

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J.

August 28, 2018

The court has considered the response to the August 10, 2018 Order (Docket No. 445) of the law firms representing the class in this case (the "Lawyers"), the Master, State Street Bank and Trust Company ("State Street"), the response to that Order of Competitive Enterprise Institute ("CEI"), as well as Labaton Sucharow LLP's ("Labaton") Motion to Strike the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record. The issues they present are resolved as follows.

A. Unsealing

The Lawyers, State Street, and the Master agree that certain documents relating to the Master's Report and Recommendation (the "Report"), objections to it, and exhibits made under seal should be unsealed with the exception of limited personal information in two documents. See Docket No. 455. In addition, without objection, the Thornton Law Firm ("Thornton") made limited redactions based on the work product doctrine to the versions of two exhibits it filed for the public record. See Docket No. 446 (referring to its Motion to Impound objection to the R&R, Docket No. 360). Liefv Cabraser Heimann & Bernstein, LLP ("Liefv") has moved to redact information in Exhibit A to its objections. See Docket No. 373. The foregoing are all documents which the court will consider in deciding issues in this case. There is, therefore, a presumption that the public has a right to see and copy them. See F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987);

Docket No. 356 at 4-6. However, it is appropriate to redact from them the limited personal information, confidential business information, and work product that they include. See United States v. Kravetz, 706 F.3d 47, 62 (1st Cir. 2013); Siedle v. Putnam Investments, Inc., 147 F.3d 7, 11 (1st Cir. 1998). Accordingly, the motions to seal the unredacted versions of the foregoing documents (Docket Nos. 455, 360, 373) are being allowed.

B. Labaton's Motion to Strike

Labaton has moved to strike the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record See Docket No. 458. The Cover Memorandum (Docket No. 423) was filed under seal on July 6, 2018, with 213 additional exhibits, totaling about 625 pages. Those exhibits are now part of the public record in this case. The Cover Memorandum includes excerpts of those exhibits, the Master's explanation of their relevance to the origins of the relationship between Labaton and Arkansas Teacher Retirement System, and to the Master's conclusion that Labaton's undisclosed payment of \$4,100,000 to Damon Chargois, Esq. was not an ethically permissible "referral fee," but rather an impermissible "finder's fee." See Special Master's Report and Recommendation (Docket No. 224) at 251-54 (the "Report").

Labaton argues that the Master should not be allowed to supplement the Report in this manner. See Docket No. 459 at 5. Rather, it contends that the Master should be required to provide

the information in the Cover Memorandum in the response to the objections to the Report that he was, on August 10, 2018, authorized to submit. Id. at 7.

As Labaton argues, in authorizing the Master to file additional exhibits, the court did not order or invite him to identify particularly important excerpts or to explain their implications. However, the Cover Memorandum was filed on July 6, 2018. The court read it in preparation for the August 9, 2018 hearing and considered it, among many other things, in deciding (ultimately with the Lawyers' agreement) to resubmit the Report to the Master to respond to the objections to it. See Docket No. 445 ¶2. As indicated earlier, there is, therefore, a presumptive right of public access to the Cover Memorandum. See Standard Fin. Mgmt. Corp., 830 F.2d at 408; Docket No. 356 at 4-6. The factual information in the Cover Memorandum is in the referenced exhibits that are already part of the public record in this case. Moreover, the usual public interest in access to judicial records is enhanced by the fact that, as explained in the August 1, 2018 Memorandum and Order (Docket No. 412), the court has been informed that a committee of the Arkansas legislature is "extremely concerned about references [in the Report] to 'political favors' in Arkansas that brought about the relationship between ATRS, Labaton Sucharow

and the Chargois/Herron law firm," Docket Nos. 412, 412-1, and has asked to speak to the Master about this matter.¹

In view of the foregoing, the court finds it most appropriate to deny Labaton's Motion to Strike the Cover Memorandum. It is, however, authorizing Labaton to file a reply to it now.

C. Scheduling

In response to the August 10, 2018 Order, the Lawyers, except for Thornton, agree that the Master and the Lawyers should be given an opportunity to discuss whether they can agree to a joint proposed resolution of their disputes before the Master responds to the objections to his Report. They propose to report on their discussions by September 6, 2018, and state that they may request additional time to continue them.

The court has a responsibility "to protect against unreasonable expense or delay" in these proceedings. Fed. R. Civ. P. 53(a)(3). Therefore, it is allowing this request. However, to reduce the risk that time and money may be wasted in negotiating terms that may prove unacceptable to the court, it makes the following observations.

¹ The court has ordered that the Master not discuss or disclose documents or information developed in his investigation without authorization by the court, and has required that requests for such information be directed to the court. See Docket No. 412.

The Master was appointed to investigate issues in this case, and to provide his recommendations regarding the facts and applicable law. If discussion of the Lawyers' objections persuades the Master that any of his original findings and conclusions should be modified, the court will consider the proposed modifications. However, the court continues to expect to receive the Master's candid views on the facts and the law, as well as reasonable suggestions that would, if adopted, reduce the length and expense of proceedings in this matter.

The court is now a fiduciary for the class. See W.B. Rubenstein, 4 Newberg on Class Actions §13:40 (5th ed. 2018 Update); In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 192-94 (D. Mass. 2005); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002). In addition, it has a duty to protect and promote the integrity of the administration of justice.

Questions about the accuracy and honesty of representations that some of the Lawyers made, under oath, in initially persuading the court to award the Lawyers about \$75,000,000 in attorneys' fees prompted the court to appoint the Master. See Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co., 232 F. Supp. 3d 189, 193 (D. Mass. 2017). The Master found that misstatements were made to the court and, at least with regard to Thornton, some of the misstatements were made knowingly. See Report (Docket No. 224) at 225-29, 364-67. The Master recommended that certain sanctions be

imposed. See id. at 362-74. Thornton, among others, disputes the Master's findings and objects to his recommended sanctions. See Docket No. 361.

Whether sanctionable conduct occurred is relevant both to the amount of attorneys' fees to be awarded and to the integrity of the judicial process. As the Ninth Circuit has written, "under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation," and whether any misconduct was willful is relevant to the magnitude of any sanction that should be imposed. Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012). In addition, sanctions, including a fine, might be justified and appropriate to punish and deter misconduct that could injure the administration of justice. See, e.g., Fleming & Assocs. v. Newby & Tittle, 529 F.3d 631, 638 (5th Cir. 2008); Martinez v. City of Chicago, 823 F.3d 1050, 1054 (7th Cir. 2016). Therefore, the court may feel compelled to resolve certain disputed issues that are relevant to possible sanctions even though doing so may involve additional time and expense.

The Lawyers and the Master should consider the foregoing observations as they discuss a possible joint proposed resolution of some or all of the disputed issues in this matter. They should not, however, regard them as the court's final view on any issue.

D. The Role of CEI

On August 10, 2018, the court authorized CEI to request leave to file additional amicus briefs, which to date the court has found helpful. See Docket No. 445 ¶3. The court took under advisement CEI's request to serve as Guardian Ad Litem for the class. See id. CEI has subsequently submitted additional information and argument concerning its requests. See Docket No. 451. As the Lawyers and the Master are discussing a possible proposal to resolve or narrow their disputes, the nature and scope of future litigation in this matter is uncertain. Therefore, the court will continue to take CEI's request to serve as Guardian Ad Litem under advisement.

In view of the foregoing, it is hereby ORDERED that:

1. The documents listed in the Report Pursuant to Paragraph 5(c) of the Court's August 10, 2018 Order (Docket No. 455), which are numbered 1 through 12, are UNSEALED.

