UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BEACON ASSOCIATES LITIGATION This Document Relates to: ALL ACTIONS	No. 09 Civ. 0777 (LBS)(AJP)
IN RE J.P. JEANNERET ASSOCIATES, INC., *et al.* This Document Relates to: ALL ACTIONS	Case No. 09 Civ. 3907 (CM) (AJP)
BOARD OF TRUSTEES OF THE BUFFALO LABORERS SECURITY FUND, WELFARE FUND AND WELFARE STAFF FUND, in their capacity as fiduciaries of the respective funds, individually and on behalf of all others similarly situated, Plaintiffs, v. J.P. JEANNERET ASSOCIATES, INC., JOHN P. JEANNERET, PAUL L. PERRY and IVY ASSET MANAGEMENT CORPORATION, Defendants.	No. 09 Civ. 8362 (LBS) (AJP)

REPLY MEMORANDUM OF LAW OPPOSING THE NEW YORK ATTORNEY GENERAL AND THE BEACON AND ANDOVER FUNDS' OBJECTIONS TO ATTORNEYS' FEES AND EXPENSES

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Preliminary Statement

Plaintiffs submit this opposition to the objections filed by the New York Attorney General ("NYAG") and the Beacon/Andover Funds ("Beacon" and collectively with NYAG, "Objectors") to Private Counsels' omnibus fee and expense application for all settling actions. There is no natural antagonism between Private Counsel and the NYAG. Private Counsel seek to vindicate their clients' rights and the NYAG, the public good. Yet, the NYAG has taken a factually baseless position. Private Counsel (class, derivative and individual) worked hard to prosecute complex claims collaboratively with the Department of Labor ("DOL"). Over the last year, the NYAG came to rely heavily on Private Counsel. *See e.g.*, Hart Supp. Decl. ¶¶ 28, 29 and Exs. 28-29. The NYAG's recent praise was unequivocal. When Lowey partner Thomas Skelton emailed that the stipulation had been sent to Magistrate Judge Peck (with the message "Houston, Tranquility Base here . . . The Eagle has landed!!!"), Mr. Waldman wrote: "Congratulations Tom. It could not have happened without your legal skill, extraordinary patience, and iron endurance. You are a helluva Lawyer." Hart Supp. Decl. Ex. 29. Mr. Furst of the DOL responded: "I agree with Roger. Tom, thanks for everything you and your team did to coordinate everything between and among the mass of plaintiffs' and defendants' lawyers and get the settlement signed, sealed and delivered. It was a terrific accomplishment, and we are very grateful." *Id.*

The NYAG repeatedly rebuffed attempts to collaborate, and never told us of Ivy's $140 million offer until the fee objections. After the NYAG filed his complaint, Ivy "took the offer **off the table**." *See* Waldman Aff. at¶ 5 (emphasis added) (Hart Supp. Decl. Ex 1). The NYAG's assertions about the comparative worth of the withdrawn 2010 offer and the current Settlement, and how little value Private Counsel conferred, are grossly inaccurate. Billions in Bankruptcy Trustee recoveries sharply reduced recoverable damages and there were major flaws

in the 2010 offer, including failing to involve the Trustee (*see infra* pp. 12–14). The NYAG concedes that the NYAG did not disclose Ivy's offer to Private Counsel or their clients. *See* Waldman Aff. at ¶ 7 (Hart Supp. Decl. Ex 1). The Fund Objectors simply have no standing and that objection is erroneous for the same reasons.

The Objections ignore critical facts: (a) the Courts' rationale for appointing counsel to represent various interests; (b) Defendants required the resolution of all claims: class, derivative, DOL, NYAG and individual; (c) Plaintiffs filed their actions sixteen months **before** the NYAG; (d) Plaintiffs (unlike the NYAG) aggressively litigated their claims; (e) Plaintiffs used a competitive process to retain counsel to pursue high-risk litigation at market rates; (f) that the ERISA and state derivative claims were viable regardless of the facts in the NYAG's complaint; (g) two state derivative complaints had already been sustained before the NYAG even filed; (h) Plaintiffs uncovered many hot documents not cited by the NYAG; and (i) Private Counsel prevailed on issues of scienter, reliance, Ivy's fiduciary status, continuing fraud doctrine, and class certification. Defendants' actions in fighting the Private actions belie the notion that Private Counsel rode the NYAG's coattails. Defendants: (a) aggressively litigated every motion and discovery dispute; (b) served extensive discovery requests; (c) intensely defended motions for class certification, deposing every putative class representative and filing Rule 23(f) petitions; and (d) filed and perfected appeals in the state court proceedings.

ARGUMENT

I. PRIVATE COUNSEL WORKED HARD, MET DEADLINES, AND WORKED TOGETHER AND WITH THE DOL

A. The Fee Requested is Commensurate With the Result and the Work Performed

In an effort to provide the global peace Defendants insisted on, Plaintiffs in three class, four derivative and numerous individual actions, plus two regulators and the Bankruptcy Trustee

came together for a dual-mediator, multiparty mediation. Prior to the mediation, Private Counsel had defeated multiple exhaustive motions to dismiss the securities and ERISA claims and the state law derivative claims. We engaged in substantial discovery. Over 20 million pages were produced by defendants and third parties into a central repository overseen by Lead Counsel and DOL to avoid duplication. Private Counsel reviewed depositions DOL had taken. Plaintiffs produced in excess of two million pages of discovery on a tight schedule as ordered by Magistrate Judge Peck. This involved recovery of decades of electronic data from dozens of computers and hard drives. Counsel moved for class certification of multiple securities and ERISA classes, which Defendants vigorously contested. Unlike the cases cited by Objectors where counsel rode coattails, Private Counsel appeared before this Court, Judge Sand and Magistrate Judge Peck at least 20 times (*see* Hart Opening Decl. at ¶ 55), and appeared numerous times in state court and briefed 26 motions and three appeals in the Nassau County cases alone.

Nearly 100% of the Rule 23(b)(3) Class Members have already filed claims. The fee requested—20% of the Net Settlement Fund (as reduced $16,000,000 by the Regulators)—is eminently reasonable. The DOL actively negotiated a reduction from 22% to 20% with all Plaintiffs' Counsel, saving the investors millions of dollars at a mediation both Objectors attended but declined to prepare for or participate actively in. The requested fee is well below the range of fees routinely approved in this Circuit in securities and ERISA class actions for settlements this substantial, and is below the percentage set by the market.[1] *See* Opening Brf at 17-20. A lodestar cross-check amply supports the fees. *Id.* at 23-24. Unlike the typical case in which Lead Counsel applies for a fee and has discretion to apportion the fee award to other

[1] *See* Opening Brf., at 14–16; *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("We expect … that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable.").

counsel, here all Private Counsel and the DOL mediated an agreement not only of what percentage Private Counsel would seek, but agreed-upon dollar allocations if the fee is awarded. Given how the cases were structured, namely, with groups of investors with different claims, with four firms appointed by Magistrate Judge Peck to represent the interests of differently-situated investors with Beacon and Andover investments, with two firms appointed by this Court to represent the securities and ERISA plaintiffs with Income Plus and Direct investments, with one Counsel for over 100 individual plaintiffs, Counsel for 17 ERISA plans and their Trustees, and counsel in four state derivative actions, and with Lowey and DOL appointed as Liaison Counsel (not to mention Defendants); forging this deal was an herculean task. The NYAG asserts (without working with us, as the DOL had) that work was duplicative. But Counsel were appointed or retained to represent specific interests, to avoid conflicts and to advise their many concerned clients. Hart Supp. Decl. at ¶ 17, Exs. 10, 11. Magistrate Judge Peck ordered that we review the regulatory productions prior to serving other requests, and he gave hard deadlines for that review and for production of Plaintiffs' documents and ESI. *Id.* at ¶ 18, Exs. 9, 12–14.

The Court now has the contemporaneous time records. The Objectors assumed (without investigating) that unnecessary duplication took place, but each firm was responsible to prepare themselves to represent specific client interests. Private Counsel coordinated with each other and the DOL to achieve this result and to avoid unnecessary duplication. As of January 31, 2013, Private Counsel's collective lodestar was $49,493,538 (exclusive of time spent on fee issues), for a negative multiplier of 0.82377 if 20% is awarded.[2] Reducing fees further than the negative multiplier when the result achieved through collaboration was universally approved by the

[2] Neither *In re Bausch & Lomb, Inc. Sec. Litig.*, 183 F.R.D. 78 (W.D.N.Y. 1998)(settlement was 1/6 of maximum damages and Court awarded 2 multiplier, noting "the size of the recovery does weigh in favor of an upward adjustment") nor *In re Renaissancere Holdings Ltd. Sec. Litig.*, No. 05 Civ. 6764 2008 WL 236684 (S.D.N.Y. Jan. 18, 2008) (No formal discovery was conducted and the Court awarded a 1.5 multiplier to lodestar) support the Objectors' position.

investors in challenging and hotly-contested litigation, is unwarranted. Counsel all worked and responsibly informed themselves and their clients consistent with their appointments and retainers. The lodestar reflects the extensive work and coordination needed to litigate the cases, and then unify plaintiffs, regulators and defendants into a global settlement, embodied in complex settlement papers. The suggestion that the 6,000 hours claimed by the NYAG was sufficient to resolve the case is refuted by the NYAG's failure to litigate, or to complete the 2010 negotiations. Defendants required every plaintiff to release every claim, most of which the NYAG did not bring. That is what **this** omnibus effort, which the NYAG was cajoled into joining, provides. Hart Supp. Decl. at ¶ 25.

The Second Circuit has endorsed current rates: "the rates used by the [district] court to calculate the lodestar amount should be 'current rather than historic hourly rates.'" *Farbotko v. Clinton County of New York*, 433 F.3d 204, 210 n. 11 (2d Cir. 2005) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989)). The negative multiplier precludes a windfall,[3] and Counsels' 2012 hourly rates are last year's market rates. Hart Decl., ¶88; Mezzetti Decl., ¶ 18.[4]

Private Counsel cannot be faulted for reviewing the regulatory productions,[5] consistent with Magistrate Judge Peck's orders. NYAG Br. at 8, 15; Beacon Br. at 10 and n.4. The

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[3] Many of the firms here employ dozens of attorneys and staff, and pay payroll and overhead regularly. The long term contingent litigation model involves the advance of hundreds of thousands of dollars, and millions of dollars of lodestar, with no guarantee of payment. Partners stake years of hard work on cases to benefit clients. It should not be disregarded that contingent lawyers came forward, negotiated competitive fees with informed clients and then lowered the fee at the behest of a federal regulator. By contrast, firms such as Objector Counsel get paid full rates by the hour, bear no risk, and advance no costs.

