UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM McGEE and LEE McGEE, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. CONSTANT CONTACT, INC., et al., Defendants.	No. 1:15-cv-13114-MLW CLASS ACTION MOTION PURSUANT TO LOCAL RULE 7.2(a) TO IMPOUND AND MEMORANDUM IN SUPPORT

In accordance with the Court's November 9, 2019 Order (the "Order") and pursuant to District of Massachusetts Local Rule 7.2, Lead Plaintiff respectfully moves to impound: (1) the Monitoring Agreement entered into in June 2014 between North Naples Fire Control and Rescue District Firefighters' Pension Plan (n/k/a North Collier Fire Control and Rescue District Firefighters' Pension Plan) ("Lead Plaintiff" or "North Collier") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") (the "Monitoring Agreement")[1]; and (2) the September 2015 Retention Agreement entered into in connection with the above-captioned litigation between North Collier and counsel (the "Retention Agreement"). Each of these documents is protected from public disclosure by the attorney-client and work-product privileges or otherwise includes sensitive business information,[2] and maintaining the confidential nature of certain aspects of these documents is warranted and consistent with the common law presumption of public access to judicial records. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404 (1st Cir. 1987).

Lead Plaintiff and Lead Counsel respectfully request, pursuant to Local Rule 7.2(a), that the agreements remain impounded until further order of the Court.

I. THE UNREDACTED MONITORING AND RETENTION AGREEMENTS SHOULD BE MAINTAINED UNDER SEAL

Institutional investors such as North Collier have a fiduciary duty to protect their assets. As a result, institutional investors frequently utilize portfolio monitoring to monitor their portfolios for securities fraud and other violations of law. Indeed, "given the extensive investments inherent in the operation of a pension fund," courts are "not surprised" when pension funds, like Lead Plaintiff here,

[1] North Collier was originally formed in 1996 as the North Naples Fire Control and Rescue District Firefighters' Pension Plan, and changed its name when it merged with another fire district in 2015.

[2] Pursuant to the Order, redacted copies of the Monitoring Agreement and the Retention Agreement are being filed concurrently herewith.

have "arranged for a law firm to keep it apprised of events (including lawsuits) that might be of interest." *In re Am. Italian Pasta Co. Sec. Litig.*, No. 05-0725-CV-W-ODS, 2007 U.S. Dist. LEXIS 21365, at *22 (W.D. Mo. Mar. 26, 2007). "Arguably, a pension fund's failure to take steps to be aware of existing or prospective litigation that affects its investments would be an abdication of duty." *Id.* The monitoring agreement between North Collier and Robbins Geller, entered into in 2014, is just such an agreement. *See Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *4 (D.R.I. Feb. 17, 2016). Notably, the Monitoring Agreement does not contain terms specific to the claims or defenses of any particular case.[3]

The Monitoring Agreement memorializes the attorney-client relationship, details the scope of the obligations and the process imposed on counsel to assess and determine the impact of securities fraud on North Collier's investment portfolio to analyze whether losses may be attributable to violations of securities laws. Thus, it is a protected attorney-client communication. *Fisher v. United States*, 425 U.S. 391, 403 (1976) (holding that, under the attorney-client privilege, confidential communications made by a client to an attorney to obtain legal services are protected from disclosure). *See also Mass. Bricklayers & Masons Trust Funds v. Deutsche Alt-A Sec., Inc.*, No. CV-08-3178 (LDW)(ARL) (E.D.N.Y.) (Order dated Oct. 31, 2011) (denying motion to compel production of retention and monitoring agreements).

As recognized by the United States Supreme Court in *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978), courts have declined an absolute and unfettered right of public access to court proceedings where the information sought is "business information that might harm a litigant's competitive standing." While "[i]t is difficult to distill from the relatively few judicial decisions a

[3] North Collier also has monitoring agreements with three other law firms. *See* Affidavit of Michelle Delaney, ¶9, submitted herewith.

comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 598-99.

The Monitoring Agreement contains competitive proprietary business information. Public disclosure of the Monitoring Agreement in its entirety would permit malefactors to learn details of the particular approach taken by North Collier in how it monitors its investment portfolio to detect possible fraudulent conduct. It would allow Lead Counsel's competitors to utilize the provisions and information contained therein for their own advantage. *See Willis v. Big Lots, Inc.*, No. 2:12-cv-604, 2016 U.S. Dist. LEXIS 99483, at *5 (S.D. Ohio July 29, 2016) (granting motion to file monitoring agreement under seal, finding that although Robbins Geller's monitoring agreements have been discussed with, and considered by, other courts, "it does not appear to the Court that the discussion has been so public and on such a scale to divest those documents of their confidential character"). *See* Affidavit of Darren J. Robbins, ¶2, submitted herewith.

The Retention Agreement contains provisions unrelated to the reasonableness determinations the Court is to make with respect to its consideration of the fairness of the settlement and any award of attorneys' fees and expenses. Therefore, Lead Plaintiff and Lead Counsel respectfully request that the unredacted Monitoring Agreement and Retention Agreement be submitted *in camera* and, in light of the facts and circumstances here, the Court utilize its broad discretion to accept for filing the redactions made in the publicly-filed versions.

The First Circuit's opinion in *FTC v. Standard Financial*, is not to the contrary. There, the First Circuit determined that this Court did not abuse its discretion in unsealing sworn financial

personal financial documents, based on a number of factors not present here. As an initial matter, the First Circuit emphasized "[t]he appropriateness of making court files accessible is accentuated in cases where the government is a party." *FTC*, 830 F.2d at 410. Here, the parties are private litigants and no such elevated threshold attaches.

The First Circuit concluded that while "'the public's right of access is vibrant, it is not unfettered. Important countervailing interests can, in given instances, overwhelm the usual presumption and defeat access.'" *United States v. Kravetz*, 706 F.3d 47, 52 (1st Cir. 2013) (citation omitted). The First Circuit further declared that the presumption of public access to materials does not extend to "[t]hose documents which play no role in the adjudication process, however, such as those used only in discovery, [which] lie beyond reach." *FTC*, 830 F.2d at 408. Here, the agreements being filed under seal were not the subject of discovery and the redacted portions do not bear on the Court's determination of the issues to be resolved in considering approval of the class settlement. Indeed, "'. . . courts usually find [discovery regarding fee arrangements between plaintiffs and their counsel] to be irrelevant to the issue of class certification.'" *See, e.g.*, *In re Front Loading Washing Machine Class Action Litig.*, No. 08-51 (FSH) (MAS), 2010 WL 3025141, at *4 (D.N.J. July 29, 2010) (quoting 7 A. Conte & H. Newberg, *Newberg on Class Actions* §22.79 (4th ed. 2005)). As such, an appropriate balance between the desire of Lead Plaintiff and Lead Counsel to protect privileged and/or otherwise sensitive business information and the public's right to access is achieved through impoundment of the unredacted versions of the Monitoring and Retention Agreements.

II. CONCLUSION

The Monitoring Agreement and the Retention Agreement are privileged communications and contain confidential information not appropriately shared with the public. The Agreements, as

publicly-filed with targeted redactions, strike a considered balance between public disclosure of information and protection of Lead Plaintiff's and Lead Counsel's proprietary business information. Lead Plaintiff and Lead Counsel respectfully request that the Court grant the relief sought herein.

DATED: November 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Court's Manual Notice List.

/s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART