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)

MEMORANDUM OF LAW IN SUPPORT OF PRIVATE PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AND PLAN OF ALLOCATION, CERTIFICATION OF SETTLEMENT CLASSES AND AWARDS OF ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

Plaintiffs in *In re Beacon Assoc. Litig.*, 09 Civ. 0777 (LBS)(AJP) ("*Beacon* Action"), *In re J.P. Jeanneret Assoc. Inc.*, 09 Civ. 3907 (CM) (AJP) ("*Jeanneret* Action"), and *Board of Trustees of the Buffalo Laborers Security Fund v. J.P. Jeanneret Associates, Inc., et al.*, 09 Civ. 8362 (LBS) (AJP) ("*Buffalo Laborers* Action") (collectively "Class Actions" and "Class Plaintiffs"), submit this memorandum in support of their Motion for Final Approval [1] of the $219,857,694 Settlement.[2] The Settlement resolves claims asserted by Class, Derivative and individual Plaintiffs, and by the Department of Labor ("DOL") and the New York Attorney General ("NYAG").[3] It provides substantial benefits to the investors and eliminates further risk, delay and cost, and is the result of Plaintiffs' extensive, coordinated litigation efforts, including: review of witness transcripts and millions of pages of documents; motion practice; argument; retention of experts; negotiations; and tremendous coordination of a multifaceted and multijurisdictional litigation. The extensive commitment of time and resources by the DOL in investigation and litigation, and the lengthy settlement process, reflects the importance of the case and the proposed Settlement to the Secretary of Labor. The NYAG's role in the settlement and mediation process similarly demonstrates that office's approval of the Settlement.

SUMMARY OF THE SETTLEMENT

Following several full-day mediation sessions involving all parties in the Settling Actions before two mediators, countless informal settlement discussions, and continued negotiations on the terms of the Stipulation through mid-November 2012, the Settlement was achieved. The

[1] Other parties, including Regulators, Plaintiffs in three State court derivative actions, the Hartman Plaintiffs and other Plaintiffs urge final approval of the Settlement and the Plan of Allocation. The Class, Derivative, individual and Hartman Plaintiffs support the fee application.
[2] Capitalized terms are also defined in the Stipulation (Ex. A to "Hart Opening Decl."),
[3] The background of the Actions and the negotiations are described in the Declaration of Barbara Hart in Support of Lead Plaintiffs' Motion for Final Approval of the Settlement and Plan of Allocation, Certification of Settlement Classes and Awards of Attorneys' Fees and Expenses ("Hart Decl.") at Section II.

"Settlement Amount" consists of $219,857,694,[4] including $216,500,000 in cash, plus waiver of management fees of $3,357,694 accrued by the Beacon Defendants.[5]

Private Plaintiffs, the DOL and the NYAG also engaged in a lengthy mediation session and many subsequent negotiations to craft the Plan of Allocation. A comprehensive explanation of the Plan of Allocation and the process through which it was formulated is in the Affidavit of Lynda Borucki of the Brattle Group ("Brattle Aff."). Separate extensive multi-session informal and formal negotiations were held regarding the fees, resulting in a reduction of the percentage being sought (already competitively capped by the clients) and forging a deal that holds everyone within the global settlement by fixing the allocation of fees among counsel.

PRELIMINARY APPROVAL AND SUBSEQUENT EVENTS

This Court granted preliminary approval of the Settlement and certification of Settlement Classes on November 30, 2012 (the "Preliminary Approval Order"), pursuant to which, the mailing of the Notices was completed on December 20, 2012, and the Notices, Plan of Allocation and Brattle Affidavit will be posted to the websites of GCG and Co-Lead Settlement Class Counsel ("Co-Lead Counsel") shortly. *See* Hart Decl., at ¶¶ 76–79. The cash portion of the

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[4] *See* Stipulation (Ex. A to Hart Opening Decl.), at ¶¶ 2.1, 5.3. The Settlement Amount is broken down as follows: Ivy Defendants ($210,000,000); Jeanneret Defendants ($3,000,000); and Beacon Defendants ($6,857,694). Payments to be made to the DOL and the NYAG will be subtracted from the Gross Settlement Fund. The "Net Settlement Fund" is that portion of the Gross Settlement Fund ($219,857,694) remaining, plus any interest that may accrue, after payment of $7,000,000 to the DOL, $5,000,000 to the NYAG, Court-approved attorneys' fees and expenses, notice and administration expenses, and taxes and tax expenses.

[5] Execution of the Settlement Agreement between the Parties to the Madoff Trustee Proceeding (Ex. J to the Stipulation) was a pre-requisite to this Settlement. The Trustee has agreed to approve the claims of the Beacon and Andover Funds in the amounts of $159,867,182 and $5,032,817. The Trustee had previously approved the Income-Plus claim of approximately $29.75 million, and Direct Investors had filed individual claims, which we understand were approved by the Trustee in the amounts of the net dollars invested with Madoff (less SIPC advances). The approval of the Beacon and Andover claims allows for substantial payments from the Madoff bankruptcy estate to those funds. As of September 30, 2012, the Trustee has recovered or entered into agreements to recover over $9.2 billion, representing nearly 53% of the more than $17.3 billion in principal estimated to have been lost by BLMIS customers who filed claims. Because that recovery will ultimately reduce the Class Members' damages, the recovery here, estimated at 70% of net dollars, is all the more remarkable.

Settlement Amount (*i.e.*, $216,500,000) is in escrow pending final approval of the Settlement.

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE[6]

"In evaluating a proposed settlement . . ., the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (McMahon, J.) (citing *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995)). "There is a 'strong judicial policy in favor of settlements, particularly in the class action context.'" *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 04 Civ. 8144 (CM), 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009) (quoting *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir. 1998)). Settlement approval lies in the Court's discretion. *See Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir. 1982).

A. The Settlement is Procedurally Fair

To merit final approval, a settlement must be procedurally and substantively fair. When assessing procedural fairness, courts examine the "negotiating process by which the settlement was reached." *Weinberger,* 698 F. 2d at 74. A proposed class action settlement enjoys a strong favorable presumption if, as here, it was the product of arm's - length negotiations conducted by

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[6] Certification of Settlement Classes is appropriate under Rule 23. The Settlement Classes meet the requirements of Rule 23(b) for the same reasons adopted by Judge Sand in certifying the classes and subclasses in *Beacon* and *Buffalo Laborers.* Certification will allow Class Members to have a voice in the Settlement process and, if approved, will provide Defendants the scope of release they required. The outstanding Settlement speaks to the adequacy of the class representatives and counsel for the classes and subclasses (including those certified and those being certified for settlement). *See* Stipulation, Hart Opening Decl. Ex. A., at ¶ 1.12; "Lead Plaintiff Opening Decls.:" Carroll, at 22–30; Lancette, at 22–30; Rounds, at 10–18; Kubik, at 9–13. We refer the Court to the class certification briefing in the *Beacon*, *Jeanneret*, and *Buffalo Laborers* Actions (*Beacon* Dkt. Nos 338, 339, 340-350, 396, 397-399, 401-402; *Jeanneret* Dkt. Nos. 249, 250, 251, 252, 253, 254, 278, 279; *Buffalo Laborers* Dkt. Nos. 50, 51, 52-53, 78, 79, 93, 94, 95), for an in-depth argument in favor of certification. We also submit that for settlement purposes, the court should find that the requirements of Rule 23.1 have been met in that the derivative claims were properly asserted and derivative Plaintiffs satisfied their obligations.

capable counsel after meaningful discovery. *See, e.g., In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 428 (S.D.N.Y. 2001) (McMahon, J) ("'So long as the integrity of the arm's length negotiation process is preserved...a strong initial presumption of fairness attaches to the proposed settlement.'" (quoting *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125, *aff'd*, 147 F.3d 132 (2d Cir. 1998))). When the requirement of arm's-length negotiations is met, counsel's endorsement of a proposed settlement is entitled to significant weight. *See, e.g., In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV. 1262 2002 WL 31663577, at *9–10 (S.D.N.Y. Nov. 26, 2002); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999).

The presumption of fairness applies because the Settlement was reached by experienced, informed counsel after protracted arm's-length negotiations. *See* Hart Decl., at ¶¶ 59–67, 70. Defendants' position was that any settlement had to resolve the full scope of their exposure; so substantial effort was expended assembling all necessary parties and devising a functional negotiation process through which a global settlement could be achieved. *See Id.* The Settlement forged the fairest achievable deal with tremendous transparency. Defendants also required that any settlement of the investors' claims be completed in conjunction with the resolution of the Madoff Trustee Proceeding. *See* Hart Decl., at ¶¶ 59, 70. As a result, all formal Settlement negotiations were conducted with the assistance of two independent mediators, with David Geronemus mediating the disputes between the Defendants and the investors, and Michael D. Young mediating the claims involving the Bankruptcy Estate. This was very complicated and required multiple mediation sessions with all parties from all Settling Actions in attendance (two days of mediation conducted on February 28 and 29 of 2012; a third day on April 19, 2012 until approximately 3 a.m. on April 20; and an additional session on July 17, 2012), in addition to countless informal exchanges before and after the mediation sessions. Negotiating the Plan of Allocation was a complex task because allocation decisions had real dollar impacts on Class

Members and other plaintiffs in different investment vehicles. The NYAG and DOL pursued different legal claims, with potentially different remedies, for overlapping but not identical investors in different investments. Allocation was discussed on numerous all-hands calls, often involving clients and experts, and necessitated an additional full day of mediation with the NYAG, the DOL, and Private Plaintiffs' Counsel. *See* Hart Decl., at ¶¶ 62, 68. The settlement process took nine months, during which the Parties exhaustively discussed the strengths and weaknesses of the Actions and the risks of litigation. Class Representatives and others plaintiffs were present during the mediation, while other clients were consulted by phone multiple times; the process was completely transparent. *See infra* fn. 7; Hart Decl., at ¶ 64.

B. The Proposed Settlement is Substantively Fair

The substantive fairness of a settlement is measured according to the "*Grinnell* factors." *See, e.g.*, *In re Marsh & McLennan*, 2009 WL 5178546, at *4 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). Application of these factors supports final approval.[7]

i. The Complexity, Expense, and Likely Duration of the Litigation

"The 'complexity, expense and likely duration of the litigation' are factors that the Court should consider in evaluating a proposed settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 05 CIV 10240 (CM), 2007 WL 2230177 (S.D.N.Y. July 27, 2007) (citing *Grinnell*, 495 F.2d at 463). "In evaluating the settlement of a securities class action, federal

[7] We will address the reaction of the class after the objection date. We note preliminarily that several class members and class representatives were present throughout the formal mediation sessions on February 28–29, and on April 19, or updated or consulted during them. "Lead Plaintiff Final Decls.:" Carroll, at 8; Lancette, at 8; Rounds, at 7. Class Members were regularly consulted throughout the course of informal negotiations. Lead Plaintiff Final Decls.: Carroll, at 7, 11; Lancette, at 7, 11; Rounds, at 6, 9, 10. The Stipulation was unanimously accepted and signed by the Regulators and all counsel in the Actions. *See* Stipulation, Hart Opening Decl. Ex. A. Moreover, a substantial percentage of the Classes were represented at the mediations. The Plaintiffs in the *Hartman* Action are the Trustees of seventeen ERISA Plans. The Fastenberg Intervenors (some 168 in number) are primarily individual investors comprising over 50% of the individuals (as opposed to ERISA plans) who invested in Beacon or Andover.

courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citations omitted). As evidenced by the Defendants' motions to dismiss, motion for reconsideration, their oppositions to class certification and their Rule 23(f) petitions to the Second Circuit; claims such as those asserted in the *Beacon* and *Jeanneret* Actions entail difficult and complex factual issues, such as the existence of a duty to investors, reliance, scienter, and loss causation. *See e.g.*, *Sumitomo*, 189 F.R.D. at 282-83; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); *Am. Bank Note Holographics*, 127 F. Supp. 2d at 426–27. Courts also recognize the complexity of ERISA breach of fiduciary claims. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 139. These were expensive and time-consuming actions to prosecute.

ii. The Stage of the Proceedings and the Amount of Discovery Completed

Plaintiffs were in an excellent position to evaluate the Settlement. *See, e.g.*, *In re Flag Telecom Holdings,* No. 02cv3400 (CM), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010). There is no litmus test for how much work on the case is sufficient, but whatever the measure, it is easily satisfied. *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207, 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010) (Plaintiffs "obtained sufficient information"). The investigation and litigation went on for four years; entailing extensive discovery, complex motion practice on outcome and value-shifting issues and vigorous courtroom advocacy. *See* Hart Decl., at § II.

iii. The Risks of Establishing Liability and Damages

The Court should balance the benefits to the Classes, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Securities and ERISA claims are challenging claims to try. *See supra* p. 16. Plaintiffs believe they would have prevailed at trial, but they recognize there are substantial obstacles to obtaining a favorable verdict. Defendants presented strong defenses on liability and damages. Litigating

those issues involves risks that settlement avoids. *In re Marsh ERISA Litig.*, 265 F.R.D. at 140 ("complex damages calculations in ERISA cases like this one are expert-intensive" (citing *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving a small settlement because the magnitude of damages often becomes a "battle of experts . . . with no guarantee of the outcome")); *Maley,* 186 F. Supp. 2d at 365 "complicated and uncertain process, typically involving conflicting expert opinions"). Private Plaintiffs' Counsel are confident in their ability to prove these claims, but the risks of an adverse ruling on any number of issues could impact the value of these Actions. That risk, when weighed against the benefits of the Settlement, confirm this tremendously compensatory Settlement should be approved.

iv. The Risks of Maintaining the Class Action through Trial

While class certification had not been ruled on in *In re Jeanneret* when the Settlement was reached, Judge Sand granted certification in *Beacon* on April 4, 2012 and in the *Buffalo Laborers* on May 3, 2012.[8] Ivy filed Rule 23(f) petitions seeking Second Circuit review of the decisions, which would be decided if the Settlement does not become effective. Class Plaintiffs believe they would maintain certification through trial, but the risks favor settlement.

v. The Ability of Defendant to Withstand a Greater Judgment

Class Plaintiffs do not believe that ability to pay was an issue with respect to Ivy due to the financial stability of BONY, Ivy's parent. Any speculative scenario that BONY might have been pressed to pay more presumes that BONY was liable for Ivy's liabilities, as BONY was dismissed as a defendant. It also ignores defenses regarding the liability of the other Defendants, and of Madoff himself who would have been the empty chair at trial. Plaintiffs do not believe that the other Defendants (who provided financial information as part of the Settlement process)

[8] The Plaintiffs in *Hartman v. Ivy Asset Management*, No. 09-8278 ("Hartman Plaintiffs") were excluded from the definition of the *Buffalo Laborers* class by Court Order dated March 19, 2012, and are also excluded from the proposed amended definition of the *Buffalo Laborers* class.

would have been able to satisfy a judgment if Plaintiffs were to prevail at trial, and believe that their resources would have been all but completely depleted by then. "In any event, 'the mere ability to withstand a greater judgment does not suggest the settlement is unfair.'" *In re Flag Telecom Holdings,* 2010 WL 4537550, at *19 (quoting *In re AOL Time Warner, Inc.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *42 (S.D.N.Y. April 6, 2006)). "[T]his factor alone does not prevent the Court from approving the Settlement where the other *Grinnell* factors are satisfied." *In re Veeco Instruments Inc. Sec. Litig.*, 05 MDL 01695 (CM), 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007).

vi. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The recovery in this case is a handsome one, whatever lens the Court uses to examine it. The adequacy of the settlement amount must be judged "not in comparison with the possible recovery in the best of all possible worlds." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455; *Id.* at 455 n.2 ("satisfactory settlement" could be "a thousandth part of a single percent of the potential recovery."); *see also In re Top Tankers, Inc.. Sec. Litig.*, No. 06 Civ. 13761 (CM), 2008 WL 2944620 (S.D.N.Y. July 31, 2008) (McMahon, J.) (settlements of 3.8% of plaintiffs' estimated damages to be within the range of reasonableness, and recovery of 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations.").[9] A recent NERA study finds that for the first half of 2012, the "median

[9] There is a broad range of potential recoveries here. Defendants could potentially defeat liability as to one or more of the claims. And even assuming Plaintiffs establish liability, several variables could affect the actual amount of recoverable damages, including when the finders of

ratio of settlement to investor losses has reached a new post-PSLRA low at 1.2%." *Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review*, at 30.

The Settlement Amount is substantial, both in absolute dollars and as a percentage of losses. On average, it will represent approximately 70% of net dollars invested with Madoff[10] even after payments to Regulators and any Court-awarded attorneys' fees and expenses. The Settlement is especially impressive given that the Madoff Trustee has already distributed millions of dollars to investors, and is expected to distribute substantially greater amounts in the future. The Settlement, when combined with actual and projected recoveries to the Investors from the Bankruptcy estate, is expected to return to Class Members all or nearly all of the money they invested with Madoff. The Settlement is fully endorsable given the range of potential outcomes at trial. This is most clear when considering many investments were made in the early 1990's and the potential impact of the statute of repose was contested. By any measure, the Settlement recovers a large percentage of losses and should receive final approval.

II. TRANSMISSION OF NOTICE TO CLASS SATISFIED BOTH THE PRELIMINARY APPROVAL ORDER AND APPLICABLE LAW

A. The Proposed Notices and the Procedure to Disseminate the Notices to the Settlement Class are Adequate

The Notices describe: (i) the nature of the actions, (ii) the definition of the classes; (iii) the claims involved, (iv) that a class member may enter an appearance though an attorney if the member so desires; (v) that the court will exclude from the opt-out classes any member who requests exclusion; (vi) the time and manner for requesting exclusion from the opt-out classes;

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fact concluded that Defendants breached their fiduciary obligations, the method by which the finder of fact determined the damages, and the proper measure of lost opportunity costs.

[10] The 70% figure is based on net dollars invested with Madoff, using the formulation endorsed in the Madoff Bankruptcy proceedings. *See In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 235–242 (2d Cir. 2011). Plaintiffs sought to recover not only the net dollars invested with Madoff, but also additional components of damage, including lost opportunity costs and the return of management fees paid to Defendants, which were hotly litigated issues that would have been the subject of substantial motion practice and expert testimony.

and (vii) the binding effect of a class judgment on class members. Fed. R. Civ. P. 23 (c)(2). The Notices also describe: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) Private Plaintiffs' Counsel's intent to request attorneys' fees (limiting and specifying the percentage of the fund being requested), and reimbursement of expenses; (iv) the procedure and timing for objecting to the Settlement; (v) the date and place for the Final Approval Hearing; and (vi) the procedure to receive additional information (including the unusual conference call with Plaintiffs' Counsel and experts). *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 144-145 (approving Notice program meeting same parameters); *In re Flag Telecom Holdings,* 2010 WL 4537550, at *13 (same).[11]

Because Rule 23(b)(1) class members cannot opt-out, the Rule 23(b)(1) Notice does not inform class members that the court will exclude those who request exclusion. Nor does the Rule 23(b)(1) Notice provide a Proof of Claim and Release Form, as members of the Rule 23(b)(1) Classes will automatically be released after final approval, and have no individual stake in the recovery. Rather, any such recovery will go to the plans themselves.

Notice to class members must be "reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 164 F.R.D. 362, 368 (S.D.N.Y. 1996), *aff'd,* 107 F.3d 3 (2d Cir. 1996). Under Rule 23(c)(2)(B), notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997)

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[11] The Rule 23(b)(3) Notice also meets the requirements of the PSLRA (15 U.S.C. § 78u-4(a)(7)), as it includes: (i) a statement of the amount to be distributed, determined in the aggregate and on an average per investment basis; (ii) a statement of the potential outcome of the case (i.e., whether there was agreement or disagreement on the amount of damages); (iii) a statement of Private Plaintiffs' Counsel's request for attorney's fees and reimbursement of expenses; and (iv) a brief statement that explains the reasons why the Settling Parties are proposing the Settlement.

(citing Fed. R. Civ. P. 23(c)(2)). "It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected." *Prudential,* 164 F.R.D. at 368; *see also Weigner*, 852 F.2d at 649. Mail is an "efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent. *Weigner v. City of New York*, 852 F.2d 646, 650 (2d Cir. 1988); *Bellifemine,* 2010 WL 3119374, at *2 ("mailing the Notices ... provided sufficient notice to satisfy the requirements of due process").

The method of providing notice to the Rule 23(b)(3) Class Members, namely individual notice by USPS Priority Mail to the last known address, is recognized as reasonably calculated to notify class members of a proposed settlement under Rule 23(e). In accordance with the Preliminary Approval Order, Notices were mailed to the Rule 23(b)(3) Class Members and posted on GCG's and Co-Lead Counsel's websites. *See* Hart Decl., at ¶¶ 78–80; GCG Decl., at ¶¶ 7–8. The Rule 23(b)(3) Notice: (a) was sent by USPS Priority Mail to the last known address of each Class Member by December 20, 2012, (b) was posted on the websites of GCG and Co-Lead Counsel, (c) provides Class Members with a toll-free number for GCG, contact information for Counsel for the Class Members, an email address for Settlement-related inquiries, and a website address where Class members may obtain more detailed information. GCG has a robust plan for following up on any delivery issues which may arise. By December 20, 2012, the Rule 23(b)(1) Notice was sent by GCG via first-class mail to the last known address of each participant and beneficiary provided by the ERISA plans from their current membership lists, and is subject to the same searching protocols as the Rule 23(b)(3) Notice in the event of any failed deliveries. *See* GCG Decl., at ¶¶ 6. That Notice was also posted on the websites of GCG and Co-Lead Counsel. *See* Hart Decl., at ¶ 80; GCG Decl., at ¶ 8.

III. THE PLAN OF ALLOCATION SHOULD BE APPROVED

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized-namely it must be fair and adequate." *Maley*, 186 F. Supp. 2d at 367; *In re Top Tankers,* 2008 WL 2944620, at *10–11. "A plan of allocation that reimburses Class Members based on the type and extent of their injuries is reasonable." *Id.* "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Am. Bank Note Holographics*, 127 F. Supp. 2d at 429–30 (internal citations omitted). Here, the Plan of Allocation is "rationally based on legitimate considerations," *In re PaineWebber Limited P'ship Litig.*, 171 F.R.D. at 131, and treats Class Members fairly, as it allocates recovery between the four investment vehicles, namely: (1) Beacon; (2) Income Plus; (3) Andover; and (4) investors who invested directly with Madoff pursuant to a DIMA ("Direct Investors").[12] The DOL, the NYAG, and Private Plaintiffs' Counsel and their clients and advisors balanced many factors, including net amount invested with Madoff through each vehicle, the timing of investments and lost opportunity costs,[13] fees paid to Defendants, SIPC advances, and money paid to resolve the Madoff Trustee litigation.

