Exhibit A

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

CUSTOMER CLASS COUNSELS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLARIFICATION OR MODIFICATION OF THE COURT'S MARCH 8, 2017 AND MARCH 1, 2018 ORDERS TO ELIMINATE THE REQUIREMENT FOR THE MASTER TO FILE ALL DOCUMENTS PRODUCED IN DISCOVERY WITH THE COURT

Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff"), and the Thornton Law Firm ("TLF") (collectively, "Customer Class Counsel") respectfully submit this memorandum in support of their Motion for Clarification or Modification ("Motion"), filed May 15, 2018 (ECF 222). As set forth in that motion, Customer Class Counsel move for a clarification or modification of the Court's March 8, 2017 Order (Docket No. 173 at ¶ 11), as reiterated in the Court's March 1, 2018 Order (Docket No. 216 at p. 2) (collectively, "the Orders"), to limit the filing of the documents produced in discovery to that which would traditionally be part of a judicial record, i.e., (a) the exhibits to the Special Master's Report and Recommendation, (b) such additional documents as the Master may wish to add, (c) such additional documents as any party believes to be appropriate in this *de novo* review period, and (d) any other documents the Court requests.

The Master asserts that he is constrained to file the entire discovery record, which consists of, among other materials, over 234,000 pages of documents produced by Customer Class Counsel. Respectfully, the Master's position is at odds with judicial precedent and may read too much into this Court's Orders, which require the Master to file the record "concerning" his Report. *See* ECF 173; ECF 216. The Master's Report already attaches a voluminous record: 266 exhibits, totaling 9,559 pages and comprised of transcripts, documents produced by Customer Class Counsel, interrogatory responses, pleadings, and other materials. This substantial record "concerns" the Master's report, as would any additional materials that the Master or the parties wish to add. The remaining discovery materials do not. Moreover, the Master's position threatens to drag the parties and the Court into an extraordinarily expensive and unnecessary redaction process, a result that Rule 53 cautions against. *See* Fed. R. Civ. P. 53(a)(3) ("In appointing a master, the court must consider the fairness of imposing the likely

expenses on the parties and must protect against unreasonable expense or delay."). In order to avoid this unnecessary burden and expense, Customer Class Counsel request that the Court enter an order providing that the filed record will consist of the Master's Report and other categories of documents listed above, and will not include the remaining portions of the full discovery record.

PROCEDURAL BACKGROUND

In its March 8, 2017 Order (ECF 173) (the "Appointing Order"), the Court ordered that the "Master shall make and preserve a complete record of the evidence concerning his recommended findings of fact and any conclusions of law," to be "filed with the Master's Report and Recommendation." ECF 173 at ¶ 11. On March 1, 2018, the Court confirmed that, in addition to the Master's Report, "[t]he complete record of the evidence concerning the Master's recommended findings of fact and conclusions of law must also be filed. See Mar. 8, 2017 Memorandum and Order (Docket No. 173), ¶ 11." ECF 216 at p. 2.

Through its Appointing Order, the Court empowered the Master to "compel, take, and record evidence," which includes the authority to propound document requests and interrogatories. ECF 173 at ¶ 4. The Master made extensive use of this authority: he issued voluminous, broad discovery requests and received significant document productions from Customer Class Counsel, totaling over 234,000 pages from these three law firms alone[1]; he propounded numerous interrogatories and received voluminous responses; and he conducted 56 depositions of fact witnesses.[2]

[1] This number does not include productions by ERISA counsel, if any, which Customer Class Counsel would not have seen. It also does not include any documents that the Special Master's counsel may have downloaded or printed from the electronic document review application in the underlying litigation, to which the Master was provided access.

[2] The Master and Customer Class Counsel also engaged in extensive expert discovery.

In his May 14, 2018 Motion to Seal Final Report and Recommendations, the Master stated that he intended to file "the complete record of evidence compiled in this case" – which Customer Class Counsel considered to be more expansive than the "complete record of the evidence concerning his recommended findings of fact and conclusions of law" ordered by the Court. *Compare* ECF 173 and ECF 216 *with* ECF 219. Accordingly, Customer Class Counsel filed their Motion for Clarification or Modification of the Court's Orders on May 15, 2018 (ECF 222).

