen could retain someone "to ask cross-examination questions in an adversarial or quasi-adversarial model," and, therefore, neither the class nor the Master would need Frank's assistance. Mar. 7, 2017 Tr. at 40. Lukey added that Judge Rosen was "obviously very skilled and has been in the role of a judge for many, many years." Id. She expressed appreciation for "the opportunity to present to a special master of his qualifications." Id. at 41. Therefore, Labaton had "no objection to Judge Rosen" being

28

Case 1:11-cv-10230-MLW Document 358 Filed 06/28/18 Page 29 of 72

11:09 AM - 28 Jun 2018

32 Retweets **46** Likes

3 32 46

Frank Decl.

EXHIBIT F

Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton

After a special master tapped to review overbilling in a $75 million legal fee award in a securities class action settlement faulted Labaton Sucharow and its co-counsel, the firm fired off criticisms of its own.

By Scott Flaherty | June 29, 2018

A newly unsealed special master's report accuses the law firm Labaton Sucharow and its co-counsel of deliberately misleading the court about how it distributed the legal fees from a $300 million settlement with State Street Corp., prompting Labaton Sucharow to call the master's analysis "wholly unmoored" from legal precedent and professional conduct rules.

The report recommends Labaton Sucharow return as much as $8.1 million of its share of a $75 million fee award to the class, and says Garrett Bradley, lead partner at the Thornton Law Firm (https://tenlaw.com/) in Boston, should pay up to $1 million in fines.

Labaton Sucharow is one of three plaintiffs firms, along with Thornton and Lieff Cabraser Heimann & Bernstein, that served as lead counsel in a securities case against State Street that settled in 2016 for $300 million. U.S. District Judge Mark Wolf in Boston initially approved a plaintiffs legal fee award of $75 million in that case, but later appointed a special master (https://www.law.com/americanlawyer/almID/1202780879704/three-firms-admit-to-overbilling-agree-to-pay-2m-for-probe-of-bills/)—retired federal Judge Gerald Rosen—to review the fees (https://www.law.com/nationallawjournal/2018/06/19/how-a-fee-inquiry-led-to-hints-of-public-corruption-that-have-labaton-fighting/) after an article in The Boston Globe raised questions about potential double counting of hours.

The Globe had previously published an exposé detailing the political donation habits (http://www.law.com/sites/almstaff/2016/11/01/boston-investigation-puts-spotlight-on-law-firm-campaign-donations/) of lawyers at Thornton, and followed that with an examination (https://www.bostonglobe.com/metro/2016/12/17/lawyers-overstated-legal-costs-millions-state-street-case-opening-window-questionable-billing-practices/tmeeuAaEaa4Ki6VhBpQHQM/story.html) of the fee request in the State Street case.

In light of the Globe's reporting, the plaintiffs firms admitted in 2017 to double-counting some hours put in by "staff attorneys" who were paid on an hourly basis and worked temporarily for the three firms, primarily doing document review. Although they described those mistakes as inadvertent and argued that they shouldn't affect the $75 million fee award, the plaintiffs firms initially agreed to pay $2 million to fund the special master's investigation.

However, the probe ended up stretching out for about a year and costing nearly $4 million, according to court records. At the end of it, the special master issued a 377-page report that was kept confidential (https://www.law.com/nationallawjournal/2018/03/06/special-master-delays-high-stakes-report-on-75m-class-action-fee-request/) while the parties to the case proposed that sections be redacted.

The long-awaited public version of the report (https://static.reuters.com/resources/media/editorial/20180628/statestreetclassaction--rosenreport.pdf), penned by Rosen and released on Thursday, walks through a litany of conduct that the special master viewed as "questionable."

Rosen detailed the double-counting issues that the firms had already acknowledged. But he also trained his eye on money that Labaton Sucharow paid to a Texas-based lawyer named Damon Chargois, who helped the firm secure an Arkansas state teachers' pension fund as an institutional investor client. The Arkansas pension fund ultimately served as lead plaintiff in the State Street securities case.

According to Rosen's report, Labaton Sucharow paid Chargois—who had connections to the Arkansas pension fund, but didn't actually work on the State Street case—roughly $4.1 million under a referral agreement, but failed to disclose the payment to the court, other members of the settlement class and even its co-counsel in the case.

"By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the court in the dark and denied it the very information it needed in order to determine how much of the settlement funds should go to counsel, and which counsel, and how much," Rosen wrote.

Rosen also criticized Labaton for its responses to the special master investigation, itself. Instead of expressing remorse for any potential misconduct, Rosen wrote, the firm responded with a "phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting.

"Although Labaton certainly has a right to present its best case," the special master continued, "some acknowledgment of the potential harm this conduct has caused to class members, co-counsel and the court would have been not only appropriate, but expected."

Ultimately, after describing the mistakes made by the firms in how they counted hours ahead of their fee request and citing the undisclosed Chargois referral fee, Rosen recommended that the three firms pay back a little more than $4 million to the class to correct for the double-counting issues.

He also suggested imposing a sanction of $400,000 to $1 million against the Thornton firm, a reduction of the billing rates for contract lawyers that worked on the case—an amount totaling about $2.42 million that would also be returned to the class—and he recommended that Labaton Sucharow be required to pay $4.1 million in connection with the Chargois referral deal. Some $3.4 million of that would go to lawyers involved in a parallel Employee Retirement Income Security Act case, who were dragged into the special master investigation but weren't faulted for any conduct, while the remaining $700,000 would go back to the State Street investor class members.

But Rosen also concluded that, despite his concerns, no Labaton Sucharow lawyers should be recommended for professional discipline.

Labaton Sucharow quickly issued a stern response to the special master's findings. The firm, represented by Joan Lukey of Choate Hall & Stewart (https://www.law.com/law-firm-profile?id=58&name=Choate), filed a formal set of objections (https://www.documentcloud.org/documents/4567867-Labaton-State-Street-Objections-to-Special.html) in court on Thursday and released a lengthy statement Friday describing the master's report as "wholly unmoored from the relevant law and the actual facts.

"The master could have concluded his endless and costly investigation long ago once he verified that the double-counting was, indeed, inadvertent," the firm said. "Instead, he opted to go down the rabbit hole chasing the scent of an 'improper' referral payment because he believed it should have been disclosed to the court. In doing so, he elected not to act as a neutral fact-finder (as was his stated charge) but rather as an adversary seeking to impugn Labaton and customer class counsel for making a referral payment that was entirely legal, ethical and appropriate under Massachusetts law. Judge Rosen may be offended by a 'bare referral' fee—one where the referring attorney does not have to do any work in order to receive the referral fee, but it is the law in Massachusetts."

Labaton Sucharow also noted that Wolf, as presiding judge, would have to conduct a "de novo" review of the special master's recommendations before deciding on a course of action. Once that review happens, the firm said it fully expects that the judge would "reject the master's novel and unusual interpretations" of the issues.

Thornton also lodged objections (https://www.documentcloud.org/documents/4567868-Thorton-Law-State-Street-Objections-to-Special.html) on Thursday; Lieff Cabraser, which largely escaped the harshest criticism in Rosen's special master report, had not filed objections as of Friday afternoon, according to the court docket.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

DECLARATION OF GARY S. PEEPLES IN SUPPORT OF THE CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS*

DECLARATION OF GARY S. PEEPLES

I, Gary S. Peeples declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. I am an attorney with the law firm Burch, Porter & Johnson, PLLC ("Burch Porter"), and I am submitting this declaration in support of the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") and in support of CCAF's Amended Motion for Leave to Participate as Guardian *Ad Litem* for the Class.

3. Although I am not a law professor, I have long had an academic interest in class action litigation. That interest began in law school, where I worked as a research assistant for Professor Brian T. Fitzpatrick. Since law school, I have continued to pay close attention to class action litigation, including the work of CCAF. I have been following this case since early 2017.

4. In support of CCAF's motion to be appointed guardian *ad litem*, I have selected a team of attorneys from Burch Porter at different levels of seniority who would litigate on behalf of the class. The team consists of: (1) Joseph (Jef) Feibelman, (2) Jennifer S. Hagerman, (3) me (Gary S. Peeples), and (4) William Irvine, Jr. All four members of this team have outstanding credentials and litigation experience that make us well-suited to represent the class's interest in this case.

5. Jef Feibelman is a senior member of Burch Porter, with nearly fifty years' worth of complex business litigation experience. He graduated from Yale Law School in 1969 and after graduating clerked for the Honorable Bailey Brown of the U.S. District Court for the Western District of Tennessee. Mr. Feibelman has deep experience in numerous areas of commercial litigation because he is one of Burch Porter's most experienced trial attorneys. He also has significant experience serving as a mediator and/or arbitrator in complex commercial disputes. Mr. Feibelman's experience in class action litigation is extensive; he has represented plaintiffs, defendants, and served as a mediator in class action lawsuits. Moreover, Mr. Feibelman has significant experience as a special master. For example, he was appointed by a state chancery court to issue a report and recommendation concerning

a discovery dispute closely related to the underlying merits of a complaint alleging self-dealing by a trust. Mr. Feibelman has served as a special master in other cases as well. Mr. Feibelman's ordinary billing rate is $475/hour, which is paid by clients in the Memphis legal market.

6. Jennifer S. Hagerman is a Burch Porter member with almost 20 years' worth of experience in labor and employment law and complex commercial litigation. She graduated from Vanderbilt University Law School in 1999 and clerked for the Honorable Julia Smith Gibbons of the U.S. District Court for the Western District of Tennessee. After working for two years at Burch Porter, Ms. Hagerman returned to clerk for Judge Gibbons, who had been elevated to the United States Court of Appeals for the Sixth Circuit. Most of Ms. Hagerman's practice is in federal court, where she has significant experience defending clients against putative class and collective actions. Ms. Hagerman's ordinary billing rate is $375/hour, which is paid by clients in the Memphis legal market.

7. As for my own background and experience, I graduated from Vanderbilt University Law School in 2010 and clerked for the Honorable Jon P. McCalla of the U.S. District Court for the Western District of Tennessee. I then worked as an associate at Jones Day (Chicago) before clerking for the Honorable Ronald Lee Gilman of the United States Court of Appeals for the Sixth Circuit. I joined Burch Porter following my clerkship with Judge Gilman and my practice focuses on labor and employment law, complex commercial litigation, and appellate work. As a senior associate, my ordinary billing rate is $275/hour, which is paid by clients in the Memphis legal market.

8. Finally, William D. Irvine, Jr. is the most junior member of the proposed team. He graduated from Vanderbilt Law School in 2016 and clerked for the Honorable Sheryl H. Lipman of the U.S. District Court for the Western District of Tennessee. Mr. Irvine, who is a junior associate, litigates regularly in federal court and his ordinary billing rate is $200/hour, which is customary for the Memphis legal market.

9. Burch Porter is one of the oldest and most established law firms in Memphis. The firm has regularly been ranked as first in Memphis for bet-the-company litigation. Additionally, Burch

Porter has been engaged in socially significant litigation, including the representation of Dr. Martin Luther King, Jr. during the Memphis sanitation strike of 1968.

10. Although Burch Porter's rates are quite low when placed alongside those charged by East Coast law firms of comparable quality, Memphis is the poorest of any metropolitan statistical area according to a recent study by the University of Memphis, and attorney billing rates are accordingly lower than virtually all other large markets. Burch Porter's billing rates appear to be approximately *half* of what Class Counsel billed for comparable attorneys. *See* Dkts. 114-15 at 7; 114-17 at 8 (billing junior associates at $340-800/hour and senior partners at $925-1000/hour).

11. Attached as **Exhibit A** are true and correct copies of the attorney profiles available from the Burch Porter website as they appeared in August 2018.

I declare under penalty of perjury that that the foregoing is true and correct.

Executed on August 13, 2018, in Memphis, Tennessee.

Gary S. Peeples

EXHIBIT A TO DECLARATION

Burch, Porter & Johnson, PLLC
130 North Court Avenue | Memphis, TN 38103
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Jef Feibelman

Member

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PRACTICE AREAS

- Alternative Dispute Resolution, Mediation & Arbitration
- Commercial & Business Litigation
- Education, Charitable & Not-For-Profit Organizations
- Intellectual Property, Information Technology & Media Law
- Labor & Employment Law

Jef Feibelman engages principally in the litigation, arbitration or mediation of complex commercial matters. He has litigated substantial claims involving fraud, breach of contract, misappropriation of trade secrets, breach of non-compete and confidentiality agreements, shareholder and partnership disputes, and business dissolution and valuation controversies. He has also been retained or appointed in numerous matters of public interest involving state and federal constitutional law and statutory interpretation.

Mr. Feibelman regularly counsels boards and governing bodies of corporations on fiduciary issues, director/officer liability, and corporate governance/ethics. An experienced trial lawyer with extensive jury and bench trial experience in both federal and state courts, from 2014 to 2016 he was the Tennessee State Chair of the American College of Trial Lawyers. He, with Joel Porter, served as lead counsel for the plaintiffs in one of the largest commercial recoveries in state history. He serves as Special Master by court appointment on pending litigation and as a special litigation committee in corporate disputes. He also regularly serves as a mediator or arbitrator in complex commercial and business disputes.

In 2006, he was awarded the Lawyer's Lawyer Award by the Memphis Bar Association, its highest honor. In 2016, Mr. Feibelman was selected by the University of Memphis Cecil C. Humphreys School of Law Alumni Chapter as a Pillars of Excellence honoree. He is ranked by *Chambers USA: America's Leading Lawyers for Business* in Band 1 of General Commercial Litigators in Tennessee (2017), one of only 10 attorneys across the state of Tennessee to receive this ranking. Mr. Feibelman began his law practice in 1970 after a clerkship with Hon. Bailey Brown, U.S. District Court for the Western District of Tennessee. He joined the firm as a member in 1977 and served as its managing partner from 2007-2010.