[4] Objectors complain that two firms in the application were paid hourly. 20% is a fair percentage on its face. The fact that it is being shared, if awarded, is an allocation issue among counsel. Reimbursement of those firms' hours is explained fully at Hart Supp. Decl. ¶ 46.

[5] The elements of the various claims were not coextensive. Private Counsel could not abdicate their responsibility to establish, for example, scienter or ERISA fiduciary status, and rely solely on the NYAG's review. *See, e.g., City of Roseville Empl. Ret Sys. v. Orloff Fam.* Tr. UAD 12/31/01, 484 Fed. Appx. 138, 140 (9th Cir. 2012).

documents referenced by the NYAG were of course important, but were not the whole picture. In an effort to prove, *inter alia*, scienter, reliance and Ivy's fiduciary status, and to establish the applicability of the continuing fraud doctrine, Private Counsel uncovered many highly relevant documents before the NYAG filed (and subsequently other documents) not referenced in the NYAG complaint. *See* Hart Supp. Decl. ¶ 19. Those documents include the 2006 and 2007 Amendments to Ivy's advisory agreements. *In re Beacon Assocs., Litg.,* 745 F. Supp. 2d 386, 400 (S.D.N.Y 2010) (Amendment "explicitly excluded Madoff from the managers Ivy agreed to research, monitor, meet with, and evaluate."); *In re J.P. Jeanneret Associates, Inc.*, 769 F. Supp. 2d 340, 353 (2011) (2007 Amendment excluding same). Both Courts relied on those Amendments in sustaining the securities claims. *See also* Hart Supp. Decl. Exs. 15-22 (attaching examples of other documents not found by the NYAG).

Private Counsel satisfied discovery obligations under the demanding watch of Magistrate Judge Peck. Hart Opening Decl. ¶ 55. We provided detailed updates on the progress of discovery and presented discovery disputes. *Id.* Magistrate Judge Peck's "rocket docket" (Hart Supp. Decl. Exs. 15, 16) required prompt compliance with production obligations.[6] Defendants agreed to produce their regulatory productions (made to the NYAG, the DOL and the Securities and Exchange Commission), and in exchange Plaintiffs agreed not to serve discovery until they finished reviewing the productions. Magistrate Judge Peck repeatedly blessed this agreement. Hart Supp. Decl. at ¶ 18. In addition to extensive briefing on multiple rounds of motions to dismiss, motions for reconsideration, extensive class certification discovery and briefing in *Beacon*, *Jeanneret* and *Buffalo Laborers*, and extensive motion and appellate practice in the state

[6] For example, on August 12, 2011, Magistrate Judge Peck told Hartman counsel that he did not care if they had to hire 50 contract attorneys or associates to meet document and ESI production deadlines. Hart Supp. Decl. Ex. 20, at 8:10-12; Supp. Decl. of Lynn Sarko and Margo Hasselman, ¶ 23.

court actions, Plaintiffs reviewed the regulatory productions, sought and obtained more documents, successfully challenged thousands of privilege designations, prepared for mediation, and were preparing with DOL for 20+ depositions. Hart Supp. Decl. at ¶¶ 21–22, 25.

B. Plaintiffs Would Uncover the Facts as the DOL Did, and They Jointly Found Many More Highly Relevant Documents

Despite the PSLRA stay of discovery, the Objectors fault Private Counsel for not uncovering the evidence before the NYAG (who has pre-filing subpoena power). The Objectors create a fiction that evidence uncovered by the NYAG is proprietary and the litigation value is the NYAG's. But the law does not support their position. Judge Lewis Kaplan recently awarded a **1.5 lodestar risk multiplier** where plaintiffs' counsel properly relied on the "quite extraordinary report" of the Bankruptcy Examiner. Judge Kaplan, in the face of the exhaustive examiner's work, still rewarded plaintiffs' counsel:

> plaintiffs took great and good advantage of the examiner's report. … **They were right to do so.** … **And just to be quite clear, this implies no criticism of plaintiffs' counsel, who lacked the examiner's access to the evidence.** But it does bear on the amount of compensation appropriately paid to plaintiffs' counsel, **particularly any amount above the lodestar.**

In re Lehman Brothers Securities and ERISA Litigation, 09 MD 2017 (LAK) (S.D.N.Y. June 29, 2012) (emphasis added) (Hart Supp. Decl. Ex. 33 at 2). The NYAG's complaint stands in stark contrast to the *Lehman* Examiner's report (which Judge Kaplan described as "a roadmap for the most significant part of [plaintiffs'] case," which is 2,209 pages long, plus 34 appendices, and "is divided into nine volumes and features hyperlinks to all of the documents cited in the report's over 8,000 footnotes." *See* http://jenner.com/lehman. And while the securities class actions used the facts disclosed in the NYAG's complaint, as fiduciaries, counsel is to advocate their claims.