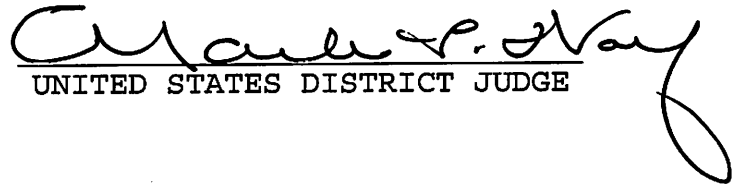
2. Lieff's Motion to Impound One Exhibit (Docket No. 373) is ALLOWED.

3. Thornton's Motion to Impound (Docket No. 360) as modified by Thornton's Notice of Filing Objections (Docket No. 446) is ALLOWED.

4. Labaton's Motion for Extension of Time to File Motion to Strike (Docket No. 456) is ALLOWED. Labaton's Motion to Strike Cover Memorandum (Docket No. 458) is DENIED. Labaton may, by September 7, 2018, file a response to the Cover Memorandum.

5. The Master and the Lawyers shall confer and, by September 6, 2018, report, jointly if possible but separately if necessary, on whether they have agreed to a proposal to resolve some or all of the issues in dispute in this matter, or request additional time to do so. After reviewing this submission, the court will, if necessary, establish a schedule for the Master to respond to the objections to the Report and for the Lawyers to submit replies.

6. CEI's Motion for Leave to Participate as Guardian Ad Litem for the Class (Docket No. 126) shall remain under advisement.


UNITED STATES DISTRICT JUDGE

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DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM,)
on behalf of itself and all others)
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Plaintiff)

v.)

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Defendants.)

C.A. No. 11-10230-MLW

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C.A. No. 12-11698-MLW

ORDER

WOLF, D.J.

August 28, 2018

The court has received, but not yet reviewed, the bills for the fees and expenses of the Master and the organizations and individuals he has retained for June and July 2018. They total more than the remaining amount of the \$3,800,000 previously provided from class funds to the Clerk of the United States District Court for the District of Massachusetts to pay such bills.¹ Therefore, the court is considering amending its prior orders to require that Labaton Sucharow, LLP ("Labaton") pay from

¹ On August 10, 2018, the court ordered that "[t]he Master and the individuals and organizations he employs shall continue to be compensated in the manner provided in the March 7, 2017 Order (Docket No. 173) ¶¶13, 14, as amended on May 25, 2017, see Docket No. 206)." Docket No. 445, ¶2. As the court explained in note 1 of that Order:

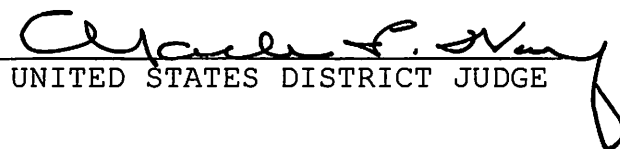
On June 22, 2018, the court issued an order granting Labaton Sucharow LLP's Motion for Relief from Order Awarding Fees, Expenses, and Service Awards (Docket No. 178). See Docket No. 331. That Order vacated the Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket No. 111). See Fed. R. Civ. P. 60(b), 1946 Advisory Committee Note ("Rule 60(b) [which provides for "Relief from a Judgment or Order"] does not assume to define the substantive law as to the grounds for vacating judgments") (emphasis added). The court has not vacated the Order and Final Judgment approving the \$300,000,000 settlement of this case (Docket No. 110). However, as the court has vacated the award of \$75,000,000 for attorneys [fees], expenses, and service awards, it deems those funds to now constitute class funds.

fees it previously received an additional \$750,000 to the Clerk to provide a fund for payment of past and possible future fees and expenses. See Fed. R. Civ. P. 53(b)(4); Mar. 8, 2017 Mem. & Order (Docket No. 173) ¶16

Therefore, it is hereby ORDERED that:

1. Any objection to the issuance of such an order, and the reasons for it, shall be filed by September 7, 2018.

2. If one or more objections are filed, the Master shall respond by September 17, 2018.


UNITED STATES DISTRICT JUDGE