EDUCATION

- Yale University (J.D., 1969)
- Yale University (B.A., 1966)

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Jef Feibelman

PROFESSIONAL ACTIVITIES AND HONORS

- Ranked by *Chambers USA: America's Leading Lawyers for Business* in Band 1 in the area of General Commercial Litigators in Tennessee (2014-2017)
- State Chair, American College of Trial Lawyers Tennessee State Committee (2014-2016)
- Named *Best Lawyers®* "Lawyer of the Year" for Litigation - Securities in the Memphis area (2016)
- Named *Best Lawyers®* "Lawyer of the Year" for Bet-the-Company Litigation in the Memphis area (2011, 2012, and 2013)
- Named *Best Lawyers®* "Lawyer of the Year" for Litigation - Banking & Finance in the Memphis area (2014)
- Named to *Best Lawyers in America®* list in the areas of Bet-the-Company Litigation, Commercial Litigation, Ethics and Professional Responsibility Law, Litigation - Banking & Finance, Litigation - Labor & Employment, Litigation - Securities (1995- 2018)
- Named to the "Top 100 Tennessee Super Lawyers" list (2007- 2017)
- Named to the "Top 50 Memphis Super Lawyers" list (2007- 2017)
- Named to the Mid-South Super Lawyers list in the area of Business Litigation (2007-2017)
- Recipient, Pillars of Excellence Award, University of Memphis Cecil C. Humphreys School of Law Alumni Chapter (2016)
- Recognized in the area of Litigation in *Chambers USA: America's Leading Lawyers for Business* (2009- present)
- Member, Business Court Advisory Commission (by appointment of Tennessee Supreme Court)
- Fellow, Memphis Bar Foundation and Tennessee Bar Foundation
- Member, Advisory Committee on Rules, U.S. Sixth Circuit Court of Appeals
- Member, Tennessee Judicial Selection Commission (Tennessee Bar Association Representative) (2002- 2008)
- Member, Board of Professional Responsibility Advisory Committee (Tennessee Supreme Court Appointment)
- Member, Federal Court Local Rules Revision Committee
- Director, Memphis Bar Association (1981-1983, 1992-1994)
- Adjunct Professor, University of Memphis Law School (1980-1988, 1992-1994)
- Adjunct Professor, Rhodes College (1973-1974, 1977-1978)
- Law Clerk to U.S. District Judge Bailey Brown (1969-1970)

PUBLICATIONS AND PRESENTATIONS OF NOTE

- Presenter, "Developments in Ethics," Memphis Bar Association (2014)
- Presenter, Charter School Leadership Institute, Nashville, Tennessee (2006)
- Presenter, Tennessee Bar Association Young Lawyers, Ethics Seminar (June 2006)

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Jef Feibelman

PUBLICATIONS AND PRESENTATIONS OF NOTE (cont'd)

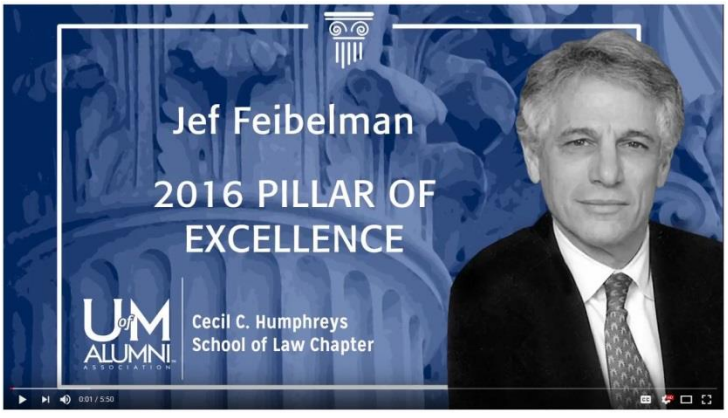
- Presenter, "Practice and Procedure Before the Board of Professional Responsibility," Memphis Bar Association (February 2006)
- Presenter, "Mediation," Memphis Bar Association (December 2005)
- Presenter, "Public Trust & Confidence in the Legal System," Memphis Bar Association (November 2005)
- Presenter, "Fun with Ethics - An Oxymoron," Memphis Bar Association (September 2005)
- Presenter with U.S. Magistrate Judge Tu Pham, Memphis Bar Association Young Leaders Institute (2005)
- Presenter, Seminar on Legal Ethics, U.S. Department of Justice Office of Legal Education (October 2004)
- Presenter, "21st Century Law, Technology & Ethics," Memphis Bar Association (October 2004 and October 2012)
- Presenter, Federal Practice Seminar, Memphis Bar Association (September 2004)
- Presenter, American Inns of Court, Leo Bearman, Sr. Inn, Board of Professional Responsibility (September 2004)
- Presenter, "Labor & Employment Law Section Annual Review," Memphis Bar Association (December 2003)

ADMITTED TO PRACTICE

- Tennessee, 1969

BAR ASSOCIATIONS

- American Bar Association
- Tennessee Bar Association
- Memphis Bar Association



To view the video presented by the University of Memphis Cecil C. Humphreys School of Law Alumni Chapter at the 2016 Pillar of Excellence Award ceremony, please go to:

https://www.youtube.com/watch?v=N_UsjxbHls4&feature=youtu.be

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Jennifer S. Hagerman

Member

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PRACTICE AREAS

- Commercial & Business Litigation
- Healthcare Law
- Labor & Employment Law
- Products Liability

Jennifer Hagerman's practice focuses on employment litigation and complex commercial litigation, with a particular emphasis on matters pending in federal court. She has represented clients in cases involving employment discrimination, retaliation, restrictive covenants, wage and hour class actions, civil rights, healthcare, education and numerous areas of commercial law. She also advises clients on a variety of employment matters including non-solicitation and non-competition agreements, employee handbooks, and employee classification under the FLSA. Following law school, Ms. Hagerman served as a judicial clerk to the Honorable Julia S. Gibbons, former Judge of the United States District Court for the Western District of Tennessee. Ms. Hagerman then joined the firm for two years before returning to serve as a judicial clerk to Judge Gibbons upon Judge Gibbons' elevation to the United States Court of Appeals for the Sixth Circuit. She is a Past President of the Association of Women Attorneys Memphis Chapter and a Past Chairman of the Board of Directors of the Center City Commission, now the Downtown Memphis Commission. Ms. Hagerman is also involved in a variety of legal and community organizations, including serving as a member of the Board of Directors of the Memphis Bar Association.

EDUCATION

- Vanderbilt University (J.D., 1999); Managing Editor, *Vanderbilt Law Review (1998-1999); Vanderbilt Law Review* Note Award *(1999)*
- Southern Methodist University (B.B.A., 1995), *magna cum laude*

PROFESSIONAL ACTIVITIES AND HONORS

- Named to the *Best Lawyers in America®* list in the areas of Commercial Litigation, Employment Law - Management, Litigation - Labor & Employment, and Litigation - Land Use & Zoning (2015-2017)
- Member, Board of Directors, Memphis Bar Association (2015- 2017)
- Named to the Mid-South Super Lawyers list in the area of Employment and Labor (2013-2016)
- Named to the Mid-South Rising Stars list in the area of Employment and Labor (2008 - 2012)
- Tennessee Bar Foundation Fellow (Elected 2010)
- Memphis Bar Foundation Fellow (Elected 2009)

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Jennifer S. Hagerman

PROFESSIONAL ACTIVITIES AND HONORS (cont'd)

- Association of Women Attorneys Memphis Chapter (Vice President, 2005-2007; Incoming President, 2008; President, 2009; Immediate Past President, 2010)
- Top 40 Under 40, *Memphis Business Journal* (2007)
- Adjunct Professor, University of Memphis School of Law (2004 - 2006)
- Tennessee Lawyers Association for Women (Recording Secretary, 2003 & 2004)
- Law Clerk to the Honorable Julia Smith Gibbons, United States Court of Appeals for the Sixth Circuit (2002 - 2003)
- Law Clerk to the Honorable Julia Smith Gibbons, United States District Court for the Western District of Tennessee (1999 - 2000)

MOST RECENT PUBLICATIONS AND PRESENTATIONS OF NOTE

- Presenter, "Employment Law Wrap Up," Burch, Porter & Johnson Client Seminar (December 2016)
- Presenter, "Hot Topics in Employment Law 2016," Memphis Bar Association (December 2016)
- Author, "Calculating and Counting FMLA Leave: An Increasingly Complex Task," HR Professional Magazine (October 2016)
- Presenter, "Controlling Unemployment Costs," National Business Institute Seminar (September 2016)
- Presenter, "Ethics and Social Media," Memphis Bar Association, Bench, Bar and Boardroom Conference (September 2016)
- Author, "Wage and Hour Issues Continue for Hospitality Industry," HR Professional Magazine (November 2015)
- Presenter, "Proposed FLSA Regulations: What You Need to Know NOW," Burch, Porter & Johnson Client Seminar (September 2015)
- Author, "Sixth Circuit Provides Useful Guidance to Employers on Attendance and ADA Accommodation," HR Professionals Magazine (July 2015)
- Presenter, "Navigating the Minefields of Social Media in Court," Memphis Bar Association, Bench, Bar and Boardroom Conference (May 2015)
- *A complete list is posted on www.bpjlaw.com/attorneys/hagerman-jennifer-s/*

ADMITTED TO PRACTICE

- Tennessee, 1999
- United States District Court for the Western District of Tennessee, 2000
- United States Court of Appeals for the Sixth Circuit, 2002

BAR ASSOCIATIONS

- Federal Bar Association
- American Bar Association
- Tennessee Bar Association
- Memphis Bar Association
- Association for Women Attorneys

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PRACTICE AREAS

- Commercial & Business Litigation
- Labor & Employment Law

Gary Peeples' practice focuses on civil litigation, including labor and employment law. After graduating from Vanderbilt University Law School in 2010, he served as a law clerk to the Honorable Jon P. McCalla of the United States District Court for the Western District of Tennessee. He then worked as an associate in the labor and employment group at a global law firm. Mr. Peeples subsequently served as a law clerk to the Honorable Ronald Lee Gilman of the United States Court of Appeals for the Sixth Circuit. He joined Burch, Porter & Johnson as an Associate in 2014.

Mr. Peeples' practice includes defending companies large and small in state and federal court and in administrative matters. He has experience in all phases of litigation, including pre-suit investigations, discovery (including taking and defending depositions), motions practice, trials, post-trial motions, and appeals. Another significant component of his practice involves advising employers on how to comply with federal and state law.

Outside of work, Mr. Peeples enjoys playing basketball and reading non-fiction. He considers Memphis to be his adopted home.

EDUCATION

- Vanderbilt University (J.D., 2010); Order of the Coif; Articles Editor, *Vanderbilt Law Review*
- University of Illinois (M.S., 2006)
- University of Illinois (B.A., 2005)

PROFESSIONAL ACTIVITIES AND HONORS

- Member, Tennessee Bar Association Leadership Law Class of 2018
- Member, Leo Bearman Sr. American Inn of Court
- Named a Super Lawyer Rising Star (2016-2017)
- Law Clerk to the Honorable Ronald Lee Gilman, United States Court of Appeals for the Sixth Circuit
- Law Clerk to the Honorable Jon P. McCalla, United States District Court for the Western District of Tennessee
- Elected to the Order of the Coif (top 10% of law school class)
- Articles Editor, *Vanderbilt Law Review*
- Vanderbilt Scholastic Excellence Awards (top grade in class) in Contracts, Criminal Law, Intellectual Property, Property, and Regulatory State

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Gary S. Peeples

PUBLICATIONS AND PRESENTATIONS OF NOTE

- Author, Mental Health in the Workplace – Is There an Effective Prescription for Employers?," HR Professionals Magazine, (March 2018)
- Author, "Judge Richard Posner's Retirement and His Influence on Labor and Employment Law," HR Professionals Magazine, (October 2017)
- Author, "The Role of Human Resources in Mergers and Acquisitions," HR Professionals Magazine, (June 2017)
- Author, "Google V. Government: "Don't Be Evil" Meets "Give Us Your Employee Data" HR Professionals Magazine, (February 2017)
- Author, "House of Representatives Votes to Delay the Implementation of the Department of Labor's New Overtime Rule," Burch, Porter & Johnson Client Alert, (October 2016)
- Author, "Warning! Millennial Recruiting May Lead to Disparate-Impact Claims Under the ADEA," HR Professionals Magazine, (June 2016)
- Author, "New Law Gives Employers an Easier Path in to Federal Court in Trade Secrets Cases," Burch, Porter & Johnson Client Alert, (May 2016)
- Author, "Short-Term Workers, Long-Term Effects," HR Professionals Magazine, (December 2015)
- Panelist, Greater Memphis Chamber 2015 HR Legal Summit, "Hot Topics: The Employment Laws You Need to Know Now" segment, October 2015
- Author, "Disparate Impact Discrimination 101," HR Professionals Magazine (January 2015)
- Author, "Tennessee Legislative Update: Significant Changes Favor Employers," HR Professionals Magazine (August 2014)

ADMITTED TO PRACTICE

- Tennessee, 2013
- United States Court of Appeals for the Sixth Circuit, 2011
- United States District Court for the Western District of Tennessee, 2011
- Illinois, 2010 (currently on inactive status)
- United States District Court for the Northern District of Illinois, 2012

BAR ASSOCIATIONS

- Illinois Bar Association
- American Bar Association
- Memphis Bar Association

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Practice Areas

Intellectual Property, Information Technology & Media Law »
Labor & Employment Law »

Products Liability »

Admitted to Practice

Tennessee, 2017

United States District Court for the Western District of Tennessee, 2017

Bar Admissions

Memphis Bar Association

Tennessee Bar Association

Federal Bar Association

American Bar Association

William D. Irvine Jr.

Associate

William Irvine is a native Memphian who received his bachelor's degree from the University of Tennessee in Knoxville and his juris doctor from Vanderbilt Law School. After completing his education, Mr. Irvine came back to Memphis to pursue his career where he felt he could be beneficial to his community. His practice focuses on Intellectual Property, Information Technology & Media Law, Labor & Employment Law, and Products Liability.

Mr. Irvine enjoys cooking and cheering on our Memphis Grizzlies. Though he is a Memphis native, Mr. Irvine has enjoyed living in other parts of the world, including Los Angeles, California and Seoul, South Korea, where he was a high school teacher and swim coach.

Education

- Vanderbilt University (J.D., 2016)
- University of Tennessee (B.A. 2010), *magna cum laude*

Professional Honors & Activities

- Law Clerk to the Honorable Sheryl H. Lipman, United States District Court for the Western District of Tennessee
- Vanderbilt University Law School Moot Court Board (2015-2016)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

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

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

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

I. BACKGROUND.

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

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

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

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

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

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

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

[3] Prof. Gillers testified that his sole objection to referral fees when writing his article was the fact that lawyers sometimes paid and received them without client consent. Supp. Ex. B (Gillers 7/12 Dep.) at 487:22-488:3. However, his published words speak for themselves, and contradict his non-credible testimony.

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

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

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

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

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

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

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

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

that Lieff and Thornton "were not privy to the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which ATRS is a co-lead counsel." R&R Ex. 232 at 42. And, during his March deposition, Prof. Gillers still attempted to defend his position that Lieff shared responsibility for the nondisclosure. Supp. Ex. C (Gillers 3/20/18 Dep.) at 227:4-228:13. Yet, after observing that Lieff's argument "had persuasive force for the Special Master," he has now reversed course. *See* Supp. Ex. B (Gillers 7/12/18 Dep.) at 540:1-5.[6]

Even after exploring Prof. Gillers' new opinions during his July deposition, his about-face remains inexplicable (if anything, it is now harder to understand). According to Prof. Gillers, the knowledge that the Chargois payment was for a referral fee – as opposed to acting as client-facing local counsel – was the dispositive factor in determining which firms needed to disclose the payment to the Court. *See*, *e.g.*, *id.* at 526:21-527:11 (testifying that the "important" hypothetical fact that led to his reversal was that "Lieff Cabraser [had] a reasonable and good faith belief based on what it knows that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving.").[7] Therefore, in his view, if the other

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[6] Prof. Gillers explained that the impetus for the change in his opinion was a hypothetical posed to him during his March 20, 2018 deposition. He testified that the Master subsequently asked him to address "the extent to which, if at all, [his] views would alter if [he] assumed as true facts contained in [Lieff's counsel's] hypothetical." Supp. Ex. B (Gillers 7/12/18 Dep.) at 515:7-13. Despite testifying that he altered his opinion based on questioning at his deposition, his Supplemental Report ostensibly relies on a substantially revised statement of facts drafted by counsel for the Master and contained in his Supplemental Report, not the hypothetical posed during his deposition. *See* R&R Ex. 233 at 1-61.