The premise of the Objections—Private Plaintiffs would not have learned the facts if not for the NYAG—is incorrect. Two state court derivative complaints (which are part of the

settlement) had already been sustained by the time the NYAG filed. *Hecht v. Andover Associates Management Corp.*, 27 Misc. 3d 1202 (A), 910 N.Y.S.2d 405 (Sup. Ct. Nassau Cnty. 2010); *Sacher v. Beacon Associates Management Corp.*, 27 Misc. 3d 1221 (A), 910 N.Y.S.2d 765 (Sup. Ct. Nassau Cnty. 2010). ERISA does not have a stay of discovery. The Objectors also incorrectly assert that "the class plaintiffs' claims were unsustainable and likely to be dismissed" because they were based on "red flags." Beacon Br. at 7; NYAG Br. at 5.[7] The Objectors try to throw the ERISA claims out with the "red flag" bathwater, but to the contrary, ERISA claims based on red flag allegations have been sustained in cases involving Madoff feeder funds in this District. *See, e.g., In re Austin Capital Mgmt., Ltd., Sec. & Employee Ret. Income Sec. Act (ERISA) Litig.*, No. 09 M.D. 2075, 2012 WL 6644623 (S.D.N.Y. Dec. 21, 2012); *In re Meridian Funds Group Sec. & Employee Ret. Income Sec. Act (ERISA) Litig.*, No. 09 M.D. 2082, 2013 WL 76188 (S.D.N.Y. Jan. 7, 2013). The ERISA claims would have survived and Plaintiffs would have obtained the evidence. The DOL used its subpoena power in 2009 to uncover the same evidence.

C. Plaintiffs Could Not Defer to the Regulatory Complaints

The Madoff scandal is rife with long-term regulatory failure. Private parties had and have every reason to prosecute on their own behalf. The NYAG did not sue all Defendants from whom Private Counsel recovered money, and could not assert securities, ERISA or private common law claims. Why the Objectors suggest private plaintiffs should have shut down their efforts to recover losses is odd, would have been an abdication of fiduciary duty and individual rights and is inconsistent with the record position of the NYAG (*see, e.g.,* Mr. Schneiderman:

[7] None of the Objectors' arguments speak to the ERISA claims. The ERISA complaints survived dismissal based on the conclusion that Ivy was a fiduciary. The facts that NYAG tries to own had no bearing on fiduciary status. Class Counsel also firmly believe that the securities claims had been properly pled prior to the NYAG complaint.

"Pension funds cheated by Bernie Madoff" should have remedies). Hart Supp. Decl. Ex. 2, at 5. *See also Assured Guaranty (UK) Ltd. v. J.P. Morgan*, 18 N.Y. 3d 341, 353, 939 N.Y.S.2d 274, 280 (2011) (NYAG Amicus Position: "proceedings by the [NYAG] and private actions further the same goal—combating fraud and deception in securities transactions.").[8] The assertion that Plaintiffs should have deferred to the NYAG rings hollow.

Each claim has its own elements, damages and defenses. Clearly we could not defer to a case not yet filed, but litigating after the NYAG filed was also appropriate. *See, e.g.*, Carroll Tr. at 317 (Hart Reply Decl. Ex. 6); *People ex rel. Cuomo v. Greenberg*, 95 A.D. 3d 474, 492, 946 N.Y.S.2d 1, 15–16 (1st Dept. 2012) ("shareholders who have cause to complain have no need of the NYAG to protect their rights."). In its Answer to the NYAG, Ivy asserted 29 defenses. If the NYAG had prosecuted his case, defenses such as lack of *parens patriae* standing[9] and statutes of limitations (s*ee Gabelli v. Securities* and *Exchange Commission*, N. 11-1274 (Feb. 27, 2013 U.S.) (discovery rule not applicable to limitations periods in government actions), could have led to dismissal. Plaintiffs also could not defer to the DOL complaint (filed after the *Beacon*, *Sacher*

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[8] "[P]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses" without waiting for government action. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 321 n.4 (2007) (internal citation omitted). "ERISA gives plan beneficiaries and the Secretary independent rights of action . . . and nowhere forecloses private actions after the Secretary files suit." *Herman v. S. Carolina Nat'l Bank*, 140 F.3d 1413, 1426 n.22 (11th Cir. 1998). The DOL agrees that class actions play an important role. *See* Brief of the Secretary Of Labor as Amicus Curiae in Support of Plaintiffs' Motions for Class Certification, In re Beacon, Dkt. 394.

[9] If not for the private actions, Defendants would undoubtedly have challenged the NYAG's continuing *parens patriae* standing. As of March 2010, Ivy's operations were being wound down. Defendants would have argued that with the Ivy Defendants' capacity to commit public injury eliminated, the NYAG's request for injunctive relief (the sole basis for its quasi-sovereign interest), was moot. The only claims were for damages, rendering the NYAG a "volunteer [to] the personal claims of its citizens." *Pennsylvania v. New Jersey,* 426 U.S. 660, 665, (1976)(same); *People of the State of New York by Abrams v. 11 Cornwell Co.,* 695 F.2d 34, 38 (2d Cir.1982)(a state that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of individuals); *Connecticut v. Physicians Health Services*, 287 F.3d 110 (2d Cir. 2002)(no *parens patriae* standing to assert ERISA claims).

and *Hecht* complaints were already sustained), as: (1) not all plaintiffs had ERISA claims, and (2) Defendants were urging negative ERISA rulings.

II. THE NYAG WOULD NOT COLLABORATE AND NEVER TOLD PLAINTIFFS OR THEIR COUNSEL OF THE $140 MILLION OFFER

A. The NYAG Did Not Disclose the Offer and Refused to Collaborate

The Objectors did not disclose the $140 million settlement offer until the fee objections. This prevented early settlement negotiations, and the possibility of avoiding years of highly-contentious and expensive litigation. One wonders how much time spent by this Court, Judge Sand, Magistrate Judge Peck and two state court Justices could have been saved.