On May 16, 2018, Customer Class Counsel received the Master's Report. The next day, the Court issued its May 17, 2018 Memorandum and Order (ECF 226). In accordance with that Order, counsel for Labaton conferred with (among others) William Sinnott, counsel for the Special Master, regarding the Special Master's views on Customer Class Counsel's Motion for Clarification or Modification (ECF 222). Late in the day on Tuesday, May 22, Mr. Sinnott responded:

> The Special Master is bound by the Court's orders in this case, and, therefore, cannot support a position that conflicts with the mandate of the Court. The Special Master, thus, defers to the Court's 3/8/17 Order (providing that "The Masters shall make and preserve a complete record of the evidence concerning his recommended findings of fact and any conclusions of law. Such record shall be filed with the Master's Report and Recommendation") and its 3/1/18 Order reaffirming that a full record is required ("The complete record of the evidence concerning the Master's recommended findings of fact and conclusion of law must also be filed.") See also Fed. R. Civ. P. 53(b)(2)(C) and 2003 Advisory Committee Notes ("A basic requirement [] is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence.).[3]

[3] *See also* Special Master's Report on Customer Class Counsels' Motion for Clarification or Modification of the Court's March 8, 2017 and March 1, 2018 Orders to Eliminate the Requirement for the Master to File All Documents Produced in Discovery With The Court (ECF No. 231), which further articulates the Master's position.

Thus, the Master appears not only to view the Court's Orders as requiring that the entire discovery record produced in this case be filed; he now is advocating in favor of such a position purportedly based on Federal Rule of Civil Procedure 53. With all due respect to the Master, this position is incorrect, as explained below.

ARGUMENT

I. The Master is Not Required to File the Entire Discovery Record.

Rule 53 does not mandate that the Master file the entire discovery record. Instead, it leaves that decision to the Court, providing that the appointing order must state "the nature of the materials to be preserved and filed as the record of the master's activities." Fed. R. Civ. P. 53(b)(2)(C). The 2003 Advisory Notes elaborate on this directive:

> A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact.

Fed. R. Civ. P. 53, 2003 Advisory Notes. Importantly, the 2003 Advisory Notes also state that, although discovery materials could be filed directly with the Court pursuant to the then-existing Fed. R. Civ. P. 5(e), "in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations." *Id.* Of course, the Court "may direct filing of any materials that it wishes to make part of the public record," but such filing is not required under the Rule. *See id.*

The Court's orders directing the Master to file the "complete record of the evidence concerning his recommended findings of fact and any conclusions of law" is consistent with this framework. ECF 173; ECF 216. The Master's broad interpretation and expansion of those

orders, on the other hand, run counter to First Circuit practice. A survey of cases in this circuit in which special masters were appointed demonstrates that it is at least unusual for a master, after filing a report, to file the entire discovery record produced in the course of his or her duties. *See, e.g., Abraca Health LLC et al. v. PharmPix Corp. et al.*, 3:11-cv-01218 (D. P.R. January 13, 2013) (ECF 185, 189) (appointing order provided that "[t]he final report shall be the only record of the Master's activities in the Court's docket."); *Prof'l Market v. AC Nielsen Corp., et al.*, 3:03-cv-02314 (D. P.R. Oct. 7, 2008) (ECF 137) (appointing order contains same language).[4] Instead, it appears that a typical practice is for the special master to preserve a fuller record generated during his or her duties, but not to file the entire record automatically.

Here, the Master has preserved the discovery record. This preservation will allow him, the parties, and the Court to supplement the Court record, to the extent they deem necessary, pursuant to the procedure proposed by Customer Class Counsel. Wright and Miller recommend a similar approach:

> The report should include all the portions of the record preserved under Rule 53(b)(2)(c) that the master deems relevant. The parties may designate additional materials from the record and may ask the court to supplement the record with evidence; the court may also direct that additional materials from the record be provided and filed.