[7] Prof. Gillers also testified that another assumed fact bearing on his new opinion was that Lieff believed Chargois received a fee "with the express knowledge and [written] approval of the client." Supp. Ex. B (Gillers 7/12/18 Dep.) at 530:14-19. This is contradicted by Prof. Gillers' Original Report, in which he stated that Labaton, Thornton, and Lieff were required to disclose the Chargois payment to the Court regardless of "whether or not the Chargois Arrangement complies with Rule 1.5(e)." R&R Ex. 232 at 74. Similarly, in his most recent deposition, Prof. Gillers testified that "if I were to assume that the division of fee agreement with Chargois was valid under Massachusetts rules at the time, that fact is irrelevant to me to the duty to disclose . . . ." Supp. Ex. B (Gillers 7/12/18 Dep.) at 554:8-15. Prof. Gillers did not explain this discrepancy. However, it is clear that the hypothetical fact that the Chargois Agreement complied with MRPC 1.5(e) did not factor into Prof. Gillers' new opinion.

Customer Class Counsel knew that Chargois did not work on the case, then they too would have been required to disclose the payment to the Court. *Id*. at 549:8-11.

Prof. Gillers proffered a vague and subjective standard to justify his selective blaming of Labaton. He stated that "an exercise of judgment on a case-by-case basis" is necessary to determine whether a fee agreement must be disclosed. *Id.* at 612:14-22. As "criteria" for this judgment, Prof. Gillers identified: (1) the amount of money paid as part of the fee agreement; (2) what was done to earn that money; and (3) "whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem that information relevant to the judge's decision." *Id.* at 613:15-24. According to Prof. Gillers, if Chargois were paid somewhat less (how much less is unclear), or if he did more work (how much work is also unclear), then disclosure would not have been required. *Id.* at 551:16-552:5, 641:8-17. He did not (and cannot) identify any legal authority supporting his "criteria."

II. ARGUMENT.

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

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

aware of the principles set forth in his random set of snippets [of case law], yet chose to have Rule 23(h) cross-reference Rule 54(d). In other words, the class action law experts who wrote the rule after study and public input balanced the principles at stake by authorizing class counsel to keep fee-sharing arrangements confidential absent an explicit judicial order to the contrary.").

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

Disturbingly, the Master incorporates Prof. Gillers' arbitrary "analysis." R&R at 303 ("Case law, much of which is quoted in greater detail by Professor Gillers (pp. 79-83) – including cases from within the District of Massachusetts – recognizes the Court's responsibility to protect the class and the class's interests, and the Court's reliance on counsel to be forthcoming with the information needed in order to do so."). Like Prof. Gillers, the Master describes a limitless interpretation of counsels' disclosure obligations: "[w]e agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court with *all available information* when seeking a fee award in class action cases." R&R at 304 n.248 (emphasis added). And, also like Prof. Gillers, the Master does not bother applying his own standard, instead choosing to focus on Labaton alone. See *id.* at 304.

For the avoidance of any doubt, the Court should reject Prof. Gillers' analysis of federal law. But his refusal to apply his own purported standard speaks volumes about the weakness of his opinions. There is simply no legal basis for singling out Labaton. The transparent factor motivating Prof. Gillers' (and the Master's) conclusions is their strong aversion to referral fees. *See, e.g.*, Supp. Ex. B (Gillers 7/12/18 Dep.) at 560:4-7 ("I don't think Judge Wolf might have said that a man who did no work under the [] assumed valid division of fee agreement . . . is entitled to any money."). As a matter of law and fairness, the Court must reject their unprincipled conclusions.

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

Perhaps recognizing that his argument regarding federal law is meritless – and perhaps cognizant that the Master needs support for his decision to single out Labaton – Prof. Gillers' new opinion pivots away from his prior "all the facts" approach, and toward a more malleable standard of "materiality." *See id.* at 612:4-13 ("[I]t's a question of materiality or judgment. I don't think there's a formula for identifying a number. Here I was addressing a particular fee of a particular person for a particular service. And I think this is something you look at on a case-by-case basis."). He describes the obligation to disclose fee-sharing agreements as a "judgment call." *Id*. at 550:23-551:7.

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

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

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

Against that backdrop, finding a violation of MRPC 3.3(a) is wholly unjustified, because such a violation requires bad faith – i.e., it "would have to be based on Labaton *knowingly* engaging in impermissible conduct." *See* R&R Ex. 241 (Joy Rep.) at 43. It cannot be said that Labaton "knowingly" engaged in impermissible conduct when even the *former president of the Massachusetts Bar Association* does not believe Labaton's conduct was improper. *See, e.g.*, R&R Ex. 252 (Sarrouf 3/21 Dep.) at 35:23-36:7. Labaton's attorneys acted just as reasonable Massachusetts practitioners could have, and therefore, the Court should reject Prof. Gillers' (and the Master's) conclusion that they made a bad-faith omission sufficient to trigger MRPC 3.3(a). *See, e.g*., *In re Discipline of an Atty.*, 442 Mass. 660, 668 (2004) (citing with approval *In re Ruffalo*, 390 U.S. 544, 554-556 (1968) (White, J., concurring)) (discipline inappropriate "on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct"); R&R Ex. 239 (Sarrouf Decl.) at 11 ("Referral fees, or origination fees, are very common in connection with plaintiffs-side litigation work. If the payment does not impact the total amount of a fee paid or awarded (which I understand to have been the case here), and if the court does not request this detail, in my experience referral or origination fee arrangements are not normally disclosed to the court.").

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

("[T]he class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill."). Moreover, as a matter of historical fact, judges in this District do not order disclosure of fee-sharing agreements when reviewing class action settlements – even though referral fees are permissible and frequently paid in the Commonwealth. *See* R&R Ex. 234 (Rubenstein Rep.) at 6.[8] Finally, in this specific case, this Court did not ask how fees were being shared among Customer Class Counsel. R&R Ex. 78 (11/2/16 Hr'g Tr.) at 22-38. Prof. Gillers' (invented) test asks "whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem [the] information relevant to the judge's decision." Viewing the above facts in their totality, an entirely reasonable answer is "no."

Third, given the above, finding that Labaton violated MRPC 3.3 would offend due process. The Supreme Judicial Court has explained that "[d]ue process requires that attorneys, like anyone else, not be subject to laws and rules of potential random application or unclear meaning." *In re Discipline of an Atty.*, 442 Mass. at 668. There are, respectfully, several layers of "random" decision-making in the conclusions reached by the Master and Prof. Gillers. The finding that the Chargois Agreement needed to be disclosed in this case – when no judge in this District had ordered disclosure in the previous 127 class action settlements – is random. *See* R&R Ex. 234 (Rubenstein Rep.) at 6. Similarly, the conclusion that Labaton was required to disclose the Chargois payment, while Lieff and Thornton were not (based on Prof. Gillers' subjective "judgment call"), is also random. *See, e.g.*, R&R Ex. 233 at 86-87 ("My opinion rests

[8] Prof. Gillers argues that the alleged omission of Chargois from the fee petition constitutes a misrepresentation. Supp. Ex. B (Gillers 7/12/18 Dep.) at 614:18-617:20. He ignores Prof. Rubenstein's explanation that there are "a variety of situations in which the identities of counsel sharing in a fee award are routinely unknown to the class action court." R&R Ex. 234 (Rubenstein Rep.) at 11.

on the extraordinary nature of Chargois' compensation . . . . It is not necessary to conclude that class counsel must inform the Court, or the class, of every lawyer who seeks a fee in a matter for the work he or she performed."). Prof. Gillers is not applying a rule; he is making an ad hoc judgment against Labaton.

Prof. Gillers' proposed standard also flouts the SJC's admonition against rules of "unclear meaning." *See In re Discipline of an Atty.*, 442 Mass. at 668. He explains that the nature of the work performed is relevant, but he cannot describe, even generally, how much work would obviate the disclosure obligation. Supp. Ex. B (Gillers 7/12/18 Dep.) at 552:1-5 ("Q: But you're unable to quantify what that level [of work] is . . . A: Correct."). Likewise, he states that the amount of the payment is also a factor, but he does not offer any specifics (other than explaining that a four-figure payment is not enough). *Id.* at 612:4-6 ("I don't think there's a formula for identifying a number."). In fact, the standard that he describes is so unclear that he cannot even respond to simple hypotheticals. *Id.* at 643:11-17 ("This is not an appropriate end-of-day circumstance to play around with hypotheticals. There are variables, and I've given you my answer to one hypothetical. And if those facts are changed, I'd have to think about whether and to what extent my answer would differ."). If Prof. Gillers is unable to apply his own standard, it is absurd to expect that practicing attorneys could – and unjust to punish them after-the-fact if they do not.

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

Prof. Gillers' Supplemental Report adds a brand-new finding that Labaton violated Rule 11, despite his concession that he is not a "Rule 11 expert." *Id.* at 580:21-22. He included a Rule 11 opinion "purely" at the request of the Master and his counsel. *Id.* at 579:10-20. However, despite adding a new opinion, Prof. Gillers offers almost no analysis, and instead retreads his argument regarding MRPC 3.3(a). R&R Ex. 233 at 96 ("My reasons for concluding

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

The absence of a Rule 11 finding against Labaton in Prof. Gillers' Original Report is telling. Prof. Gillers applied Rule 11 in his analysis of a different firm's conduct, but did not mention Rule 11 in connection with Labaton. R&R Ex. 232 at 84. Now, only after the Master prodded him, Prof. Gillers has added such an opinion. *See* Supp. Ex. B (Gillers 7/12/18 Dep.) at 579:10-20. One obvious explanation for his initial reticence is that the First Circuit has never found a Rule 11 violation based on an omission, leaving Prof. Gillers with a single out-of-Circuit appellate decision supporting his view. *See* R&R Ex. 233 at 95. Prof. Gillers conceded that First Circuit case law does not support his opinion. Supp. Ex. B (Gillers 7/12/18 Dep.) at 581:19-23 ("Q: You have no basis in the law, no case of any kind in the First Circuit to support an opinion that an omission constitutes a Rule 11 violation, correct? A: Yes."); *see also* R&R at 317 "[T]here is no First Circuit case, either appellate or district, holding that a material omission warrants the imposition of Rule 11 sanctions.").

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

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

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

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

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

[9] As Labaton explained in its Objections, Prof. Gillers' opinion that any of Customer Class Counsel had a duty to disclose the Chargois payment to the class is incorrect. ECF 359 at 70-76; *see also* Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 11 ("Labaton's ethical obligations to keep class members reasonably informed as to the proposed settlement are shaped by its legal obligations under the Rules of Civil Procedure, with which the Special Master found as a matter of law Labaton had met."); R&R Ex.

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

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

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

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

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227 (Joy Dep.) at 154:9-14 (explaining that Labaton had a fiduciary duty to the class, "but not one that encompassed disclosing the fee-sharing arrangement"); Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 11 (the "Special Master's finding that Mass. R. Prof. C. 1.2 and 1.4 imposed additional ethical disclosure obligations on Labaton when there were no legal obligations, and no ethical guidance in Massachusetts reaching a similar conclusion, is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority.").

behalf of ATRS, retroactively ratified the payment to Chargois. *See* R&R Ex. 130; *see also Saggese,* 445 Mass. at 442 ("Ratification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate."); Wolosz Decl. (ECF 362) Ex. S (Joy 6/28/18 Decl.) at 7 ("Even if the Court were to adopt the Special Master's unique interpretation of Mass. R. Prof. C. 1.5(e) as it existed at the time of the retention agreement between Labaton and ATRS, Hopkins' ratification would have been adequate consent to the fee sharing agreement . . . ."). During his March deposition, Prof. Gillers – bound by controlling precedent – testified that this ratification was effective consent to the Chargois Agreement on behalf of ATRS. R&R Ex. 253 at 106:18-22 ("Q: Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral . . . ? A: On behalf of Arkansas alone."). During his July deposition, Prof. Gillers reconfirmed his view. Supp. Ex. B (Gillers 7/12/18 Dep.) at 566:12-24.

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

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

At every turn, the Master has emphasized that Prof. Gillers' opinions strongly influenced his own conclusions. *See, e.g.*, Supp. Ex. D (Gillers 3/21 Dep.) at 440:6-19 ("I intend to rely upon Professor Gillers' opinions. I may not adopt all of 'em, but I intend to rely upon them in

one way or another."); ECF 216-1 ("[I]n light of Professor Gillers' report, and its potential implications for the firms and the practicing bar in general, I believe that it is important that the firms be allowed the fullest opportunity to respond."); Master's July 3, 2018 Response to Customer Class Counsels' Motion for Accounting, and for Clarification that the Master's Role has Concluded at 10 ("Gillers played a valuable role in advising the Special Master on several specialized and underdeveloped areas of legal ethics . . . [his opinions] were highly informative to the Master's investigative process."); *see generally* R&R (citing Gillers' Supplemental Report 20 times). In fact, in at least one portion of his Report and Recommendations, the Master appears to have largely duplicated a paragraph written by Prof. Gillers. *Compare* R&R at 323 (discussing *United States v. Shaffer Equipment*) *and* R&R Ex. 233 at 89 (same).

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

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

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

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

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

Keller Rohrback claims that, even though Mr. Sarko dodged questions from the Department of Labor ("DOL") about allocation of fees, he would have taken a completely different approach if he had known that Customer Class Counsel were going to pay a portion of their share to an attorney who did not work on the case. Keller Exception at 2-4. In making this claim, Keller Rohrback (i) admits that Mr. Sarko is not qualified to speak to the ethical requirements for Massachusetts, New York, Texas or Arkansas (*id.* at 4, n.1), and (ii) offers no authority to support the notion that Chargois' lack of work on the case triggered a disclosure obligation. *Id.* at 3-4 and n.1. Zuckerman Spaeder's submission contains no more substance. That firm claims that it would have filed a separate fee petition if it was aware of the Chargois payment, because the payment raises "legal and ethical questions." Zuckerman Exception at 4. Yet, Zuckerman Spaeder cites no statute, rule, case or any other authority identifying or supporting the existence of such "questions." *Id.*[11] With all due respect, the allegations being directed at Labaton and Customer Class Counsel regarding the Chargois payment are far too serious to be based solely on self-serving, *ipse dixit* offered by law firms that are asking the Court to order Labaton to pay them $3.4 million.

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

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

ERISA Counsel's reasonable fee should be calculated against that settlement amount. *Id.* at 2; *see also id.* at 4 (claiming that ERISA Counsel would have sought "a reasonable attorney's fee from the $60 million common fund produced for the ERISA class members"). These statements ignore the fact that, although all parties negotiated the overall $300 million settlement, it was the DOL that pushed for the ERISA plans to receive an "exceptional premium." *See id.* at 3 n.1. The DOL – and not ERISA Counsel – required as a condition of settlement that the ERISA plan plaintiffs receive an increased allocation and that the fees deducted from that allocation be capped at $10.9 million. *See* Supp. Ex. E (Goldsmith 9/20/17 Dep.) at 96:8-99:12; 106:19-107:22; 253:16-254:18. There is no basis for ERISA Counsel's suggestion now that they were solely responsible for the allocation to ERISA plans, or that the Court should perform a new, standalone fee analysis as if that were a separate settlement.[12]

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

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

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

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

IV. CONCLUSION.

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

Dated: July 26, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 14, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

I, Stuart M. Glass, on oath, depose and say as follows:

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

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

3. Attached hereto as Exhibit A is a true and correct copy of a June 13, 1979 article authored by Prof. Stephen Gillers published in the New York Times, titled "Lawyers: Paid for Doing Nothing?".

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

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

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

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

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

/s/ Stuart M. Glass
Stuart M. Glass

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 14, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A

ARCHIVES | 1979

Lawyers: Paid for Doing Nothing?

By STEPHEN GILLERS JUNE 13, 1979

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit B

Volume: 3

Pages: 457-686

Exhibits: 25-30

JAMS

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

In Re: STATE STREET ATTORNEYS FEES

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

DEPOSITION of PROFESSOR STEPHEN GILLERS

July 12, 2018, 10:04 a.m. - 4:22 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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about what, if any, discipline should be imposed, even if my reading of the rule is correct. I've talked about my reading of the rule back in March.
I don't know what the Massachusetts disciplinary authorities would do on these facts. I know that experts that you called have testified that there would be no discipline and that may be true empirically. They may have more knowledge about how the Massachusetts disciplinary authorities choose to proceed in their prosecutorial discretion than I have.
So I think that answers your question. If not, you can ask me some more.
Q. Well, do you believe that an attorney should be faulted at all if he follows the letter of the existing rules of professional responsibility without knowledge of any judicial gloss?
MR. SINNOTT: Objection. Joan, wasn't this covered at length during his original deposition?
MS. LUKEY: I don't know, but I need it for background for where I'm going.
A. I were -- if I were a disciplinary counsel and that's all there was, that a lawyer followed the

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rule as written in the text of the rule despite what might have been an obligation imposed by the Saggese gloss, I would not be inclined to cite that lawyer for discipline depending, of course, on the lawyer's disciplinary history. That's always a factor in considering these decisions.
Q. When you wrote the op-ed, sir, was it your intention to express a view that you considered division of fees to be undesirable?
A. No.
Q. Was it your intention to express the view that you only considered the division of fees between lawyers to be undesirable if the client did not consent?
A. It was -- well, again, I don't think I can improve on my prior answers because you're -- again you're asking me to reconstruct my state of mind in 1979.
My purpose was to avoid a return to the days in which it was common for lawyers to get a portion of a fee without the client's knowledge.
Q. So to be clear, in writing this article -- the words will speak for themselves -- but your purpose was to express displeasure with a situation

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in which lawyers divided fees without the client's knowledge; is that right?
A. Right.
Q. Okay. Sir, the article or op-ed is entitled "Lawyers: Paid for doing Nothing?"
Doesn't that suggest that you were writing about the concept of a so-called "bare referral" or forwarding fee where the lawyer did no work for this fee?
A. Titles to op-eds articles are written after they're accepted by the editors. That was not my title.
Q. So it was not your intent to express displeasure with bare referral fees; is that right?
A. It was not my intent to express displeasure with bare referral fees by which I mean -- I assume a referral fee -- well, maybe you want to define "bare."
Q. Do you have an understanding of what the phrase "bare referral fees" means?
A. I do from your -- yeah, from your submissions that I read, and that is one like the Massachusetts rule. I think that's what we're talking about, but we should make that clear.

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Q. Yes.
A. It was not my intention to express disapproval of bare referral fees. I did not even know the term until this case.
Q. So, for the record, you understand that a "bare referral fee" as that phrase is used in Massachusetts means that there is a division of the fee with a forwarding or referring lawyer who does no work on the case, correct?
A. Right.
Q. And that doesn't trouble you, the fact that you may have an attorney receiving a fee for doing no work, right?
A. With the client's knowledge.
Q. Yes.
A. Right. No, that doesn't trouble me in the sense that I would not fault a lawyer who complied with the bare referral fee rule. Separately I've talked about my policy references which is a different kind of question.
Q. Yes, it is, sir. So we are separating what you consider to be ethically permissible from what you would prefer aspirationally as a matter of policy, correct?

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Q. Okay. I'm not going to take the time to go through each of these, sir, but is it your testimony that each of these revised questions is only revised stylistically?
A. Except for the Lieff Cabraser issue.
Q. Which one is that?
A. The answer to question three is that.
Q. Is there any reference to Lieff Cabraser in any of these questions or answers here --
A. No --
Q. -- in this page?
A. -- there is not, nor does there have to be.
Q. So I just asked you about that same question.
You're saying that you don't consider your question to be different, but you meant to imply with your answer that it was different; is that right?
A. The answer to three and four are both -- incorporate a question that emerges from the hypothetical that Mr. Heimann asked me at the first deposition.
Q. Well, sir, there's a change that's more than stylistic because what you've done is to go from

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suggesting that all three firms -- because they had awareness that there was a fee paid to Mr. Chargois -- were responsible for disclosure to a changed finding that only Labaton was responsible because it knew all of the terms and details of that arrangement. Correct?
A. I can't answer that the way you phrased it. I said ten minutes ago that one of the instructions I understood from Judge Rosen was to address the extent to which, if at all, my views would alter if I assumed as true facts contained in Mr. Heimann's hypothetical. I said that I knew that that was part of my charge.
When we talk about these questions, I said they are stylistic changes, except for the incorporation of what I'm calling "the Lieff Cabraser issue" which is incorporated in the answer paragraph -- in the answer to question three and the answer to question four.
Q. Okay, sir.
A. Furthermore, I don't know what Lieff Cabraser knew. That's a finding of fact.
Q. Okay.
A. So it's -- let me just finish.

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Q. I'm sorry, I thought you were, sir.
A. So it's stated generically. It's not stated as "the Lieff Cabraser issue." That is a shorthand we're using.
It's stated generically to describe that the report will address issues that are prompted by the facts Mr. Heimann asked me to assume to be true.
Q. That causes me to ask you the question, sir, the factual background in the supplemental report -- the section called factual background Roman numeral two -- up to the questions presented section that we were just addressing --
A. Yes.
Q. -- who wrote that section, that background?
A. Mr. Sinnott and Miss McEvoy and probably others in his firm. Maybe Judge Rosen gave his opinion on that. I don't know.
Q. Were those findings that you were asked to assume to be true for purposes of your opinions?
A. Correct.
Q. So those were not findings that you made; is that right?
A. Yes, correct.
Q. Okay. So to the extent there are changes in

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the facts as there are in Section 2, you were asked to accept as true those changes to the facts, correct?
A. I was asked to accept as true the factual assumptions as changed, yes.
Q. Did you yourself do a comparison to see how the facts had changed in the new fact section that was provided to you by the master's team?
A. I read new facts, not in Track Changes. I don't know if I did a comparison of Track Changes.
Q. In your changes to your opinion section you not only absolved Lieff of legal liability for failure to disclose the Chargois Arrangement to the Court, you also absolved Thornton, correct -- the Thornton Law Firm?
A. Incorrect.
Q. Well, you made a finding that related to Garrett Bradley and what he put in his declaration -- not a finding. I'm sorry.
You offered an opinion of law on the conduct of his signing of the fee petition for the Thornton Law Firm, correct?
A. That's a separate issue.
Q. Yes. Are you saying that you did not

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the answer was yes. And then issued -- I formed an opinion at the deposition.

So I cannot -- I did not play with the hypothetical. I said if this is true, then my opinion is such and such.

Q. What were the facts in the hypothetical that were determinative for you in concluding that if true Lieff did not have an obligation to disclose to the Court?

A. Okay. So if you want to do that and because my earlier efforts to paraphrase the hypothetical were questioned at the first deposition, even though I was doing it within minutes of the hypothetical and thought I had gotten it correct, we need the hypothetical which should not be hard to find if we search "hypothetical" in the first deposition.

Q. There will be a lot of hits on "hypothetical," sir.

A. Oh. Hypothetical and asked by Richard Heimann.

Q. I'm not sure it's that easy. Can you tell us which facts were important to you?

A. I can tell you to the best of my memory.

Q. Please do.

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A. All right. So Lieff Cabraser has a reasonable and good faith belief based on what it knows that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving.

Q. Okay.

A. And I remember the word "valuable" in particular.

Now I'm not saying that was the full scope of the hypothetical which is not before me. I'm giving you my best recollection.

Q. Okay. Well, we're looking for the hypothetical, but given the limited time and given that it's your opinions that we're talking about, you considered it to be of import to your opinion as to whether Lieff Cabraser had any obligation to disclose to the Court if it were true that Lieff Cabraser had a reasonable good faith belief that Damon Chargois was providing valuable services to the class commensurate with the fee he was receiving, correct?

A. Correct.

Q. Is there any other fact that you recall in the hypothetical or otherwise that would influence

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your or did influence your opinion as to whether Lieff had any responsibility for not disclosing to the Court?

MR. HEIMANN: Let me interject the testimony in question begins at page 248 of the first deposition.

MS. LUKEY: Thank you. Got it? We don't want to mark the whole deposition, but we can hand it out.

THE SPECIAL MASTER: Maybe he can refresh his recollection with it so we don't have to mark it as an exhibit.

MS. LUKEY: 248?

MR. HEIMANN: 248 of the first day.

(Pause.)

BY MS. LUKEY:

Q. Professor Gillers, I'm going to hold -- I'm going to hand you a copy of the transcript. I am going to refer you to the section because Richard goes through each of the facts seriatim.

And looking at the top of page 248 of day one was one of the facts that you assumed that bore on your opinion as to whether Lieff had any obligation to disclose to the Court that the Lieff

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Cabraser lawyers understood that Chargois served as legitimate local counsel to the Arkansas Teacher Retirement System?

A. That was one of the facts in the hypothetical which I assumed to be true for purposes of my answer.

Q. Was -- otherwise stated, was one of the facts that Lieff Cabraser understood that Mr. Chargois was the legitimate bona fide local counsel to the Arkansas Teacher Retirement System?

(Pause.)

A. Where are you reading now? What line?

Q. Line 18.

A. Well, it doesn't end retirement system.

Q. Well, I'm not reading per se. I'm giving you the facts and the correct name of the client.

So what I'm asking you is is this one of the facts, but I am inserting the correct name of the client, the whole name.

So I'm just trying to refresh your memory as to what the facts were that caused you to form the opinion that if true Lieff Cabraser would not have an obligation to disclose?

A. Right. So you're telling me that ATRS is

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the Arkansas Fund?
Q. Yes.
A. Okay.
Q. So just so we have all the facts in mind, 'cause you wanted to see the hypothetical, I want to be sure we refresh your memory so you're comfortable you've given us all the facts, one fact that you took into account in forming the opinion that if true would mean that Lieff did not have an obligation to disclose to the Court was that Damon Chargois was providing bona fide local counsel service to the client?
A. Correct.
Q. And that he did so with the express knowledge and approval of the client?
A. Written approval.
Q. In written approval -- I'm sorry, okay -- of the client. Correct?
A. Correct.
Q. And that he provided valuable legal services to the client and to the class in his role as local counsel, correct?
A. Yes.
Q. And that both Labaton as lead counsel and

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the client as lead class representative regarded the fees that were being paid to Mr. Chargois as fair and reasonable and consistent with the value that Chargois' services provided to the class and to the benefits obtained on behalf of the class, correct?
A. Right. You skipped two lines. The clarification in line five at the question in line two refers to this case.
Q. Okay. So we're talking about this case --
A. Yes.
Q. -- not another case?
A. Yes.
Q. So that's important, too?
A. Yes.
Q. And that the value of the services and --
A. Can you hold one second? I want to read the next question.
(Pause.)
A. Okay.
Q. Then I think -- I think this is the last one.
The value of the services -- of those services to the class and to the benefits obtained for the class were consistent with the fee.

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A. Right. So I interject a question and consistent, and Mr. Heimann says what the value of his services and the value of those services to the class and to the benefits obtained for the class. And then I say okay. Then he asks the question.
Q. All right. So now that you've had a chance to refresh your memory, I'm not going to read anything from this.
You should feel free to refer to the page to refresh your memory further if you need to in answering, but will you tell us please what the facts are that if true caused you to form the opinion that Lieff Cabraser did not have an obligation to disclose to the class -- to the Court? Excuse me.
A. After the end of page 249 there is colloquy. Then we move to page 253, and I ask for a clarification on the hypothetical.
And I say in the first assumption could we add Lieff had a reasonable good faith understanding that Chargois was -- this doesn't parse perfectly, but I wanted to inject the reasonable, good faith understanding as a predicate for each of the factual assumptions I'd been asked

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to make. And Mr. Heimann says you may augment all of my proposed assumptions with that clarifier. Okay.
Q. So I think after reviewing this that it brings us back to where you were before, and you made what seemed to be a pretty accurate answer, which is if you assumed as true that Lieff Cabraser had a reasonable, good faith belief that Mr. Chargois was providing valuable services to the class commensurate with the fee he was receiving approved by the client in writing, then in your view Lieff Cabraser would not have an obligation to disclose to the Court?
A. Well, I'm not going to answer based on your paraphrase of the hypothetical. I'm going to answer based on the hypothetical. And my answer was that -- my answer was no to the question that Mr. Heimann asked me.
You're paraphrasing --
Q. Actually, I wasn't paraphrasing. I took down what you said, and I just read it back. So -- originally.
But now that you've had a chance -- I don't want to waste a lot of time on this, sir, but

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A. Yes.
Q. In the subsequent report you only speak in terms of Labaton, correct, having that obligation?
A. I don't -- certainly Labaton could not enjoy the facts assumed in the hypothetical as -- as presented by Mr. Heimann.
So it is true that I assume that the Heimann hypothetical facts do not apply to Labaton. If it did, then my answer would be the same. It's not a law firm-specific answer. I tried to capture the difference by using the phrase "counsel who knew the terms of the Chargois Arrangement."
Q. What page are you referring to, sir?
A. It's in the answer to question -- to questions three and four on page 63 of my copy.
Q. Okay. Okay. When --
A. It's the stuff we went through earlier.
Q. Did you assume -- well, let me strike that.
Did your opinion as to the obligation to disclose to the Court the Chargois payment extend to the Thornton Law Firm or just to Labaton alone?
A. I didn't think about Thornton Law Firm at all.
Q. I take it then that you did not go back and

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review pages 55 through 57 in the findings of fact as to what you were to be assuming about what Thornton did or didn't know, correct?
A. I did not because again this was not Lieff specific.
Q. So if the facts were true in Mr. Heimann's hypothetical that we just went through for Lieff they would not have an obligation to disclose the Court, and if those same facts were true for the Thornton Law Firm, it would not have an obligation to disclose to the Court?
A. That's what it means to say it's a generic standard and not law firm specific.
Q. And if those facts were not true, then the obligation to the Court would survive?
MR. SHARP: Objection.
A. It would then depend upon what the not true facts were and what other facts there may be. So I addressed only the facts in the Lieff hypothetical.
Q. Did you have reason to believe that the master was prepared to adopt the facts in Mr. Heimann's hypothetical?
A. Um --
(Pause.)

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A. You used the term reason to believe, and I -- I -- I inferred from the oral argument that Mr. Heimann offered on April 13 that it had persuasive force for the special master; that it was influential or could have influence.
No one told me what he was concluding. I've never read his report and recommendation.
Q. You never have?
A. No. Nor the response -- the firm responses.
Q. Have you read the statement of facts that you were asked to assume, to the extent that you know what the facts are in the fact section of your report, regarding the state of the Thornton Law Firm's knowledge?
A. Could you ask that again?
Q. Yes, sir.
Have you read the statement of facts that you were asked to assume to be true in your own report on the issue of the facts found by the master that you were asked to assume regarding the Thornton Law Firm's state of knowledge?
A. No, because I think that my treatment of the issue as a generic issue fulfilled my responsibility.

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Q. So as far as you were concerned, what you were trying to convey in your opinions and your answers to the questions presented was that you knew that Labaton didn't meet the hypothetical facts; you didn't know whether Lieff or the Thornton Law Firm met the hypothetical facts; but if they both did, then they didn't have an obligation to disclose to the Court?
A. Correct.
Q. Okay.
(Pause.)
A. Let me -- let me say from the perspective of collegiality, I do intend to eventually read everything, but these items have become public only recently. I was not privy to anything that went on between May 8th and last week.
So it's not that I'm uninterested. Certainly professionally I'm interested. But that -- but I didn't have the time, and these are voluminous documents.
Q. Indeed.
A. Yeah.
Q. Sir, at anytime in the course of your work on your supplemental report, did the special master

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A. Yeah, I mention the news sources only as another source of some information about Thornton.
Q. Did you have discussions about the contents of your supplemental report with the master or anyone on his team as you were preparing it?
A. No. As I recall, they were preparing their -- let me back up for a second.
There were conversations after the oral argument or even after the various experts testified about their testimony. Non-definitive, not reaching conclusions, just commenting on what Bruce Green said or Peter Joyce said or Brad Wendell said and what do you think of Professor Vairo.
When it came time to do my supplement, my best recollection is that the special master and Mr. Sinnott were largely unavailable because they were preparing -- they were busy preparing the report and recommendations.
That doesn't mean that they would not take my calls, but they were busy, and I knew it. And so I was working on my own. I don't remember at that time period any focused conversation on my report. In fact, my best recollection is I sent it in, and I signed it.

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There was a day -- I think it was a Monday -- that Mr. Sinnott either called or wrote and said we need your report; we have a deadline. And I rushed to finish it.
So I don't -- I see it as -- in this time period -- that is, the actual drafting of it -- how it reads as largely a product of my own work. It was not -- it was not a collegial effort by any means.
Q. But you don't recall when in there you received their portion of the work, mainly the fact section that you were asked to assume to be true?
A. All I can tell you is that after the oral argument and certainly before I signed off in my own mind on my supplemental declaration, I would not have finalized my declaration without having read their portion. That's for sure. But I -- I don't -- I cannot say that I did not begin it before having read their portion.
Q. I believe you told us it didn't cause you to alter anything that you had written, correct?
A. Correct. Right.
Q. Did it cause you to alter any beliefs that you had formed but not yet committed to paper?

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A. Correct.
Q. It did not?
A. Did not.
(Pause.)
Q. If we go to page 92 of your report, sir.
MR. HEIMANN: Is this the Track Changed version?
MS. LUKEY: Yes, and I think there's only one page 92.
A. Right.
Q. This is the one that you were referencing earlier where you changed the heading to read: "The Massachusetts Rules of Professional Conduct required disclosure of the Chargois Arrangement to the Court by those who knew its terms."
And which terms were you referring to in that section?
A. Right, that Chargois was receiving his payment for the -- from the State Street matter out of the recovery and did no work on the matter.
Q. Okay. So you were aware that all three firms knew that Chargois was receiving a fee and knew its amount because they split up the responsibility, correct?

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A. Right.
Q. So what they -- what you are suggesting in this section is if they did not know that Mr. Chargois did no work on the matter, they would not have had an obligation to disclose the arrangement to the Court, correct? Maybe I should eliminate the negatives.
They would have had an obligation to disclose to the Court had they been aware that he did no work on the case; is that right?
A. Right.
Q. Okay. Did the amount of the fee have any significance to your opinion as to who was obligated to disclose to the Court?
A. Yes, I think I included that.
Q. I don't remember hearing anything in that regard.
A. Oh, yes. Yes. The amount matters.
Q. Can you explain for us why it matters?
A. It's a lot of money, and it is from the class recovery, and the judge has the ability to reject any agreement between Labaton and Chargois regarding Chargois' payment.
Q. All right. Well, let me break it into two

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parts.
Going back to the issue of your belief that if they were unaware that he did no work, they would not have an obligation -- sorry. I'm doing the double negatives again.
Your belief is that they would have had an obligation to disclose if they were aware that Chargois was being paid but had done no work on the case, right? Step one.
A. I'm sorry, can you tell me that again?
Q. Certainly. We were just discussing the fact that you hold the opinion that any lawyer or law firm that was aware that Mr. Chargois did no work on the case but received a fee would have an obligation to disclose to the Court that a fee was being paid to Chargois?
A. Given the size of the fee.
Q. If it were a small fee, they would not have had an obligation?
A. Yeah, if there were a small fee, I wouldn't be here. If it was a thousand dollars, I wouldn't be here. I think that judgment is required.
Q. Well, where do you draw the line?
A. Well, that's a wonderful question, and there

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is a concept of materiality.
So if I were asked to testify that a lawyer acted improperly by not disclosing a three- or four-figure sum, I would decline. I think it matters what the amount of money is.
Where do you draw the line? It's a judgment call.
Q. Can you describe for us as a matter of principle why it matters in performing an analysis what the amount of the fee was?
A. Because I think that 4.1 million dollars is imposing enough, is large enough to likely influence the Court which has the fiduciary duty to protect the class and makes the decision of how the class money will be distributed.
Q. Okay. So there would have been some level at which none of these lawyers would have had an obligation to disclose to the Court in your view that Mr. Chargois had received a fee for which he had performed no work; is that right?
A. There would have been some level at which I would not fault the lawyers for not disclosing. The Court might have a different view. But we have different roles.

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Q. But you're unable to quantify what that level is --
A. Correct.
Q. -- is that correct?
A. It's certainly correct.
Q. And would I be correct in assuming that the level would depend in part on the size of the overall award from which the fee was being paid?
A. It could.
Q. Well, $1,000 on a $10,000 fee might be considered, I gather in your principled view, something to be disclosed.
One thousand dollars on 20 million in an award wouldn't be considered something that would require disclosure?
A. I think proportionality enters into it, yes.
Q. Is that proportionality of the work performed or the overall percentage of the fee that's being awarded?
A. In this case for me it's the amount.
Q. Flat out the amount?
A. Right.
Q. It doesn't matter how big or small the overall fee award was?

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A. Right.
Q. Okay. Now we are -- we've already discussed working with applicable rules from the Commonwealth of Massachusetts which is a bare referral fee state.
So would you agree that the mere fact that a bare referral fee was paid does not in and of itself require disclosure to the Court?
A. Would be paid.
Q. The mere fact that an attorney received a bare referral fee would not have to be disclosed to the Court in a state that permits bare referral fees, correct?
MR. SINNOTT: I'm going to object, Joan, as to the characterization of this as a referral fee.
MS. LUKEY: You can object all you want. It's a fee division. I'll rephrase it.
BY MS. LUKEY:
Q. In the Commonwealth of Massachusetts where the division of a fee between lawyers -- however characterized -- is permissible if the requirements of 1.5(e) are otherwise met, is there an obligation for the paying lawyers to disclose that payment to the Court in the absence of a consideration of the

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size of the payment?
A. I just want to clarify that at this point when you're before the Court the fee has not yet been paid to Chargois. So they're not disclosing a paid fee; they would be disclosing an intention to pay Chargois from the Court award.
Q. We can use that clarification, sir.
A. Okay. So if I were to assume that the division of fee agreement with Chargois was valid under Massachusetts rules at the time, that fact is irrelevant to me to the duty to disclose because the Court does not have to honor and can actually reject the private contract, valid though it may be, between the paying and receiving lawyer in the Court's role as a fiduciary for the class.
Q. So to be clear then, what you are saying is even if it's a bare referral state, in your view the paying attorneys would have the obligation to disclose the intent to share their fee to the Court; is that right?
A. Yes, that's right.
Q. But it would be dependent upon the amount of the fee whether they have that obligation; is that right?

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A. I would -- yes. I would say that amount can matter.
Q. Okay. In the award process you understand here that the Court had made a determination that the total amount of the attorneys' fees requested was reasonable, correct?
A. Correct.
Q. And that award was entered, if I recall correctly, sometime around November 2, 2016 --
A. Yes.
Q. -- correct?
A. Correct.
Q. Within about two or three weeks an issue arose about the double recording of some time which is not the issue that you're here to opine about when these proceedings began -- so the proceedings began late 2016, early 2017, right?
A. Right.
Q. You are aware, sir, that the Court has never revoked, rescinded or modified the finding of reasonableness in the award of the total fees on November 2, 2016, correct?
A. Correct, yes.
Q. You have not formed an opinion, I assume,

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that the Court was incorrect in concluding that the total amount of fees requested just under 75 million and 24 percent was reasonable -- you haven't formed the conclusion that that's wrong, have you?
A. I have not. I'm not capable of doing that in my expertise, and I have not been asked to do that.
Q. Okay. And you formed no opinions in any way as to why the Court hasn't revised, revoked or modified the finding of reasonableness or the fee award, right?
A. Correct.
Q. Is it of any consequence at all to you that the Court even after these proceedings were underway never chose to reverse, revoke or modify the fee award or the finding of reasonableness?
A. No.
Q. You are aware that the Court did not request and was not provided with a breakdown of the allocation of the total fee of just under 75 million among counsel, correct?
A. Among customer class.
Q. Among all the law firms.
A. Among all the law firms, yes, I'm aware the

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Court did not ask or was not provided that information.
Q. But it is nonetheless your opinion that the Court should have been told that on the portion that was going to the customer class counsel, that they intended to take part of their fee and share it with Mr. Chargois; is that right?
A. Yes -- no, not correct because I don't consider -- I understand that one of your positions is that the fee for Chargois was coming out of the Labaton or customer class recovery and that therefore the Court did not have to know; that the lawyers were paying it out of their pocket. And we went over this I think -- or we could have gone over this in the first deposition because I address that issue in my first report.
So my position in that report was and is that there was no fee for the firms until the Court awarded it. There was an undifferentiated corpus of money that was the recovery from the settlement. And that the Court should have been told about the 4.1 Chargois payment in order for it to exercise its fiduciary obligations to the class in deciding how to allocate the corpus of money it was responsible

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to disburse.
Q. Was it the obligation of the Court to determine what constituted a reasonable fee to be paid to the attorneys from the overall award?
A. Yes.
Q. Did the Court make a determination that the number of just under 75 million, just under 25 percent, was a reasonable allocation in totality for the fees?
A. It did.
Q. Once the Court had made that determination of reasonableness and the fees were therefore available for distribution, you do not consider those fees to belong to the attorneys?
A. The problem is that the Court did not know what I'm saying it should have been told before it made the decision to give the money to the lawyers; that that -- that knowing about the Chargois fee may have affected the Court's judgment about how it went about disbursing the money.
Q. Well, the Court was deciding what constituted a reasonable total fee by percentage and by dollars, correct?
A. Yes.

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Q. And the Court decided that what constituted a reasonable fee was just under 75 million and just under 25 percent, correct?
A. Yes.
Q. So if that's the reasonable number in its totality and the judge has properly made that determination, the judge has fulfilled his fiduciary obligation to the class, has he not?
A. No, because in order to fulfill that obligation he needs to know the fact that was not revealed. He -- he -- if you reveal -- not you but if Labaton or the customer class counsel who knew the full story had revealed that information to the Court, the Court might have said, no, you cannot pay Chargois; you give this money to the class. I'm reducing the award to the lawyers by 4.1 million dollars and giving the money to the class.
The Court has that power. There's no question about it. The Court is not bound by private agreements. So the class might have been 4.1 million dollars richer.
Q. But if the Court has determined that a particular dollar amount and a particular percentage is reasonable, what would be the basis on which the

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Court would say to customer class counsel I'm not going to let you pay the referral fee or the forwarding fee, whatever you want to call it?
A. Because I don't think Judge Wolf might have said that a man who did no work under the, um, assumed valid division of fee agreement you had is entitled to any money. That money comes out of the undifferentiated corpus of money that you received in settlement, and I have the power -- there's no question about it -- to redirect that money to the class.
Now Judge Wolf might have said fine. We don't know. He might have viewed the situation harshly. He might have said, well, why didn't you tell me before; why didn't you the tell the class in the notice of pendens; that they were entitled to learn that. We don't know what he would have done, and I don't know what he would have done.
I'm only saying it was information that he in the exercise of his fiduciary obligation should have been told.
Q. But you're not saying it -- as I recall, you state in your report, you are not making that statement either pursuant to either Rule 54 or Rule

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23 --
A. Correct.
Q. -- correct?
A. Right.
Q. So you are looking outside the Rules of Civil Procedure to come up with your opinion that he should have been told?
A. I'm looking outside the rule -- the two rules you mentioned.
Q. Are you looking at any rule -- Federal Rule of Civil Procedure?
A. There is in the report, as we've discussed, a portion on Rule 11 -- an additional portion of Rule 11.
Q. We're going to come to that in a moment, sir. Are you contending under Rule 11 he should have been told?
A. Yes.
MR. HEIMANN: Before we get there, can we break for lunch?
THE WITNESS: That's a cliffhanger.
THE SPECIAL MASTER: Somebody's stomach is growling.
MR. SINNOTT: Is this a good time to

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going to be asking you the question that begins at line 18.
MR. HEIMANN: What was the page again, Joan?
MS. LUKEY: 106.
MR. HEIMANN: Thank you.
(Pause.)
A. Okay. How far down do you want me to read?
Q. Read as far as you want, but I'm going to repeat the question beginning at line 18.
A. Go ahead.
Q. Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral to Chargois & Herron, and you answered on behalf of Arkansas alone. Correct?
A. Correct.
Q. So you did agree that that was a ratification on behalf of Arkansas?
A. I accepted that it was.
Q. Do you still accept that it was a ratification on behalf of Arkansas Teacher Retirement System?
A. Yes.

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Q. That nonetheless doesn't change your opinion that the fee agreement was inadequate under Rule 1.5(e); is that right?
A. Correct.
Q. Even though it was ratified by the client?
A. In its individual capacity.
Q. There was no class at that time of course, was there?
A. There was no class at that time?
Q. At the time that the engagement was entered into.
A. Right.
(Pause.)
A. Just to be clear, it's the time that the attorney/client relationship was formed, not the time that Mr. Hopkins filed his March 2018 affidavit when there was a class.
Q. Right.
A. Okay.
Q. Sir, one of the things that's new in your supplemental report begins at page 87, and it's a discussion of comment 14(a).
A. Right. Oh --
Q. There's more than one? Is that right?

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A. Page 87.
MR. FINNERTY: It's past page 99. It's one of the pages marked 10.
MS. LUKEY: Oh, okay.
MR. FINNERTY: It's 87 in your supplemental report. It's actually page 97 in the redline.
Q. I'm sorry. In the redline it's page 97, and this is the comment to Rule 3.3(d).
A. Right.
Q. This was a new edition when you did your supplement, correct?
A. Correct.
Q. And can you tell us, sir, what new facts came to your attention that caused you to add this argument which is not present in your original report?
A. I added the argument to address an issue that arose in Professor Joy's deposition. There are --
THE REPORTER: I'm sorry, I couldn't hear you.
THE WITNESS: I'm sorry.
A. I added the argument to address testimony by

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Professor Joy. There are no new facts.
MR. HEIMANN: I'm having trouble finding it. What page again?
MS. LUKEY: It's actually 97.
MR. HEIMANN: Ninety-seven?
MS. LUKEY: Yes.
BY MS. LUKEY:
Q. So nothing had actually changed, but Professor Joy when asked took the position that these proceedings were not ex parte, correct? And that's what caused you to add 14(a) to your argument?
A. That's what led me to add discussion of 14(a) and 3.3(d).
Q. The circumstance of whether the earlier proceedings were adversarial in character or were ex parte didn't change between your original report and your subsequent report --
A. True.
Q. -- correct?
A. Yes.
Q. But because Professor Joy rejected the notion that this was equivalent to an ex parte proceeding within the meaning of comment 14(a), you

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there was no time left for the parties' attorneys or experts to respond?
A. I did not know and I did not think about it. Throughout this proceeding time -- time deadlines have been expanded, and, you know, it could have been that it would be again.
I understand that Judge Wolf has said that you can submit expert reports in response to my supplement plus this deposition at the end of this month.
So as it turns out, you'll have that opportunity, though I realize you will not have had that opportunity before Judge Rosen submitted his report, but Judge Rosen might then in this never-ending case submit an amended report in light of the further discovery.
This is not in the purview of a person in my role. I have a role that is not the same as Judge Rosen's role and certainly not the same as Judge Wolf's role. And I try to do the best I can at it.
Q. Okay. All right. Now we get to Rule 11.
If you turn the page to where we were, we get to yet another page 10 because the entire new

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edition, which is seven or eight pages long, will bear the number of the original report where it didn't appear.
And we have a section called Omission of the Chargois Arrangement From the September 15, 2016 Fee Petition Violated Rule 11 Federal Rule of Civil Procedure.
Whose idea was it to add a Rule 11 section against Labaton?
A. You asked me this earlier, and the answer was that Judge Rosen and/or Mr. Sinnott asked me to address that issue.
Q. If they had not asked you to address it, would you have been addressing it on the basis of anything that occurred in the other expert depositions?
A. No.
Q. So this was purely at their request; is that right?
A. Yes.
Q. Were you asked to write a report supporting a Rule 11 finding, or did you come up with that on your own?
A. I was asked to -- no one told me to support

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or not support it. I was asked to address the Rule 11 issue.
Q. All right. You decided you were going to recommend a Rule 11 -- a finding of a Rule 11 violation, correct?
A. Except for the word "recommend."
Q. Right. You found a Rule 11 violation?
A. I wrote what I wrote. I'm not recommending anything. The judge -- there are reasons why the Court would reject a Rule 11 violation.
Sanctions are discretionary, and the rest is up to the Court and up to Judge Rosen as to whether to recommend to the Court because we have different roles in this matter.
Q. Well, you don't mean to downplay the significance of accusing an esteemed member of the bar of a Rule 11 violation, do you?
A. No.
Q. You did that though, didn't you?
A. I did, yes.
Q. Are you a Rule 11 expert?
A. No.
Q. In fact, you told us you're not an expert on the Federal Rules of Civil Procedure at all, are

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you?
A. Did I say any of them?
Q. I believe you said you were not an expert on the rules of -- Federal Rules of Civil Procedure. If you want to tell us that you are --
A. No, I'm not --
Q. -- go ahead.
A. -- no, but I -- Rule 11 is very closely aligned to Rule 3.3, and Rule 11 comes up in my work. So I felt comfortable addressing Rule 11.
Q. Can you cite to any case in the First Circuit where the Court has ever found that a Rule 11 violation occurred by reason of an omission?
A. No.
Q. That was new in your theory, wasn't it? That's yours, not the First Circuit's in other words?
A. What's the question?
Q. You have no basis in the law, no case of any kind in the First Circuit to support an opinion that an omission constitutes a Rule 11 violation, correct?
A. Yes.
Q. You are aware, of course, as any of us can

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of disclosure?
A. Not disclosed in the ERISA counsel's fee petition --
Q. Right.
A. -- annexed to this.
Q. Yes.
A. Right. I would have to study that and see how much and consider whether or not -- as we discussed with regard earlier to Rule 11, whether the amount under the circumstances was such that I think it should have been disclosed in ERISA counsel's fee petition.
Q. Well, so it isn't -- I gather then in your opinion the disclosure obligation isn't absolute; it's dependent upon amount?
A. We discussed this, yes. There could be amounts that are comparatively small where I would not make the same judgment.
Q. Doesn't there have to be some objective standard by which one judges if a disclosure obligation exists particularly when you're talking about an alleged misrepresentation by omission?
A. There has to be some judgment, and that judgment looks to the size of the payment and the

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reason for the payment. So why would -- if I were called upon to address that issue for ERISA counsel's fee petition, I would read the fee petition.
I would inquire about the work of the law firms who are not identified, assuming there are law firms who are not identified, and the amounts they're being paid, and I would make a judgment as a matter of the substantiality of the omission.
Q. So is it your testimony then that we're not talking about omission but substantiality of omission?
A. I think that plays into it. Let's say an ERISA counsel paid a firm $500 out of its recovery, that's comparatively a trivial amount.
I think we could all agree -- maybe we could not agree -- but at some point you reach a dollar amount where it would not create a 3.3 or Rule 11 violation. Ten dollars? A hundred dollars? Reimbursement of FedEx expenses?
And so one does look to the amounts and what the amount -- the money was paid for.
Q. So what's the objective standard by which a law firm or lawyer is to determine under your view

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of the law whether they have to disclose to the Court an allocation to another firm, even if the Court hasn't asked?
A. I couldn't -- it's a question of materiality or judgment. I don't think there's a formula for identifying a number.
Here I was addressing a particular fee of a particular person for a particular service. And I think this is something you look at on a case-by-case basis. The amount is large. The services at best modest. Maybe less than modest. Coupled with the interest of the class and the obligation of the judge as fiduciary.
Q. So there is no objective standard by which a law firm can determine whether omitting information as to a payment to another law firm constitutes a material misrepresentation, and therefore a violation of Rule 11? Is that what you're telling us?
A. There is -- there's an exercise of judgment on a case-by-case basis, and law firms have to decide how risk averse they want to be. They may feel, well, I can defend this, but the better course would be to disclose it, even if I could defend not

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disclosing it. That's a fact that --
THE REPORTER: I'm sorry, it would be a better?
THE WITNESS: Oh, sorry.
A. Even if I could defend not disclosing it, that's a situation that permeates commercial life and law firm practice.
Q. But we're talking about an ethics violation allegation?
A. As well --
Q. You're alleging a violation of Rule 11, and you're saying there's no objective standard for the law firm to decide whether it's a violation; it's a matter of their own judgment?
A. I think -- no. I think there are criteria. I don't think there's a formula.
Q. And what are the criteria?
A. Amount of the money. What was done to earn the money. At the very least.
Q. Even in --
A. And whether a reasonably prudent judge exercising his or her fiduciary duty to protect the class and its recovery would deem that information relevant to the judge's decision.

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Q. And under Rule 54(d) would that reasonably prudent judge typically ask if he were concerned about a payment to a different law firm?
A. He might or he might look at this petition and see a bunch of recipients and conclude that there's no one not listed who is getting money; and if there was a problem, there would be an objector or the class representative would highlight the problem because that person also has obligations to the class.
So it is not necessarily true that the judge would ask faced with this petition. In other words, the judge could be misled by the empirically true items of information in the petition and conclude that this is the universe of recipients. A functional equivalent to the petition saying "and there is no one else."
Q. We have now gone through each of the instances in which the law firms are listed and read the paragraphs to which those footnotes relate.
To what paragraph or paragraphs can you point and what language within those paragraphs that suggests that this is an exhaustive listing of everyone who is receiving part of the money as

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opposed to everyone who worked on the case?
A. Chargois fits in no paragraph. Chargois gets a paragraph of his own. My testimony is based on an itemization of the identification of the recipients coupled with their petitions that could lead the judge to conclude that there is no one else.
Q. Please tell us what language there is that would suggest to the reasonable judge that no one else is receiving a payment.
A. The language is what is not there. It purports to be a complete list.
Q. Where? Where does it purport to be a complete list of the recipients?
A. In the listing -- in the identification of the recipients a judge is encouraged to believe -- I think it's a reasonable inference on the part of a judge reading this petition that there is no one receiving money from the class settlement who is not on this petition.
Q. I just need you to tell me where you're referring to that anywhere suggests that no one else is receiving any money.
A. From the existence of the list itself. Just

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as -- just as in the Seventh Circuit case there was nothing false that was stated. And the Court went out of its way to point out that the information was empirically true. But the omission made it materially misleading because it was highly relevant.
Q. But in this case the language specifically relates to those who have worked on the case, not to those who are being paid for the case?
A. And so are we asking the judge to read this by way of microscope and say, hmm, is this artfully drafted to exclude lawyers who are receiving money who did not work on the case; is something being withheld from me. Is this language chosen so as to be literally true.
And if the existence of someone else emerged, that would be the defense. The judge is not expected to come to that view, and indeed I think that is partly what is behind the case law on candor to the Court. Am I misleading the judge by omitting the recipient of money when I'm identifying recipients of money?
Q. You have read, I assume, Professor Rubenstein's declarations?

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A. There are three.
Q. Yes.
A. I didn't read the first because that was on part one. I did read the second. I didn't read the third.
Q. Do you recall that he identifies by having performed a survey how many times in class actions in the last several years in this circuit attorneys' fees awards have been made?
A. In the second?
Q. Yes, sir. Do you recall that?
A. I do.
Q. Do you recall that he states that in none of those instances did any judge in the circuit ask whether there were funds being allocated to other attorneys?
A. Yes, I don't know that it was none, but it was almost none.
Q. Okay.
A. It may have been none.
Q. Does that mean in each of those instances, which from memory was something over a hundred -- in each of those instances if there were referral fees, those attorneys were guilty of a Rule 11 violation?

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acting attorney did?
A. Could, but the judge in his discretion might not find a violation under those circumstances. And a judge in his discretion here might include that Mr. Sucharow did not include Mr. Chargois because he believed that since the fee in his view -- in Mr. Sucharow's view was coming from counsel's recovery, he did not have to.
So, yeah, that bears on what remedy a Court might think appropriate under Rule 11.
Q. So if the reasonable attorney in Massachusetts would believe that the fee under these circumstances was coming from the class counsel's share of the attorneys' fee award, that would not be a Rule 11 violation, would it?
A. Sorry, I was reading the Rule 11 case --
Q. Sure. If the reasonable attorney in this circuit would believe that disclosure was not necessary because the -- I got to start over because my phone got me.
If a reasonable attorney in this circuit would believe that disclosure of the referral fee payment was not necessary because the money was coming from funds that actually belonged to customer

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class counsel after the awarded fees, then the conduct of not disclosing would not constitute a Rule 11 violation, correct?
A. No, I don't think the bar gets to vote. I mean I think that would be a factor that a judge would consider in determining whether a sanction was appropriate. But I don't think it is a factor on the threshold question of violation.
Q. I thought you just said that the requirement was that a reasonable attorney would believe the conduct to be inappropriate? You said it was no longer subjective intent, it was now a reasonable attorney standard --
A. Yes -- no, as the Court sees it.
Q. You meant as the Court sees what a reasonable --
A. Yes.
Q. -- attorney would do?
A. Right.
Q. Okay. So let's say the actual reasonable attorney in this circuit would believe that it was permissible not to disclose a referral fee because the money came out of class counsel funds, their law firms' funds, then you're saying the judge can

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override that even though that's what the reasonable attorney would actually believe?
A. That's what -- the First Circuit says counsel is held to standards of due diligence and objective reasonableness. And I don't -- I don't think that if you took a vote and the bar voted one way, 70/30, that that is preclusive of a judge's otherwise -- concluding otherwise.
Q. Wouldn't that mean that the standard was actually what the judge thinks and not what the reasonable lawyer thinks?
A. That's why there are judges. That's what judges do.
Q. Well, not when they're applying standards that involve an element of intent, and what happened here according to you -- although I'm not conceding this point -- is that the subject of intent standards was replaced by the reasonable objective lawyer standard.
When that happens, the Court doesn't get to substitute its judgment for what the reasonable objective lawyer would actually believe, does it?
A. I believe that a Court should properly, in assessing what a reasonable attorney would do, look

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to what attorneys do but not be bound by what attorneys do.
Q. So in that instance if the Court would be looking to what attorneys do, presumably something like the declaration and testimony of Camille Sarrouf would be taken into account then, correct?
A. Yes.
Q. Okay. If the attorney who received the 4.1 million dollars had done some work on the case, does the judge still have a right to know that?
A. Well, the key words are "some work." The hypothetical went beyond some work. And so we're going in circles, but at some point I agree that the quality of the work, the nature of the work, the value -- that was the word -- the value of the work and other facts contained in the hypothetical would relieve the lawyer from disclosure I've identified.
Q. Okay. So the lawyer would not --
THE REPORTER: I'm sorry, from disclosure?
THE WITNESS: I've identified.
BY MS. LUKEY:
Q. So if the referring attorney did some valuable work for which he received a proportional

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appropriate payment in the amount of 4.1 million dollars and the lead counsel chose not to disclose that attorney in the lodestar or his work in the lodestar, not to disclose the attorney at all or the payment at all, that would be okay? Right?
A. Based on the facts posed to me in the hypothetical, I have the opinion I have. If you change the facts and make them more ambiguous, then I might have a different opinion.
And -- so I'm not prepared to answer a counter-hypothetical that is much softer than the one that I was presented with in March.
Q. Well, I want to know whether the -- in your view the opinion -- in your opinion the obligation to disclose is dependent on whether or not the attorney did -- who was receiving the funds did valuable work?
Take the Chargois situation, except he did valuable work. Was there any ethical violation if he was not revealed or disclosed to the Court?
A. I think the question posed to me in the hypothetical was valuable work commensurate with the money that he was being received meaning that the money that he was being paid was earned by the

Page 643

quality and quantity of the work he did.
Q. Well, not necessarily the quantity but by his contribution to the case.
If his contribution to the case was sufficiently valuable to warrant a fee of 4 million dollars, then there would be no obligation on the part of lead counsel to disclose him to the Court if he chose not to, correct?
A. I'd have to think about that.
Q. You have no opinion on it?
A. This is not -- no. This is not an appropriate end-of-day circumstance to play around with hypotheticals. There are variables, and I've given you my answer to one hypothetical.
And if those facts are changed, I'd have to think about whether and to what extent my answer would differ.
Q. Well, sir, you're the expert, and I'm attempting to determine which variables actually matter. I believe --
A. As an expert --
Q. I believe that what you've told us is that the variable that matters is that he didn't do any work for a large sum of money.