[12]With respect to Settlement Class Members who received more in distributions and withdrawals than they invested with Beacon, Income Plus, Andover, or directly with Madoff, but who nevertheless could potentially claim lost-opportunity damages ("Investors Receiving Only Opportunity Cost Payments"), the Plan of Allocation will allocate approximately 1.2% of the Gross Settlement Amount or ($2,650,000) to such Investors on a *pro rata* basis. The amount of their potentially cognizable lost opportunity cost damages is calculated using the same time value of money utilized in the Plan of Allocation for all investors (IRC § 6621 interest rate).

[13] The SEC took the position recently that a time value of money component may be appropriate in securities actions under certain circumstances: "Although the calculation of customer net equity must be made by reference to the cash in/cash out, we believe the value of the dollars invested may, when warranted, be adjusted to reflect the differences in the value of those dollars at relevant points of time ...." *See* Memo of Law of The Securities and Exchange Commission Supporting a Constant Dollar Approach to Valuing Customers' Net Equity Claims For Fictitious Securities Positions, at 1, *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC*, Adv. Pro. No. 08-1789 (BRL). Here, the Plan of Allocation included a time value of money component which was negotiated at length. Brattle Aff., at ¶¶ 21–26.

The debate was robust not only by virtue of Class Counsel and the Regulators but because Folkenflik &McGerity represented 168 high net worth individuals with securities but not ERISA claims and Hartman's 17 ERISA Funds, plus Lead and sub-lead ERISA Counsel all actively (**and vocally**) participated and ultimately agreed.

The Notice sets forth the proposed Plan of Allocation establishing the method by which the Net Settlement Fund will be distributed to Class Members submitting acceptable Proofs of Claim. The Plan of Allocation is the product of extensive consultation with a financial expert, and a lengthy mediation session and many subsequent negotiations negotiation among Settling Plaintiffs' Counsel representing the interests of investors in all investment vehicles, the DOL and the NYAG. Many allocation issues were hotly debated among various Plaintiffs and their Counsel, and the Regulators. Different investors had markedly different views as to whether to use a time value of money component, and if so, at what rate. At the recommendation of Lowey Dannenberg Cohen & Hart, P.C. ("Lowey"), Plaintiffs and the Regulators agreed to retain a financial expert (after a competitive interview process) to assist in the complex issues of allocation. The Brattle Group was retained, and regularly consulted over the course of negotiations with the variously situated Plaintiffs' Counsel and the Regulators. *See* Hart Decl., at ¶¶ 7, 68. Under the Plan, recovery is first allocated at the fund level and then among the investors within each fund according to their proportionate investment as of December 2008.[14]

[14]The Net Settlement Fund is allocated as follows: (a) all Authorized Claimants will benefit from the proceeds of the Ivy Defendants' settlement payment; (b) only Authorized Claimants who entered into Discretionary Investment Management Agreements with JPJA will benefit from the Jeanneret Defendants' settlement payment; and (c) only Beacon and Andover Authorized Claimants will benefit from the Beacon settlement payment. The Net Settlement Fund will first be allocated according to the *pro rata* share of total Madoff-related investment losses incurred by each of (i) the Beacon Funds, (ii) the Income Plus Fund, (iii) the Andover Funds, and (iv) Direct Investors. Second, each feeder fund's pro rata share of the Net Settlement Fund will be divided among the Authorized Claimants in that feeder fund.

The Brattle Affidavit, which will be posted on GCG's website and on the websites of Class Counsel shortly, provides a comprehensive explanation of the Plan of Allocation and the process through which it was formulated. Class Members and their counsel may register for and dial into a teleconference with Class Counsel and their financial experts, to better understand the Plan of Allocation. The Plan of Allocation should be finally approved.

IV. COUNSEL IS ENTITLED TO REASONABLE FEES AND EXPENSES

A few succinct points about the fee request: (1) various percentages were negotiated by Private Plaintiffs' Counsel, as set by the market; (2) the percentages were then capped by Lead Counsel's fee agreement which was competitively set, and that percentage was then lowered substantially as a result of negotiations with the DOL; (3) the percentage compensates counsel at a negative multiplier to the work required in this risky, complex case; and (4) the settlement is a great outcome for the clients and the fee should compensate counsel for that accomplishment.