In May 2010, Lead Counsel reached out to the NYAG's office to explore joint prosecution, and inquire about news reports regarding settlement negotiations. Hart Supp. Decl. at ¶¶ 7-8. On March 10, 2011, Lowey sent a draft common interest agreement to the NYAG. Hart Supp. Decl. Ex. 3. But the NYAG did not enter into a common interest agreement, collaborate, or advise us of Ivy's $140 million offer. Hart Supp. Decl. at ¶¶ 5, 8, 10. The NYAG also did not actively litigate against Ivy. Hart Reply Decl. Ex. 3.[10] By contrast, Plaintiffs and the DOL entered into a common interest agreement and collaborated. *Id.* at ¶ 9.

The first disclosure of Ivy's offer was made in the context of the fee objections. Hart Reply Decl. at ¶ 31, Hart Supp. Decl ¶ 5. The Objections are premised on the assertion that Ivy's offer was known and on the table when we litigated and when we mediated. *See* Beacon Br. at 17. That is utterly untrue. The NYAG has conceded that after the NYAG filed, Ivy "took the offer **off the table**." Waldman Aff. ¶ 5 (emphasis added) - Ex.1 to Hart Supp. Decl.) Private Counsel are criticized for their lodestar, but the NYAG could have materially advanced the

[10] There are 8 entries on the NYAG/Ivy docket: the complaint, 4 affirmations of service and 3 answers. No RJI was filed and no Judge assigned. *Cf.*, *Beacon* and *Jeanneret* docket (444 and 305 docket entries, respectively, prior to entry of the Preliminarily Approval Order).

litigation in 2010 by bringing Private Plaintiffs into any negotiations, and if negotiations failed, by jointly prosecuting the claims. Remarkably, as late as November 2011, the NYAG would not commit to mediating, but instead would only commit to **not** paying mediation expenses. Hart Supp. Decl. Ex. 7. The Objectors sat idly through the post-settlement fee mediation, offering commentary, but were unprepared. Private Counsel sent summaries and offered time records before the fee mediation (Hart Supp. Decl. at ¶ 30, Ex. 27) and the Objectors were encouraged to get whatever information they needed. Instead they chose not to prepare and to burden the Court, after they watched Private Counsel and DOL work hard to forge a difficult compromise. Laches precludes these belated objections. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 283 -284 (2d Cir. 2005) (laches prevents an argument or claim when one can show (1) delay and (2) prejudice resulting from the delay). Prejudice flows from their waste of an opportunity to mediate and the additional risk and delay after four years of contingent work.

As the Ninth Circuit in *City of Roseville Employees' Retirement System, v. Orloff Fam. Tr. UAD 12/31/01*, 484 F. App'x 138, 141 (9th Cir. 2012) concluded:

> we find that the district court … gave consideration to Orloff's argument concerning the benefit of the DOJ's investigation, but decided that it did not merit a fee reduction in light of other circumstances, including the lack of government cooperation, extensive discovery, and the difficulty Plaintiffs faced proving loss causation and damages.

See also In re Municipal Derivatives Antitrust Litig., Master Docket No. 08-02516 (VM) (S.D.N.Y. Nov. 5, 2012, amended Dec. 14, 2012) (30% percent fee awarded where guilty pleas had been attained by DOJ, and the IRS and SEC were also prosecuting), Hart Supp. Decl. Ex. 34.

A 20% fee compensating **all** plaintiffs' counsel, where there is a great result,[11] is not

[11] *See Velez v. Novartis Pharmaceuticals Corp.*, 04-cv-09194 CM, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (McMahon, J.) (approving 2.4 multiplier due in part to "the extraordinary results of the Settlement"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467

rendered unjustified by the filing of the NYAG complaint (sixteen months after the class actions) nor a previously-undisclosed and withdrawn offer. The argument that Private Counsel should receive a fee on only $79 million, or even less,[12] is unjust. *See* Waldman Aff. at ¶¶ 5, 7. Prior to the mediation, there were zero dollars on the table. Hart Supp. Decl. at 5. The $219 million recovery is not based on any earlier offer. Indeed, Ivy argued in their Rule 23(f) petition that the settlement was driven by the Class Certification decisions. We think it was ultimately a collective success, all Private Counsel, the DOL and the NYAG; the merits; and the unwavering commitment of our clients.

B. The 2010 Offer Could Not Be Consummated and Pales Compared to the Settlement

In the actual Settlement, Defendants insisted on global peace with all Plaintiffs, and among each other. If the 2010 offer had been timely disclosed, Private Plaintiffs could have: (a) engaged in negotiations with Ivy to secure a substantially higher recovery (because those negotiations would have occurred prior to billions in recoveries by the Bankruptcy Trustee); (b) brought other Defendants whom the NYAG did not sue into the negotiations to provide additional recoveries before insurance policies were depleted; and (c) brought the Trustee into the negotiations, as clawback claims needed to be resolved and Private Counsel insisted on the Trustee's consent not to seek an offset against any dollars recovered from this Settlement when he pays out his recoveries. That issue was not addressed in 2010. *See* Waldman Decl. at ¶ 9.

(S.D.N.Y. 2004) ((J. Lynch) (approving a 2.16 multiplier due in part to "enormous effort that yielded the extraordinary $245 million cash Settlement").

