

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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ARKANSAS TEACHER RETIREMENT SYSTEM,  
on behalf of itself and all others similarly situated,

Plaintiff,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

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No. 11-cv-10230 MLW

ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R.  
TAYLOR, RICHARD A. SUTHERLAND, and those similarly  
situated,

Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

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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.

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No. 12-cv-11698 MLW

**LABATON SUCHAROW LLP'S MOTION TO STRIKE  
THE COVER MEMORANDUM TO THE MASTER'S  
FIRST SUBMISSION OF DOCUMENTS TO SUPPLEMENT THE RECORD**

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7.1, for the reasons set forth in the accompanying memorandum, which is incorporated herein by reference, Labaton

Sucharow LLP (“Labaton”) respectfully moves to strike the cover memorandum to the Master’s First Submission of Documents to Supplement the Record, filed under seal on August 3, 2018 (the “Cover Memorandum”). *See* Mot. to Seal, ECF 415.

WHEREFORE, Labaton respectfully requests that the Court strike the Cover Memorandum.

Dated: August 21, 2018

Respectfully submitted,

By: /s/ Joan A. Lukey

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)**

Labaton's counsel contacted other counsel in this case in order to confer regarding the substance of this motion.

The Thornton Law Firm does not object to the relief requested in this motion. Lieff Cabraser Heimann & Bernstein LLP and State Street Bank and Trust Company take no position on the relief requested in this motion. McTigue Law LLP, Keller Rohrback L.L.P., and Zuckerman Spaeder oppose the relief requested in this motion.

The Special Master responded as follows: "While the Special Master does not wish to withdraw the Cover Memorandum, we do believe it is in the interest of the Special Master's supplementation of his Report and Recommendations to keep this pleading under seal until such time as all issues surrounding the Report and Recommendations are resolved or the Court directs otherwise."

*/s/ Joan A. Lukey*  
\_\_\_\_\_  
Joan A. Lukey

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 21, 2018.

*/s/ Joan A. Lukey*  
\_\_\_\_\_  
Joan A. Lukey

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No. 12-cv-11698 MLW

**MEMORANDUM IN SUPPORT OF LABATON SUCHAROW LLP'S  
MOTION TO STRIKE THE COVER MEMORANDUM TO THE MASTER'S  
FIRST SUBMISSION OF DOCUMENTS TO SUPPLEMENT THE RECORD**

Labaton Sucharow LLP (“Labaton”) respectfully submits this memorandum in support of its motion to strike the cover memorandum filed by the Master with his First Submission of Documents to Supplement the Record (“Cover Memorandum”), filed under seal on August 3, 2018 (Motion to Seal at ECF 415). Labaton does not seek to strike the documents themselves, nor did Labaton object to the documents being released to the public record.

### **BACKGROUND**

The Court’s March 8, 2017 Order appointing the Master provides that the Master’s “complete record of the evidence concerning his recommended findings of fact and any conclusions of law . . . shall be filed with the Master’s Report and Recommendation.” March 8, 2017 Order ¶ 11, ECF 173. On May 15, 2018, Customer Class Counsel,<sup>1</sup> filed a Motion for Clarification or Modification asking the Court to clarify that the Master should not file in Court the entire, extensive record compiled in discovery during his investigation, but, rather, that he should limit the documents filed in these proceedings to: (1) the exhibits to the Master’s Report and Recommendations (the “Report”), (2) additional documents the Master may wish to add, (3) additional documents the parties wish to add, and (4) any other additional documents the Court wishes to add. Customer Class Counsels’ Mot. for Clarification or Modification, ECF 222. In no way did the motion suggest that the Master would, in conjunction with expansion of the judicial record, be permitted to expand or modify his Report.