By way of background, Lead Plaintiffs in *In re Beacon* and *In re Jeanneret*, in their fiduciary capacities both to their funds and as class representatives, had a multi-law firm "beauty contest," involving competition on qualifications, strategy and fees. Lowey was retained only after agreeing to a cap on fees lower than all the other qualified bidders who also specialize in this complex field. All the firms bid based on their own view of the substantial risks of Madoff litigation and the difficulties of certifying a "non-efficient-market" class. The clients' fund counsel was present during these meetings, giving their view of the proposals and fees. Lowey's proposal, which provided for fees of the lesser of either four times the hourly rate as calculated under the lodestar method or 22% of any amount recovered, was the most competitive fee proposed. That proposal was not only lower than the rates offered by the other firms who submitted bids to the ultimately-appointed lead plaintiffs, but is less than that of the other firms

retained to prosecute individual claims in this action. Other counsel evaluated this case given the then-known risks, and negotiated higher rates with their own fund clients. Lowey's highly competitive rate (set for a single firm application before multiple firms were contemplated as part of the fee) was truly set by the market. That percentage then proved, by virtue of the way the settlement was structured, to become a cap on the fees for all Private Plaintiffs' Counsel.

Notably, Plaintiffs engaged in a separate mediation session during which, at the insistence of the DOL, Private Plaintiffs' Counsel agreed to substantially reduce the fees which would be requested, thereby creating substantial additional benefits going directly to Class Members. First, before the proposed fees could be calculated, the proposed payments to the DOL ($7,000,000) and the NYAG ($5,000,000), and an additional $4 million which is going to Class Members (which, at the insistence of the DOL, Private Plaintiffs' Counsel agreed not to seek fees on), were deducted from the Gross Settlement Fund. Thus, Private Plaintiffs' Counsel are not seeking fees on $16 million of the Settlement Fund. Private Plaintiffs' Counsel then agreed to cap any request for fees at 20% of that reduced amount. To put Private Plaintiffs' Counsel's concessions to the DOL in context, 22% of the Settlement Fund (still after first deducting the proposed DOL and NYAG payments) would have resulted in a fee request of **$45,728,692** ($219,857,694 minus $12,000,000 times 0.22), which is **$4,957,154 more** than the fees that Private Plaintiffs' Counsel is now requesting. This concession at DOL's insistence resulted in a corresponding increased recovery to the Classes and Non-Class Plaintiffs.

Also, Lowey (on behalf of Lead Plaintiffs in *In re Beacon* and *In re Jeanneret*) intervened in the declaratory judgment action *Beacon Associates Management Corp. v. Beacon Associates LLC 1*, No. 09-cv-06910 (S.D.N.Y.), and obtained a ruling that the Beacon/Andover management defendants had to stop paying their legal fees out of the Beacon and Andover Funds, and they escrowed amounts previously paid. That benefit is conservatively worth an

additional million dollars not reflected in the settlement amount nor in the fee request. And as part of the fee negotiation, all Plaintiffs and their counsel agreed to a fixed allocation of whatever fees are awarded by the Court, which reflects counsels' commitment to drive this home for their clients and forestall post-approval fee disputes. Finally, while the recovery of 70% of net dollars invested (net of payments to regulators and fees and expenses, and not even considering the recoveries from the Bankruptcy estate), is exceptional, there will be no success based multiplier requested here. The collective lodestar of Private Plaintiffs' Counsel is approximately $48 million, while the requested fees (if awarded in full), would be $40,771,538.

A. The Requested Fee Is Reasonable

Co-Lead Counsel, in coordination with other Private Plaintiffs' Counsel and the DOL and the NYAG, have obtained a substantial settlement for the benefit of all Settlement Classes and Subclasses. This outstanding result is a credit to the vigorous prosecution of these coordinated Actions, *see* Hart Decl., ¶¶ 6, 85, 111, and is particularly noteworthy given the actual and projected payments to be made by the Madoff Trustee to these investors. *See* discussion *supra* fn. 5. Prosecuting federal securities and ERISA breach of fiduciary duty claims is highly risky. Trial would have been expensive and time-consuming with Defendants pointing to Madoff's brazen criminality and their own personal financial investments and losses. Defendants' version of this story would make them guileless, inadvertent aiders and abettors; claims not recognized under the federal securities laws. Defendants stridently contested scienter, fiduciary status, reliance and damages. Yet, the Complaints were sustained and Plaintiffs obtained certification of the *Beacon* and *Buffalo Laborers'* Classes in this non-efficient market case.