[12] The NYAG claims that the Private Counsel may be responsible for only $9 million of the Settlement, NYAG Br. at 10, and Beacon takes responsibility for $3.4 million of that. Beacon Br. at 10 n. 5. These arguments are even more disingenuous than the Objectors' other arguments, as the NYAG did not even attempt to litigate, and ignores the substantial evidence uncovered by Private Counsel, the favorable rulings obtained by Private Counsel and billions in recoveries by the Bankruptcy Trustee. The Beacon Defendants' agreement to waive the management fees was based on the evidentiary record established by Private Counsel and the rulings we obtained. Mr. Jakoby's unsupported assertions to the contrary should be rejected.

The $140 million offer must be put in historical context. Between May 2010 and the real Settlement: (1) the Bankruptcy Trustee recovered over seven billion dollars, greatly reducing potential damages to Class Members; (2) Private Counsel uncovered substantial additional evidence not cited by the NYAG (Hart Supp. Decl. at ¶ 19, Ex.15-23); and (3) obtained orders sustaining the federal securities and ERISA claims, and certifying the *Beacon* classes (in which Judge Sand endorsed the continuing fraud doctrine, holding that all of the private securities claims were timely). Unlike the NYAG's *Merkin* deal or the failed 2010 negotiations, the agreement before the Court secured the Bankruptcy Trustee's agreement not to seek an offset against Class Members for recoveries in this Settlement. *See* Opening Br. at 18-19.

The Bankruptcy Trustee is actively seeking to enjoin other NYAG Settlements on the grounds that any recoveries should go to the Bankruptcy Estate. Opening Br. at 19. It is unclear whether or when the *Merkin* or *Fairfield Greenwich* settlements will be completed. What is clear is that the construct of NYAG/Ivy settlement might have harmed these Class Members. Waldman Decl. at ¶ 9. If the NYAG settled without the Trustee, the Trustee would challenge that settlement and claim the recovery for the Estate. At a minimum, limbo would result, as class members would not have known the true value of the settlement **to them** until the Trustee's challenge made its way through the courts, including likely appeals and possibly going to the Supreme Court. If the Trustee ultimately prevailed, rendering the NYAG recovery from Ivy part of the Estate, that money would go to all Madoff investors. The NYAG states that class member losses were $227 million (NYAG Br. at 2), which represents 1.31% of the principal dollars lost by Madoff investors ($227 million ÷ $17.3 billion = 0.0131). Class Members would be allocated less than $2 million of the settlement (0.0131 x $140 million = $1,836,994). In any later negotiations with Private Plaintiffs, Ivy would seek credit for $140 million, while Plaintiffs would only give credit for $1.9 million. If the Trustee prevailed, the NYAG/Ivy settlement

would have put investors in a far worse position.

While the NYAG objection characterized the 2010 offer as one Class Members would embrace, the actual process of working with Class Members to obtain their signed releases has been quite complex. The NYAG did not actually gauge interest in that offer. There is no reason to assume plaintiffs with additional claims and more favorable damage theories (*see e.g. Donovan v. Bierwirth,* 754 F.2d 1049, 1056 (2d Cir. 1985) (allowing for lost opportunity cost damages)), would have opted-into a settlement at that level in 2010 (which predated substantial Bankruptcy recoveries). NYAG Br. at 4. The NYAG did not appear to have negotiated with the Bankruptcy Trustee in 2010, despite knowing of the Estate's position as early as 2009 due to the *Merkin action*. Hart Supp. Decl. Ex. 35. The assertion that the 2010 talks captured $140 million of the current Settlement value is irresponsible.

C. The NYAG Was Unwilling to Allocate Resources to This Case

Mr. Schneiderman took office in January 2011, and other than issuing a press release on November 13, 2012 announcing the Ivy settlement, did not file another document until its Objection. A comparison with NYAG's prosecution in *Merkin* is instructive. The "NYAG's Merkin team" actively prosecuted that action (Hart Supp. Decl. Ex. 30 (showing 456 docket entries in the *Merkin* action) from filing of the complaint on April 6, 2009 to settlement (which was conditioned on receiving releases from the Trustee). *See* Hart Reply Decl. Ex 4 at 9-10. In contrast, the "NYAG's Ivy team" filed its action in May 2010, and did not even file an RJI. Recently, the NYAG criticized the Bankruptcy Trustee for delays in the *Merkin* action: "the Trustee admittedly just sat, watching and did nothing. … [T]he Trustee allowed the cases to be litigated at great expense to all concerned." Hart Supp. Decl. Ex. 31. After May 2010, the NYAG's Ivy team sat and watched, and now criticizes Private Counsel for litigating aggressively. Private Plaintiffs and the DOL created a global negotiating structure. The NYAG

was non-committal on mediation but clear in refusing to pay mediation fees. Hart Supp. Decl. Ex. 7.

Following the agreement in principle, it took seven months to negotiate the Stipulation and even now, terms are being negotiated. *See* Hart Supp. Decl. Ex 32 and ¶ 25. The NYAG criticizes Private Counsel as if a deal was in hand years ago, ignoring the complexities of these actions. Class Counsel not only litigated but marshaled the settlement papers to conclusion, the Notice and notice process, worked on the plan of allocation, the Proofs of Claim, the various orders, and briefs in support. Once the NYAG joined the team, working together was fine; often cordial and productive. Why now, when the entire team should have a sense of accomplishment; with clients and class members pleased, does the NYAG turn on us?