On May 31, 2018, the Court granted Customer Class Counsels’ motion. The Court ordered that the Master should “preserve all documents and information developed in his investigation,” but that he was to file only:

- (a) the exhibits to the Master’s Report and Recommendation;
- (b) *any additional documents and information the Master wishes to add*;
- (c) any additional documents or information previously provided to the Master

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<sup>1</sup> Labaton, Lieff Cabraser Heimann & Bernstein LLP, and the Thornton Law Firm.

that any party wishes to add; and (d) any other documents that the court requests (the “Record”). The parties shall confer and, by June 6, 2018, propose a schedule and procedure for preparing and filing the record.

May 31, 2018 Order ¶ 12, ECF 237 (“May 31 Order”) (emphasis added). The Court’s May 31 Order did not authorize the Master to file an additional substantive memorandum supplementing his findings of fact and conclusions of law, which were already set forth in his lengthy Report, as to which all Objections have already been filed.

As they had been ordered to do, on June 6, 2018 the parties jointly filed All Parties’ Response to May 31, 2018 Order (ECF No. 237) Regarding Additional Documents from the Record, ECF 259. This filing set forth a proposed protocol (“Protocol”) for submitting additional documents and information from the record that had not been included as exhibits to the Master’s Report. The Protocol does not suggest that the Master should be granted the authority to expand or modify his Report by belatedly filing supplemental findings of facts, conclusions of law, or argument.<sup>2</sup>

On July 6, 2018, the Master wrote to the Court and asked whether the Court wished the Master to “respond to the objections of Customer Class Counsel including the enlargement of the filed record and/or to specify relevant portions of the existing filed record.” July 6 Letter to Hon. Mark L. Wolf, ECF 383. The Court issued its response on July 9, 2018, ordering the Master to file “any additional documents or information developed in his investigation.” July 9, 2018 Order ¶ 3, ECF 385. The Court reserved judgment on whether the Master would be called upon to respond to the parties’ objections. *Id.* at ¶ 4.

On August 3, 2018, the Master filed (under seal) 675 additional pages of documents produced in the proceedings before him. Without the Court’s permission and with no notice to

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<sup>2</sup> The Court adopted the Protocol in part in its August 10, 2018 Order, although it altered the procedure for the filing of documents identified by the Master. August 10, 2018 Order ¶¶ 4, 5(b), ECF 445.

the parties, the Master included a written memorandum, confusingly entitled, “Special Master’s First Submission of Documents to Supplement the Record.” *See* Mot. to Seal, ECF 415. This ten-page substantive memorandum, which Labaton refers to herein as the “Cover Memorandum,” is not a document produced in discovery or a transcript of a deposition generated during the proceedings before the Master. Rather, the Cover Memorandum details additional factual matters and includes additional legal analysis attempting to buttress the Master’s disputed findings of fact and conclusions of law in the Master’s Report, including, for example, with regard to the dispute among experts concerning Prof. Gillers’ analysis of the interplay between Rules 1.5(e) and 7.2(b) of the Massachusetts Rules of Professional Conduct.<sup>3</sup> The Master filed the Cover Memorandum after the parties had already filed their objections to the Master’s Report, so this modified or expanded information was not addressed in their objections. *See* May 16, 2018 Memorandum and Order at 6 ¶ 4, ECF 223; June 28, 2018 Memorandum and Order at 34 ¶ 12, ECF 356.

After the Master filed the unauthorized Cover Memorandum, Labaton commenced preparation of this motion to strike. Wolosz Decl. ¶ 6, ECF 457. Labaton’s preparation of this motion was interrupted when the parties and the Master began to negotiate regarding a possible resolution of this matter, as reported to the Court at the August 9, 2018 hearing. *Id.* On August 16, 2018, however, the Master, through his counsel, informed Labaton that he saw no reason not to un-seal the Cover Memorandum. *Id.* Labaton therefore now moves to strike the document, which should not have been filed in the first instance. The presence of the Cover Memorandum,

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<sup>3</sup> Labaton will not be more specific here, as this memorandum is being filed publicly, and the Cover Memorandum remains under seal.

without response, will only serve to confuse the public record in a manner that is neither necessary nor appropriate.<sup>4</sup>