[4] A non-exhaustive search within the First Circuit has uncovered numerous additional examples in which the special master did not file the entire record generated during the course of his or her duties. *See Mass. Inst. of Tech. v. Still River Sys., Inc.*, 10-cv-12186 (D. Mass. July 8, 2011) (ECF 22); *Commonwealth of Mass. et al. v. E*Trade Access, Inc., et al.*, 03-cv-11206 (D. Mass. May 22, 2013) (ECF 351); *DBH Kaplan v. First Hartford Corp., et al.*, 05-cv-00144 (D. Me. June 16, 2009) (ECF 209); *Maine People's Alliance, et al. v. Holtranchem MFG Co., et al.*, 00-cv-00069 (D. Me. July 1, 2004); *In re: Mortgage Foreclosure Master Docket*, 1:11-mc-00088 (D. RI. 2011) (ECF 156); *In re: Volkswagen and Audi Warranty Extension Litig.*, 07-md-01790 (D. Mass. Oct. 23, 2008) (ECF 122); *In re: Webloyalty.com, Inc., Mktg. and Sales Practices Litig.*, 07-md-01820 (D. Mass. June 18, 2007) (ECF 52); *In Re: Tyco Sec. Litig., et al.*, 02-md-01335 (D. N.H. June 24, 2010) (ECF 1671); *Consejo de Salud Playa Ponce v. Gonzalez Feliciano*, 3:06-cv-01260 (D. P.R. May 13, 2009) (ECF 260; ECF 321); *U.S. Fidelity v. Gabriel Fuentes Cons, et al.*, 3:03-cv-01903 (D. P.R. Aug. 30, 2005) (ECF 724). On the other hand, Counsel's research did not locate any recent case within the First Circuit in which the entire discovery record generated by a master was required to be filed.

9C Wright & Miller, *Federal Practice and Procedure*, § 2611 at 621 (3d ed. 2008). This, of course, is consistent with the Rules of Civil Procedure more generally, which provide that discovery materials not actually used in connection with a motion or Court proceeding are not to be filed. *See, e.g.,* Fed. R. Civ. P. 5(d)(1); D. Mass. Local Rule 26.6(a).

If the Master believes that other parts of the discovery record are relevant to his Report, beyond the 9,559 pages that he has already selected, he should identify those materials and file them. However, his stated approach – filing the entire record – is not required by the Rules, departs from the apparent practice of this Circuit, and conflicts with the procedure suggested by relevant authorities. Respectfully, the Court should clarify its orders to adopt Customer Class Counsel's reasonable proposal, which allows the Master and all parties to include such portions of the record as they may deem of import to the *de novo* review, and permits the Court to order supplementation of the record as it deems appropriate.

II. Filing the Entire Discovery Record Would Conflict With Rule 53(a)(3).

Rule 53(a)(3) provides that in "appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3). Customer Class Counsel have already paid $3.8 million to fund the Special Master's work, in addition to incurring significant legal fees and spending substantial time responding to the investigation.

Filing the entire discovery record, and the attendant redaction process, would be costly for the firms and would unnecessarily drain judicial resources. Merely submitting the discovery record to the Court appears expensive and unwieldy, demonstrating how atypical the process would be. *See* May 16, 2018 Order (ECF 223) at n. 1 ("The Master has informed the court that it will take several more weeks to compile the record for filing. In addition, it has not yet been determined whether it is feasible and cost-effective to have the record converted into a

searchable electronic form as previously ordered."). Moreover, this difficulty in merely *filing* the discovery record portends the burdensome and expensive work that will follow: several law firms poring through voluminous discovery that is replete with privileged communications, work product, confidential personal information, and commercially sensitive material. The cost of that process alone will be massive. Then, inevitably, disagreements will arise over proposed redactions within those tens of thousands of pages. This undertaking will consume a substantial amount of the firms', the Court's, and perhaps the Master's time.

In addition, each party's law firm will have the right to file under seal its own proposed redactions of the 234,000+ pages, presumably in hard copy, which will result in burdening the Court with a truck-load of bankers' boxes, and the obligation to go through each in order to rule upon the requested redactions. Were the Court to choose to shift this review responsibility to the Master, the Court would simultaneously be shifting a huge expense as well.[5]

It would indeed be unusual to embark upon this process merely to enable the filing of those documents that the Master and the parties have decided are *not* necessary for determination of the issues presented.[6] It is difficult to see the benefit in this exercise. The costs are obvious and materially outweigh any minimal value gained from filing the documents upon which neither the Master nor the parties rely. Under the circumstances, this simply would not constitute a reasonable expense. *See* Fed. R. Civ. P. 53(a)(3).

III. There Is No Countervailing Reason to File the Discovery Materials Because They Are Not Judicial Records, and the Public Has No Presumptive Right of Access to Them.

[5] Customer Class Counsel respectfully continue to preserve their rights with regard to an accounting regarding, and potential objection to, the amounts that they have been required to fund.

[6] As stated in Customer Class Counsel's Motion, much of the document production is wholly irrelevant to the Master's Report and Recommendations.

The record that the Master seeks to file consists of typical discovery materials, produced in response to requests for the production of documents, interrogatories, and deposition questions, pursuant to a Limited Protective Order entered by this Court. ECF 191.[7] There is no public interest that militates in favor of filing the entire discovery record. The Supreme Court has explained that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). As such, "the courts of appeals have uniformly held that the public has no common law or constitutional right of access to materials that are gained through civil discovery but neither introduced as evidence at trial nor submitted to the court as documentation in support of motions or trial papers." *United States v. Kravetz*, 706 F.3d 47, 55 (1st Cir. 2013); *see also, e.g.*, *Anderson v. Cryovac*, 805 F.2d 1, 13 (1st Cir. 1986) (holding that there is no common law right to inspect discovery documents because "[t]here is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.").

Instead, whether there is a public right of access to materials "turn[s] on whether the documents that are sought constitute 'judicial records'" – i.e., whether the Court relies on the materials "in determining the litigants' substantive rights." *Kravetz*, 706 F.3d at 54. The key inquiry is whether the documents are relevant to the Court's decisionmaking. *Id.* at 58-59, n. 9

[7] The Protective Order makes clear that discovery was a private process before the Master, rather than the preparation of an all-encompassing filing for public consumption: "[d]ocuments and information produced in these proceedings [before the Master] may be used only in connection with these proceedings, and may not be otherwise used or disseminated." ECF 191 at ¶ 2. Tellingly, the Protective Order also contemplates that only some of the record would be filed: "such proceedings shall be private; provided, however, that the transcripts thereof (*or excerpts*) shall be filed in Court with the Special Master's Report and Recommendation . . ." *Id.* at ¶ 4 (emphasis added).

("We do not hold that an irrelevant document, that neither was nor should have been relied on, is nevertheless a judicial document and thus necessarily presumptively subject to disclosure."); *see also FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) ("Those documents which play no role in the adjudication process . . . such as those used only in discovery, lie beyond reach."). Therefore, while the documents relied upon by the Court, the Master, and the parties may be judicial records, the balance of the discovery materials are not. Accordingly, there is no presumptive right of access to these documents, and there is no reason for filing them that outweighs the attendant burdens.

CONCLUSION

For the foregoing reasons, and the reasons stated in Customer Class Counsel's Motion (ECF 222), Customer Class Counsel respectfully request that the Court clarify or modify its March 8, 2017 Order, (Docket No. 173 at ¶ 11), as reiterated in its March 1, 2018 Order (Docket No. 216 at p. 2), to limit the filing of the documents produced in discovery to (a) the exhibits to the Special Master's Report, (b) such additional documents as the Master may wish to add, (c) such additional documents as any party wishes to file in the *de novo* review period, and (d) any other documents that the Court requests.

Dated: May 25, 2018

Respectfully submitted,

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