D. The Objectors Falsely Cite Cases as Being on All Fours

The Objectors' cases are not on all fours. They involved significant starting offers communicated to and relied on by the parties. NYAG Br at 9-11; Beacon Br at 14-17. In *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96 (D.D.C. 2002), unlike here, (a) the FTC filed its case before private plaintiffs; (b) the FTC had an agreement in principle to settle for $16 million in disgorgement – **before** private parties filed their cases; (c) private plaintiffs engaged in no litigation and no discovery; and (d) class counsel's efforts were devoted entirely to persuading defendants to increase the existing deal. Here, between January 2009 and October 5, 2010 (when the *Beacon* complaint was sustained), the only NYAG involvement was the filing of its complaint until it agreed to negotiate. The NYAG never had a **commitment** to settle and no money was on the table when the omnibus mediation began. *In re Swedish Hospital Corp.*, 1 F.3d 1261 (D.D.C. 1993), is also distinguishable (follow on suits after court ruled for plaintiffs

that contested rule was arbitrary and capricious; class certification uncontested and settlement value already on the table).[13]

III. BEACON LACKS STANDING, ITS COUNSEL HAS NO AUTHORITY TO OBJECT AND DID NOT HAVE AUTHORITY TO NEGOTIATE WITH IVY

A. Beacon Lacks Standing to Object

Beacon lacks standing to challenge the fee application.[14] As a general principle, "[o]nly Class members have standing to object to the Settlement of a class action." *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 923 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992). Beacon is a not a Class Member. *See* class definitions asset in forth in Notice. "[Article III] limits are jurisdictional: they cannot be waived by any party, and there is no question that a court can, and indeed must, resolve any doubts about this constitutional issue." *City of Los Angeles v. County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). Article III requires that "a class member must be 'aggrieved' by the fee award to have standing to challenge it." *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011). The key inquiry is "to determine whether modifying the fee award would actually benefit the objecting class member." *Knisley v. Network Associates, Inc.,* 312 F.3d 1123, 1126 (9th Cir. 2002). The Funds simply lack standing.

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[13] The Objectors' other cases are also inapposite. *See Ramos v. Patrician Equities Corp.*, No. 89 Civ. 5370, 1993 WL 58428, at *8 (S.D.N.Y. March 3, 1993) (settlement negotiations began one week after filing and concluded five weeks later); *In re Prudential Insurance Co. Amer. Sales Practice Litig. Agent Action*, 148 F.3d 283, 337-338 (3d Cir. 1998) (work of multi-state task force served as the basis for settlement).

[14] At the fee mediation, prior to which the NYAG was provided billing information, the NYAG negotiated one point, *i.e.*, that Plaintiffs' Counsel would not object to the NYAG's standing to object. We assumed the Court would hear the NYAG's views and do not contest its standing. The Court has its own review of the fee application and of parties' standing. *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 103-04 (S.D.N.Y. 1997) ("parties cannot either waive or confer standing by agreement."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 696 (2d Cir.1989); *Barhold v. Rodriguez*, 863 F.2d 233, 234 (2d Cir. 1988). *In re American International Group, Inc., Sec. Litig.*, 04 CIV. 8141 DAB, 2013 WL 68928 at *6 (S.D.N.Y. Jan. 7, 2013) (rejecting NYAG's standing to challenge a class action settlement).

B. Beacon's Counsel Cannot Object

Beacon's Counsel has no authority to object. The operating agreements vest exclusive power to manage the Funds to the Funds' Managers. Hecht Reply Decl. ¶¶ 5 (n.1), 12 (n.2), 15 (n.3). Mr. Jakoby acknowledges that having the Funds' Managers direct Beacon's actions in these proceedings would pose a conflict of interest. *Id.*, Ex. L at 1, n. 1. Mr. Jakoby represented that Beacon "formed committees comprised of members who collectively have substantial assets in the [Funds] and with whom [they] consult in connection with decisions [they] make regarding [their] representation of the Funds." *Id.* at 2. Despite demands from investors, Mr. Jakoby refused to disclose the source of authority of the committees. Lipner Reply Decl. ¶¶ 4, 6. The investor committees had no authority to authorize Mr. Jakoby to object. Hecht Reply Decl. ¶¶ 5 (n.1), 12 (n.2), 15 (n.3).

The Settlement Stipulation (¶ 6.3) provides that Defendants will take no position on attorneys' fees. Are the Beacon Management Defendants Mr. Jakoby's clients? His 2010 negotiations contemplated their releases. *See* Waldman Decl. at ¶ 9. The Fund Objection is contrary to the Beacon Defendants' settlement obligations. The quandary of Mr. Jakoby's role throughout this litigation remains. The question also arises as to Mr. Jakoby's involvement in negotiations in 2010. He was appearing before when Judge Sand who issued a May 2009 Order vesting Lowey with sole authority to conduct settlement negotiations for Beacon investors. Hart Supp. Decl. Ex. 10. Mr. Jakoby has represented that his "exclusive professional loyalty is to [his] clients, the Beacon / Andover Funds, and **the investors in those funds**" (Hecht Reply Decl. Ex. L (emphasis added)), but Code of Professional Responsibility, EC7-7 requires that settlement

offers be disclosed to clients ("it is for the client to decide whether to accept a settlement offer").[15]

IV. THE *GOLDBERGER* FACTORS ARE SATISFIED

Private Counsel satisfy the *Goldberger* factors. Opening Br. at 20-24. In *Goldberger*, the Court reduced the fee below the 25% sought, and instead awarded fees based on lodestar. The fee request here is justified under either approach. *See supra*, pp. 11-12. As the Second Circuit recognized in *Goldberger*, the percentage of recovery method furthers public policy by encouraging efficiency, removing "an unanticipated disincentive to early settlements," and permitting courts to forgo "gimlet-eyed review of line-item fee audits." *Goldberger v. Integrated Resource Inc.*, 209 F.3d 43, 48-49 (2d. Cir 2000). *In re Top Tankers, Inc. Sec. Litig.* No. 06 Civ. 13761 (CM), 2008 WL 2944620 (S.D.N.Y. July 31, 2008), cited by Beacon, is clearly distinguishable, as an early "nuisance value" settlement.