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And to confirm or rebut that, I am asking whether if he did valuable work does he have to be disclosed?
A. As an expert and presented with a hypothetical, I would want to drill -- I might want to drill down on the hypothetical and clarify some language.
In the hypothetical in March I did that. I asked a followup question. Sometimes I want to think about it and not just come to a conclusion.
Q. Well, unfortunately, the litigation system is such that we have limited time and limited opportunity.
Are you able to give me an answer to the question as to whether a referring attorney who made a valuable contribution to the case and received a substantial fee must nonetheless be disclosed to the Court to prevent lead counsel from being in an ethical violation position?
A. I would say it would depend on facts I have to think about.
Q. Well, unfortunately, I don't have another chance come back to you, but we'll have to let it go at that. We have no further questions on direct.

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MR. SINNOTT: Josh.
MR. SHARP: Yes. First I'd like to mark the supplemental report because that's what I'm keying off of. I'm sure everybody has it.
(Exhibit 27 marked for identification.)
EXAMINATION
BY MR. SHARP:

Q. Okay, professor. One of the additions to your supplemental report concerns the propriety of expert opinion and whether the Rules of Professional Conduct have been violated. Is that right?
A. Yes.
Q. And you believe that courts in Massachusetts accept expert opinion on whether the Rules of Professional Conduct have been violated?
A. Well, I found two cases, one from the district court and the famous case of Fishman versus Brooks.
Q. And you believe that those cases show that courts in Massachusetts accept that expert opinion on whether --
THE REPORTER: I'm sorry, accept or

Exhibit C

Volume: 1
Pages: 1-373
Exhibits: 1-24

JAMS

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

In Re: STATE STREET ATTORNEYS FEES

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

DEPOSITION of PROFESSOR STEPHEN GILLERS

March 20, 2018, 9:03 a.m.-6:30 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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as your prior assumptions suggested, on what we assumed about the knowledge of the Lieff Cabraser lawyers.

Your prior question assumed that the lawyers had a reasonable basis to believe that Chargois was getting -- and I'll use the word appropriate, not a clearly excessive fee -- for valuable work to the class, and I said in answer to your question that if that were true there would be no need to -- it was not my opinion that the Court had affirmatively be told about Chargois.

If you want me to make those same assumptions, which were not the assumptions I was making in my opinion, then the conclusion is the one I gave you before.

Q. Where in your report do you make some other assumption about the state of Lieff Cabraser's awareness of the Chargois Arrangement other than that Lieff Cabraser didn't know?

MS. LUKEY: Objection.

A. Just ask me that again.

Q. What assumptions -- I'll ask it a different way.

What assumptions did you make about the

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state of Lieff Cabraser's awareness of the Chargois Arrangement, and where in your report do you report those assumptions?

A. Okay. So Chargois -- the assumptions I make are that even though Lieff Cabraser did not know what Labaton knew about the Chargois Arrangement, Chargois never shows up in any of the work that is done on behalf of the Arkansas Teachers.

Lieff and Thornton have a basis to believe that Chargois is perhaps acting as local counsel doing some liaison work with Arkansas Teachers but has that basis as a result of I think things Michael Thornton says yet never encounters Chargois.

Chargois is getting a substantial amount of money -- more money than someone who is merely local counsel and not doing valuable work meriting 4.1 million dollars would ordinarily receive.

There is a duty to the class as counsel to protect its recovery. In my opinion there is -- that duty requires Lieff Cabraser to ascertain that the Chargois payment -- to ask questions about the Chargois payment, about the fact that 4.1 million dollars is going to Chargois.

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My opinion is based on the fact that all Lieff knows is that Chargois has been characterized as local counsel and is getting 4.1 million dollars and that the class has never been told when invited to consider whether to object to counsel fees.

So I think you make a valuable point that the knowledge of Lieff may be such that it didn't trigger any need to disclose Chargois because of his valuable contributions.

But, on the other hand, the unusual nature of the payment for a local counsel would have at least impelled the firm in protecting its client to look into the matter.

Q. Where is that in your report, sir?

A. It's not.

Q. It's not in your report?

A. No.

Q. So you're sandbagging me here?

A. I'm sandbagging you?

Q. Yeah.

A. It's not my job to answer that question.

Q. In your report you address none of what you've just described, correct?

A. The -- the statement of facts lays out the

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facts I described.

Q. Show me where.

A. It will take a long time to find it.

Q. We're going to take the time. As long as we have the time to do it, we're going to do it because I don't think it's there.

You show me -- you show me where the facts you just described are laid out in the report.

A. It refers to the 4.1 million dollars. Can we agree on that?

Q. That I'll agree with.

A. All right. It refers to the fact that Chargois has been described as local counsel and that Lieff has been privy to those descriptions. That's in the statement of facts.

THE WITNESS: Maybe someone can pick that up if you doubt that --

Q. Is that all Lieff Cabraser was told about Chargois' role, that he was local counsel, that's it?

A. There's a paragraph -- well, we can get the exact language perhaps.

And it knows that the class has not been told that Chargois is in the picture. So it knows

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those three things. And those three things are in the report which includes the statement of facts.
Q. Well, those three things plus other things are in the factual section of the report I agree.
A. And therefore what?
Q. Well, there's nowhere in your opinion part of the report where you put together what you've just described as what you think Lieff Cabraser should have done based on its knowledge.
A. I think that's a valid point.
Q. Why not?
A. I think it's a valid point.
Q. I understand. Why didn't you put it in the report if it's your opinion?
A. It's a legitimate question.
Q. Answer it.
A. I -- I did not pull it together.
There was nothing in the report that suggested valuable contribution. I was relying on those three facts. Now your point is I should have had a summary sentence identifying those three facts as influencing my conclusion.
Q. No. I think you should have explained why you thought Lieff Cabraser violated their ethical

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obligations based on the extent of Lieff Cabraser's knowledge.
A. All right.
Q. That's what I would have expected an ethics expert to do in a report when he's accusing a law firm and lawyers of engaging in ethical violations. Isn't that fair?
A. It's fair.
(Pause.)
BY MR. HEIMANN:
Q. Let me ask you to refer to page 42 of the report.
In the statement of facts the following, among other things appears: Lieff -- and I assume that's a reference to Lieff Cabraser, not to Mr. Lieff personally?
A. Correct.
Q. -- and the Thornton Law Firm were not privy the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which Arkansas is a co-lead counsel. Do you see that?
A. Yes.
Q. Going over to page 43, first full paragraph.

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"As indicated earlier, the arrangement was addressed amongst the three customer class firms in the April 24, 2013 'Dublin' e-mail in which Garrett Bradley described a financial obligation owed to Chargois. Bradley characterized Chargois as local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System.
The Labaton attorneys addressed on the e-mail, Chris Keller and Eric Belfi, did not offer any additional explanation nor did either attorney inform their co-counsel that Chargois was not performing any work in the matter."
Do you see that?
A. Yes.
Q. Were you also aware, by the way, that that e-mail was copied to Mr. Chargois and that he indicated in the affirmative to the accuracy of the description of him in that e-mail that was shared with the Lieff lawyers?
A. I was aware that he was copied. I wasn't aware that he indicated accurately to the description of him.
Q. Then if you'll go over to the next page, page 44, there's a reference to an e-mail that was

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sent to, among others, the Lieff Cabraser lawyers in July of 2016 in which Damon Chargois was identified as the local attorney in this matter who has played an important role. Do you see that?
A. Yes.
Q. That's what Lieff Cabraser lawyers were told about Chargois --
A. Right.
Q. -- among other things, right?
A. Right.
Q. And then further down in the same page, "None of the Labaton attorneys followed up on this e-mail in writing, nor does the record contain any evidence that any of the Labaton attorneys informed their co-counsel either before or after this e-mail that Chargois had played no role in the State Street case, nor did the Labaton attorneys attempt to explain what 'important role' Chargois played."
Do you see that?
A. I do.
Q. And then further on page 44, Bob Lieff testified that he thought Chargois was local counsel for Labaton, and then they quote from his testimony.
"I thought he was local counsel for

Exhibit D

Volume: 2

Pages: 374-456

Exhibits: None

JAMS

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

In Re: STATE STREET ATTORNEYS FEES

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

DEPOSITION of PROFESSOR STEPHEN GILLERS

March 21, 2018, 1:52-3:32 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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left hanging that I haven't got an answer for is whether or not we'll be able to cross-examine him further, whether or not we're going to be able to defer our expert reports until we get his revised report and whether or not you're going to allow us to submit additional proof or evidence once we have his final report.

THE SPECIAL MASTER: I'm going to kill the snake that's closest to me --

MR. KELLY: Whoa, whoa, whoa.

THE SPECIAL MASTER: That's Brian. -- which is to get the discovery and the experts that we're doing here.

I may ask Professor Gillers to amend his report to conform with or to take into account what he's heard in your questions and exhibits he's been shown.

Richard, what I'm not understanding is what in the factual record and in your hypothetical was not before Professor Gillers other than maybe subjective state of mind?

MR. HEIMANN: Well, sir, first --

THE SPECIAL MASTER: Other than maybe --

MR. HEIMANN: I won't argue this anymore

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with the professor here. If we have him stand out, then we can have the argument, but I have an answer to your question.

THE WITNESS: Shall I leave the room?

THE SPECIAL MASTER: No, no.

I'll make the decision on all of those questions at some point. We're under a very tight timeframe, and I'll make the decision on all of your points, but I intend to rely upon Professor Gillers' opinions. I may not adopt all of 'em, but I intend to rely upon them in one way or another. If I don't adopt them, I'll say where I don't adopt them.

I believe Judge Wolf will want to see the report. I believe Judge Wolf will want to make a report public. He's already said he's going to make the report public after you folks have an opportunity to weigh in on privilege issues according to our agreement and those sorts of things.

What I am hoping to do by having -- asking him to amend his report is to consider what he's heard so far, and he may also, by the way, as a good expert want to consider the views of your experts. I don't know that he will.

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THE WITNESS: Of course I will.

THE SPECIAL MASTER: But that's -- that's the point, isn't it?

And I -- frankly, I thought that was the point of having this whole process in my view, and the reason I was able to persuade Judge Wolf to give us the extension that was requested was because that was the process. You saw the letter I sent to him.

MR. HEIMANN: The public saw the letter.

THE SPECIAL MASTER: That was not my doing. That was not my doing.

MR. HEIMANN: I understand that. It doesn't -- it doesn't make it any less prejudicial, however, from our perspective.

THE WITNESS: If Bruce Green says something that causes me to realize that I made a mistake on a point and I concede that, is that concession -- can that concession become part of the record?

I mean wouldn't we then deem my report amended to the extent of that concession? That would be a good thing. Presumably it's beneficial to you.

So a report can get changed in light of

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an expert's acceptance of another expert's testimony. If it can get changed that way, if it's not static and frozen that way, then why is it static and frozen if an examination at a deposition of an expert reveals a gap that the expert is prepared to fill.

MR. HEIMANN: Because that's the way the rules work is the short answer to that question.

THE SPECIAL MASTER: You've taken an artificial construct of the rule --

MR. HEIMANN: Well --

THE SPECIAL MASTER: -- which is 26(b) applies to trial.

In my view we are still in the information-collecting stage, and we will be. I don't view -- I don't view April 13th as trial.

MR. HEIMANN: All right. Well, we disagree on that, judge. I mean to me that's -- that's the key to this whole case is whether or not --

THE SPECIAL MASTER: You are --

MR. HEIMANN: Can I finish?

THE SPECIAL MASTER: No.

You are creating an artificial construct

Exhibit E

Volume: 1

Pages: 1-266

JAMS

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

In Re: STATE STREET ATTORNEYS FEES

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

DEPOSITION of DAVID J. GOLDSMITH

September 20, 2017, 9:21 a.m.-4:20 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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extra burdens and scrutiny on ERISA counsel?
A. I don't think they placed extra burdens and scrutiny on ERISA counsel. As I said, their interest, their sole interest was to ensure the proper and perhaps favored treatment of class members that held the ERISA-governed assets.
Q. How much of a cap did DOL put on the customer class lawyers' fees?
A. That's not -- well, none. But that's not -- that's sort of a nonsequitur because the fees -- there was a cap on fees, not fees to go to any particular lawyer. The cap on fees came out of the ERISA settlement allocation.
That cap didn't come from any lawyer versus any other lawyer.
THE SPECIAL MASTER: Could I just -- we're trying to understand exactly what that cap was. It's characterized as the ERISA settlement allocation.
THE WITNESS: Right.
THE SPECIAL MASTER: And the 10,900 -- 10,900,000 cap on attorneys' fees was applied to, as we understand it, David, the 60-million-dollar allocation -- the proposed 60-million-dollar

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allocation to the ERISA class. Right?
THE WITNESS: Yes.
THE SPECIAL MASTER: So putting it another way, attorneys' fees from that 60-million-dollar ERISA allocation could not exceed 10.9 million dollars?
THE WITNESS: Yes.
THE SPECIAL MASTER: Is that right?
THE WITNESS: Yes.
THE SPECIAL MASTER: Okay.
THE WITNESS: It would be like this. It would be --
THE SPECIAL MASTER: And the -- and the -- let me complete it.
THE WITNESS: Go ahead. Sorry.
THE SPECIAL MASTER: And so the 10.9 million dollars was really in fact part of the larger 75 million dollars in attorneys' fees, correct?
THE WITNESS: Correct.
THE SPECIAL MASTER: Except that no more than 10 million dollars -- point 9 million dollars could come out of the ERISA allocation.
THE WITNESS: Yes, sir.