## ARGUMENT

### **I. The Cover Memorandum Should Be Stricken Because its Filing Was Not Authorized by Rule 53 or by any Order of the Court.**

Federal Rule of Civil Procedure 53(h)(1) provides that a master “shall prepare a report upon the matters submitted to him by the order of reference, and, if required by the order of reference to make findings of fact and conclusions of law, he shall set them forth in the report.” Sequentially, Rule 53(h)(2) then allows the parties to serve written objections to the Report, which is precisely what happened here. Rule 53 anticipated no further amendment to the Report absent a resubmission, which had not occurred at the time that the Master filed his First Submission of Documents to Supplement the Record. Nor was there an order from the Court that authorized such an expanded Report. The process contemplated in the Court’s March 8, 2017 Order, ECF 173, was complete. The Court’s Orders of May 31, 2018 and July 9, 2018 addressed the filing of additional documents and information from the record but not a modified or expanded Report. *See* May 31 Order ¶ 12; July 9, 2018 Order ¶ 3, ECF 385. Neither these orders, nor any others from the Court, authorized the Master to use the submission of documents as a justification for submitting a modified or expanded Report containing new proposed findings of fact and conclusions of law.

Because the Master did not have authority to file the Cover Memorandum, and no mechanism was in place for Labaton to object to the recommended findings or conclusions contained therein, it can only serve to confuse the record and should therefore be stricken.<sup>5</sup>

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<sup>4</sup> As noted above, Labaton’s objection relates only to the Cover Memorandum. With the exception of limited personal information from two documents (to which the Master consented), Labaton has raised no objection to the filing of the 675 pages of additional documents themselves. *See* Special Master’s Response to Court’s August 10, 2018 Order at 4, ECF 454.



**II. The Cover Memorandum Should Be Stricken to Avoid Confusion in Circumstances in which Labaton is Unable to Respond.**

As noted above, the Master filed the Cover Memorandum after the deadline had passed for Labaton to file objections. The inability to file a direct and fulsome reply poses the substantial risk of prejudice to Labaton.

As previously noted, much of the Cover Memorandum expands upon the Master's opinion that the Chargois fee arrangement violated Mass. R. Prof. C. 1.5(e) such that Rule 7.2(b) would purportedly govern. This novel argument crafted by the Master's ethics expert, Professor Stephen Gillers, was and is hotly contested. *See* Report at 248-72; Labaton's Objections at 25-43, ECF 434. The Master was not authorized to attempt to "get the last word", and should not be permitted to use his authorized supplementation of documents and information from the record to engage in such an unauthorized effort.

To the extent that the Master wishes to address the Rule 1.5(e)/7.2(b) issue, and other issues, in a modified or expanded manner, he may do so in the context of the Court's recent resubmission of the Report to him. Labaton will presumably then have the opportunity to respond in an orderly fashion, following the sequencing specified in Rule 53. If such sequencing is not followed, and the Cover Memorandum is left unanswered in the public record, confusion will inevitably arise as the resubmission process proceeds and yet another version of the arguments is presented.

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<sup>5</sup> After the Cover Memorandum was filed, the Court ordered that this matter will be resubmitted to the Master to allow him an opportunity to respond to the parties' objections. August 10, 2018 Order at 2, ECF 445. But that order was not in place when the Master filed the Cover Memorandum, and in any event, the authorized response is expected to be a different document that has not yet been prepared. That is the document to which Labaton presumably can, and should respond.

**CONCLUSION**

For these reasons, the Court should strike the Master's Cover Memorandum, and restore order through the resubmission of a revised Report if the Master chooses to submit one. Any such submission will provide the opportunity for Labaton to respond as anticipated by the Federal Rules of Civil Procedure.

Dated: August 21, 2018

Respectfully submitted,

By: /s/ Joan A. Lukey

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on August 21, 2018.

*/s/ Joan A. Lukey* \_\_\_\_\_

Joan A. Lukey