Public policy favors settlement, and early disclosure by the NYAG might have led to an earlier settlement. Despite differences in their clients' claims, Private Counsel and DOL engaged in considerable coordination and achieved an excellent recovery. Private Counsels' blended rate on the fee sought would equal $327 per hour through January 31, 2013 ($40,771,538 ÷ 124,776 hours).[16] By contrast, the NYAG, whose salaries and expenses are not contingent, seeks a $5 million award for 6,000 hours of work, a rate of over $833 per hour.

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[15] Mr. Jakoby sought to stay *Sacher*, a derivative case brought for the benefit of investors (Hecht Decl. Ex. F at 3) and allowed the Funds to indemnify the Beacon Defendants for their defense costs until Lead Plaintiffs in *Beacon* obtained a ruling to stop those payments. *Rounds v. Beacon Assoc. Mgm't Corp.*, No. 09 Civ. 6910 (LBS), 2009 WL 4857622 (S.D.N.Y. Dec. 14, 2009). Only after the Court held that indemnification of Beacon Management was improper did Mr. Jakoby seek recoupment of payments already made. Hecht Decl. Ex. J.

[16] This includes time spent from December 1, 2012 through January 31, 2013, and 123,674 hours from inception through November 30, 2012 (a computation error inadvertently led to our

V. THIS WAS NOT A "NO RISK" OR "ORDINARY RISK" CASE.

The Objectors contend that once the NYAG "filed his Complaint, there was negligible litigation risk in pursuing the Class Action" and Beacon contends these were "ordinary" risk securities cases, ignoring the lack of an efficient market and the impact of *South Cherry Street LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009). NYAG Br. at 11-12; Beacon Br. at 21-22. This "no risk by hindsight" should be rejected. Risk is assessed at the time a lawsuit is **filed**. *Goldberger,* 209 F.3d at 55 ("litigation risk must be measured as of when the case is filed."); *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 488 (S.D.N.Y. 1998) (same); *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994) ("Although today it might appear that risk was not great based on [the] global settlement with the [SEC], such was not the case when the action was commenced and throughout most of the litigation."). As Your Honor has noted, the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *In re AOL Time Warner Shareholder Deriv. Litig.*, No. 02 Civ. 6302 (cm), 2010 WL 363113, at *22 (S.D.N.Y. Feb. 1, 2010) (McMahon, J.) (citation omitted). And as retired Supreme Court Justice Sandra Day Conner recognized, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.,* 572 F.3d 221, 235 (5th Cir. 2009).

The private actions started in January 2009, sixteen months before the NYAG filed. Plaintiffs had no idea that the NYAG would file, and many Plaintiffs, as fiduciaries of ERISA

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reporting that the hours through November 30, 2012 were approximately 118,000). *See* Hart Supp. Decl. at ¶ 47.

plans, felt obligated to prosecute. Their counsel took the risk of contingency fee litigation in January 2009, despite no guarantee of payment. The litigation risk was compounded by the complexity of the issues. Magistrate Judge Peck and Mr. Liman stated as much. Hart Supp. Decl. Exs. 25, 26. Given the duration of the Madoff fraud, all claims were susceptible to statute of limitations or repose defenses. Plaintiffs established that the continuing fraud doctrine applied to the securities claims, and that the ERISA statute of limitations had not run based on the fraud and concealment exception. The question of whether Ivy acted as an ERISA fiduciary under the investment advice for a fee regulation had not been tested in the context of an advisor to a fund of funds. Class certification was hard fought. The settlement negotiations and structure were complicated, as were the papers which alone took seven months.

VI. BEACON'S OBJECTION TO EXPENSES IS UNFOUNDED

Beacon questions the expenses. Beacon Br. at 27. As reflected in the expense reports provided to the Objectors, and the Court, there is no duplication with respect to the Litigation Fund, as the total expenses sought equal what the firms spent (including their respective contributions to the litigation fund). We are not double-counting the Litigation Fund as an expense. Hart Reply Decl. at ¶ 97, 107, 110 and 115; Hart Supp. Decl. at ¶ 50. The firms all attest to the copying, computer and similar charges Beacon challenges. The expenses incurred are not overhead. The NYAG does not challenge the expenses. Finally, Private Counsel have provided expense reports to the Objectors and the Court. The expenses should be paid.

CONCLUSION

The Objections ignore the facts to make unsupported assertions. The Objectors played "GOTCHA" to challenge the fee application. We respectfully request that the Court reject the objections and grant the fee and expense application. It is supported by case law, Lead Plaintiffs, the other clients, and not objected to by the almost 100% of the Class that have filed claims.

Dated: March 1, 2013

Respectfully submitted,

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