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THE SPECIAL MASTER: Is that correct?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: That was the purpose of the cap?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Okay.
THE WITNESS: If I can offer something on this. The fee cap term was proposed by the DOL. It was their idea. It was something they insisted on, and it was something we agreed to with some reluctance.
I wasn't happy about it because I thought it would be confusing -- and I think I'm right about that -- and I thought -- and I think it's not simple to administer. But I don't think it's unfair, and I think Judge Wolf was right to approve it.
I think the best way to think about it is it's simply a term that is mechanical and helps -- it is one of the terms that determines what class members will get out of the settlement.
The DOL wanted to ensure a premium for ERISA class members both by looking to the gross ERISA money. So they --

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THE SPECIAL MASTER: The 60 million dollars.
THE WITNESS: That's the 60 million dollars, and the 60 million already gives the ERISA people more than they otherwise would get because the 60 million is 20 percent of the 300 million settlement whereas the actual ERISA class members, we believe, constitute less than 20 percent of the class. So that's one premium vehicle.
The other premium vehicle is this 10.9 percent cap because the ERISA people are paying -- and I say that word in quotation marks -- less fees than everybody else so long as the judge awarded the fee that we asked for which the judge did.
So the way to look at it is it's a premium vehicle, if I can use that term, off of the net --
THE SPECIAL MASTER: Right.
THE WITNESS: But when I heard about this term, which was not my idea -- it came from the DOL and only the DOL -- I said this is confusing, and it's going to -- and it's going to be -- it's going to complicate matters. And I was right about that. So that's all it is.

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THE SPECIAL MASTER: So distilling this down, isn't it accurate to say that DOL wanted to ensure that the ERISA class members got a greater share vis-a-vis attorneys' fees, and therefore wanted to set a cap -- the 10.9 million dollars -- on the amount of attorneys' fees that could come out of the 60-million-dollar allocation?

THE WITNESS: I would characterize it a little differently.

I don't know if they were -- if they were counting fees in the same way. I don't think they were looking to it like we want our people to get charged less than your people.

I think what they were doing was after they agreed to the 60 million ERISA allocation versus the 240 million ERISA allocation, later it was -- 'cause time-wise, judge, it was much later that they came back to us and said, oh, by the way, we want more; we want this attorney fee cap.

So it was an additional term by which they could boost the premium --

THE SPECIAL MASTER: Yeah, to attempt to maximize the ERISA class members' recovery.

THE WITNESS: Yes, yes. And I think it

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was -- I can't say what was in the mind of the DOL, but I don't think it was focused on paying fees because, you know, individual class members are not paying fees.

It's a gross fee, of course, that gets deducted from the gross settlement fund. I think this was a mechanism that the DOL decided to use to, as you say, judge, maximize the ERISA premium.

THE SPECIAL MASTER: Okay. And that was the objective in doing this, to maximize the recovery to the ERISA class members?

THE WITNESS: Yes.

THE SPECIAL MASTER: Okay. So, as I understand it, the 10.9-million-dollar cap was the cap that would apply as a part of the 60-million-dollar allocation, correct?

THE WITNESS: Yes. It's a cap on fees that would apply to the 60-million-dollar allocation. And depending on --

THE SPECIAL MASTER: Right.

THE WITNESS: It's a cap because if the Court had offered a lesser fee, depending on what it would have been, it's possible that the amount of fees deducted from both buckets would have been the

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same.

THE SPECIAL MASTER: Okay. So, in fact, the ERISA lawyers got approximately 7-and-a-half million dollars, correct?

THE WITNESS: Yes.

THE SPECIAL MASTER: So there was -- as between the cap and the actual allocation of fees to ERISA counsel, there was approximately a 3.4-million-dollar differential?

THE WITNESS: I mean arithmetically if you subtract one number from other, that's true.

But I don't think those two numbers have anything to do with each other. We agreed with ERISA counsel early in the case -- I personally didn't have anything to do with the negotiations, but there was an agreement struck early in the case long before the settlement that the ERISA counsel would have 9 percent of the gross fee.

I believe that 9 percent was a function of the approximate ERISA volume of the class. Basically -- basically how big the ERISA case was compared to the Arkansas case.

THE SPECIAL MASTER: Based upon what was known at the time.

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THE WITNESS: Known at the time, correct. Later -- much later Larry decided to voluntarily bump that percentage up to 10 percent, and that's -- and that is the fee that the ERISA counsel received.

There was never, to my knowledge, any sort of cross-over or discussion of how this cap, which was requested by the DOL and negotiated between the DOL and Lynn Sarko to my recollection, informed or had anything to do with the 9/91 and then later 10/90 agreement.

THE SPECIAL MASTER: Okay. So at least from the DOL's perspective, if the differential between the 10.9-million-dollar cap and what ERISA counsel received didn't go to ERISA counsel for fees, shouldn't DOL have rightly expected that differential to go to the ERISA class since DOL's objective was to maximize the recovery to the ERISA class?

MS. LUKEY: Objection.

THE WITNESS: Well, DOL did maximize the recovery to the ERISA class, and I believe that DOL was well aware of the -- what I would call the 9 percent/91 percent agreement. And the reason I say

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object?
MS. CHIPLOCK: Yes. This is Dan Chiplock objecting because Richard Heimann is not here to do it.
MR. SINNOTT: Okay. Thank you for protecting the shield, Dan. We could barely hear your objection.
What did you object to just for the record, Dan?
MR. CHIPLOCK: I just objected to the question as phrased, the form of the question.
MR. SINNOTT: Okay, thank you.
BY MR. SINNOTT:
Q. They were under much greater scrutiny and attention with respect to their fees, the ERISA counsel, than customer class counsel were with respect to theirs, correct?
A. Yes, it appears that way.
Q. Is it an overstatement to say that DOL could have blown up this agreement?
A. I mean not -- not as between plaintiffs and State Street, but I think that both plaintiffs and State Street had an interest in satisfying the DOL's concerns and moving the entire kit and caboodle

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forward.
I mean I also don't think based on my experience that ERISA counsel was much interested in having their fees overseen by the DOL, and I -- to my knowledge, the ERISA counsel was satisfied by the agreement that we struck with them from the beginning.
I mean I think there was one of the other e-mails that you showed me had a portion where Lynn said something to the effect of the DOL is asking me about our fee agreements, and I haven't answered their questions.
So I think -- I think all the counsel would agree that the DOL was being a bit, you know, nosy about various fee agreements, and I don't think anyone was interested in -- in cooperating with them on that particular question.
The fee cap was again a vehicle by which the DOL was able to secure a maximized premium on the dollars that would go to the class members. It was not a way to impact attorneys' fees that were being paid to counsel.
THE SPECIAL MASTER: Could I just -- going back to bringing the DOL -- the necessity to

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bring the DOL into the tent -- the settlement tent, I think you testified earlier -- and I just want to make sure that it's still your testimony -- that it was necessary to have DOL as part of the settlement and that DOL be satisfied because State Street wanted DOL as part of a global settlement because State Street wanted a release from all parties, including DOL?
THE WITNESS: Right. It was State Street that wanted the DOL in there. We didn't want them.
THE SPECIAL MASTER: Yeah, because State Street needed a release from everybody including DOL, correct?
THE WITNESS: Correct.
THE SPECIAL MASTER: So DOL needed to be satisfied.
THE WITNESS: They did.
BY MR. SINNOTT:
Q. David, when did you first learn of the presence or association of a referring attorney or if you knew him by name of Damon Chargois in the State Street case?
A. I first learned of the existence of the

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referring arrangement, and the first name of the referring attorney on Monday, November 21, 2016. That was the Monday before Thanksgiving.
THE SPECIAL MASTER: That was after the class had been certified.
THE WITNESS: Yes, sir.
Q. Now had you worked on any previous cases in which Mr. Chargois was the referring attorney?
A. Not to my knowledge. But, as I sit here today, I know that I have worked on two.
Q. And which two are those?
A. A10 Networks --
THE REPORTER: I'm sorry?
THE WITNESS: Letter A number 10.
A. -- Networks and Hewlett-Packard.
THE SPECIAL MASTER: You didn't work on Colonial?
THE WITNESS: No, sir.
BY MR. SINNOTT:
Q. You didn't work on K12?
A. No, sir.
Q. When you say you worked on those cases with him, did you meet him during those cases?
A. Well, I did not work with him at all. I

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been reached?
A. Correct.
Q. And all of the staff attorneys' work on the case had been completed about the time of that e-mail, correct?
A. I believe so based on my understanding of the overall timeline.
Q. Are you aware of an e-mail between Evan Hoffman and Mike Rogers from March of 2015 concerning staff attorney hours?
A. I do believe I have a vague recollection of an e-mail like that, yes.
Q. Okay. And I know it's a bit difficult because I'm not there to show you the documents --
A. Right.
Q. -- but do you recall that on March 6, 2015 Mike Rogers sent Evan Hoffman a timekeeper report that listed the hours worked by each of the Thornton assigned reviewers by name?
A. I don't have a visual recollection of it, Emily, but I may well have seen that in researching these facts, you know, on my -- on my -- you know, for my own purposes.
Q. And do you recall that in the August 2015

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e-mail that you referred to earlier Evan referenced the March report that he had received from Mike Rogers, and he told Mike he was seeking a daily breakdown because he was compiling the document review hours for Thornton?
A. I don't remember that specific wording, but, you know, I'm sure the e-mail says what it says.
Q. So, again, I know it's a bit difficult because I'm not there in person. I'd just like to read the Bates numbers into the record, if I may.
A. Sure.
Q. The documents are TLF-SST-18436, TLF-SST-18438, TLF-SST-31155; TLF-SST-31158 and TLF-SST-1947.
Thank you, David. I have no further questions.
A. Sure.
MR. SINNOTT: All right. Thank you, Emily. Dan, or, Richard, any questions?
MR. HEIMANN: This is Richard, and, yes, I have a number of questions.
CROSS-EXAMINATION
BY MR. HEIMANN:
Q. Hello, David.

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A. Hello.
Q. All right. Let's start with some basics if we can.
The class action complaint filed by Arkansas essentially defined the class as custodial clients of State Street --
THE REPORTER: I'm sorry. Wait, wait. It's too loud almost, and I can't understand him --
MR. SINNOTT: Okay. Hey, Richard, could you hold on? It's not your fault; we've got to just turn down the speaker a little bit.
For some reason we had a burst of energy, and it's overpowering our court reporter.
MR. HEIMANN: Sorry.
BY MR. HEIMANN:
Q. Let's start with some basics, if I may.
The class action complaint filed by the Arkansas Fund essentially defined the class as custodial clients of State Street who had used State Street's indirect FX services, correct?
A. Yes.
Q. And as it turned out, included within that definition were a number of ERISA plans, correct?
A. Yes.

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Q. And ultimately when the case was settled, the settlement class definition tracked the same definition and included a number of ERISA plans, correct?
A. Yes. So it included not only custody customers but trust customers. So the settlement class definition begins custody and trust customers.
Q. All right. But just one settlement class was certified, correct?
A. Correct.
Q. There was no separate class for ERISA plans, correct?
A. Correct.
Q. Or even a subclass, correct?
A. Correct.
Q. Nevertheless, the Department of Labor negotiated essentially a 60-million-dollar earmarked out of the 300-million-dollar settlement specifically for ERISA plans, correct?
A. The ERISA plans and group trusts. So focusing on the ERISA-governed assets within those group trusts.
Q. All right. Did you understand that the Department of Labor's position in that regard --

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that is to say, negotiating that 60-million-dollar earmark -- that it was their view that it was the ERISA lawyers and only the ERISA lawyers who brought about that result as opposed to any efforts on behalf of the customer class counsel?
A. No.
Q. Why is that?
A. Well, the 60 million dollars wouldn't exist unless the 300 million dollars existed. The 300 million dollars existed because of the efforts of customer class counsel and ERISA class -- ERISA counsel.
Q. The Department of Labor also negotiated a cap of some 10.9 million dollars on the fees to be charged against the 60-million-dollar amount that they had negotiated for the ERISA class members, correct?
A. Correct.
Q. And did that negotiated fee apply only to the settlement being allocated to the ERISA plan -- excuse me.
Let me begin again. Did that cap on the fee apply only to the ERISA counsel's fees?
A. No.

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Q. Did it apply to all counsel's fees?
A. Yes.
Q. In your view did the customer class counsel play a role in obtaining a recovery for the ERISA plans?
A. Absolutely.
Q. Would you regard that role characterized fairly as substantial?
A. Yes, I would.
Q. In the course of the work on the case as opposed to most more recent times, did anyone ever suggest that the ERISA counsel deserved 100 percent of the credit for that 60-million-dollar recovery going to the ERISA members of the class?
A. No.
Q. Did any of the ERISA counsel -- I'm talking now about comments made back during the day, not most recent self-serving comments.
Did any of the ERISA counsel ever suggest that?
A. Absolutely not.
Q. And did the DOL, Department of Labor, suggest that?
A. No.

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Q. In fact, did customer counsel actually participate in the negotiations with the Department of Labor about the ERISA allocation?
A. Yes, they did.
Q. It wasn't just Mr. Sarko, for example, who did that?
A. No, it was not. I would characterize Mr. Sarko as a point person and as perhaps a lead negotiator, but he was not the sole communicator.
Q. All right. Thank you. I'm going to switch subjects in a sense here.
In the papers that were presented in connection with the settlement approval process and the fee application, the term "plaintiffs' counsel" was defined to be the three what I'll call main customer counsel, Labaton, Lieff and Thornton, and the three main ERISA counsel, Keller Rohrback, McTigue and Zuckerman Spaeder. Correct?
A. Yes. I'm not looking at the document, but that sounds correct.
Q. I believe Mr. Sinnott actually asked you about the document earlier and focused on the term "plaintiffs' counsel." Do you recall that?
A. Yes.

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Q. But firms on the plaintiffs' side in addition to the three or the six firms actually submitted fee applications, did they not?
A. They did. And, just for the record, I'm looking at the definition of plaintiffs' counsel in the settlement agreement, and what you said is correct.
Q. All right. In fact, the firm by the name of Beins Axelrod in addition to Richardson Patrick from Charleston, South Carolina and Feinberg, Campbell & Zack all submitted fee applications in connection with this matter, right?
A. Right.
Q. And all of those firms were associated or affiliated with the ERISA side of the case, correct?
A. Correct.
Q. Did any of the three main ERISA counsel ever disclose to Judge Wolf the terms or nature of the relationship between them and these three other firms?
A. No.
Q. Did they ever disclose to the Court what allocation they expected would come out of their share to pay any of those three firms?