We request that the Court approve the award of attorneys' fees and recognize that Counsel worked hard to forge an agreement on how the fees will be allocated among Counsel representing all Plaintiffs. This agreement was undertaken to avoid post-settlement disputes and

forge a global and deliverable deal for the benefit of the investors. We therefore request an award in the aggregate amount of $40,771,538, plus reimbursement of $1,213,292.58 in current out-of-pocket expenses (the expenses include those which have been processed and/or paid to date, are continuing to accrue (*e.g.*, the cost of the conference call for Class Members), and Plaintiffs' Counsel will update this figure as additional expenses come in).

B. Private Plaintiffs' Counsel are Entitled to a Percentage of the Common Fund

As Your Honor has noted, "Counsel for a class is entitled to be paid a fee out of the common fund created for the benefit of the class." *Guippone v. BH S & B Holdings, LLC*, No. 09 Civ. 01029 (CM), 2011 WL 5148650, at *8, (S.D.N.Y. Oct. 28, 2011). The "trend in this Circuit is toward the use of the percentage" of recovery method for class counsel fee awards in common fund cases. *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, (S.D.N.Y. Nov. 30, 2010). Your Honor noted that "District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez,* 2010 WL 4877852, at *21 (citing *In re Oxford Health Plans, Inc., Secs. Litig.*, MDL Dkt. No. 1222, 2003 U .S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million fund)).[15]

Private Plaintiffs' Counsel recognize there is case law for the proposition that for cases involving very large settlements, the Court must ensure that the percentage awarded will not be a "windfall" to Counsel. We respectfully submit that under the circumstances of these Actions, the requested fees do not in any way constitute a "windfall." This Settlement resolves a complex

[15] *See also In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) (30% of $111 million); *In re DaimlerChrysler, et al.*, 00-cv-993 (LPS) (D. Del. Jan. 28, 2004) (22.28% of $300 million); *In re Williams Secs. Litig.*, No. 02-cv-72-SPF (N.D. Okla. Feb. 12, 2007) (25% of $311 million); *Informix Corp. Sec. Litig.*, Master File No. C-97-1289-CRB (N.D. Cal. Nov. 2, 1999) (30% of $132 million); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (36% of $127 million); *In re Rite-Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa.2001) (25% of $193 million).

array of actions in different Courts, including a state and a federal regulator.[16] This Court, in *In re Jeanneret*, appointed one Lead Counsel for the Securities claims, *see* Order dated Nov. 6, 2009, and one Lead Counsel for the ERISA claims. *See* Mem. Endorsement dated Dec. 14, 2009. In *Beacon*, Judge Sand appointed (a) Lowey as Lead Counsel, (b) Cohen Milstein as ERISA Counsel, (c) Bernstein Liebhard as Investor Counsel and (d) Wolf Haldenstein as Additional Plaintiffs' Counsel. This Court also appointed Kessler Topaz Meltzer & Check as Lead Counsel for the *Buffalo Laborers* Class. In light of the potential for a cacophony of voices, Judge Peck appointed Lowey and the DOL as Liaison Counsel to coordinate with all Plaintiffs and Defendants. Counsel in other actions were pursuing their clients' claims, including the *Hartman* Action in this Court (two law firms), four derivative actions in Supreme Court for New York and Nassau Counties (three law firms), and others. It took substantial time and effort to avoid duplication, and present uniform, coordinated litigation and negotiating positions on behalf of all Private Plaintiffs and the Regulators on various discovery, scheduling, and settlement issues.

Defendants' insistence that all claims asserted by Plaintiffs and the Regulators in all Courts had to be resolved simultaneously and in tandem with the Madoff Trustee Proceedings required a tremendous foundation to be set before negotiations could start. There was no guarantee private counsel could bridge their differences, let alone resolve claims in tandem with the Madoff Trustee and the Regulators. The parallel mediation to resolve the claims of the Madoff Trustee added complexity and was an innovation by Plaintiffs' Counsel to get these cases resolved. The strategy of proceeding with a global settlement process encompassing the

[16] The fact the Regulators are also prosecuting claims does not undermine the fee application. *See 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). Here, the DOL actively negotiated with Private Plaintiffs' Counsel, resulting in an agreement to cap the fees.

private, Regulatory, and Madoff Trustee claims has proven prescient by stark comparison to other Madoff litigation. We secured the Madoff Trustee's agreement that if the Class Members ultimately receive more than their net dollars invested with Madoff from this Settlement and the actual and projected Bankruptcy distributions, the Trustee will not seek to offset any Class Members' claims for recoveries above net dollars invested. *See* Trustee Stipulation, at § 4. We also avoided the pitfall that occurred after the NYAG announced a $415 million settlement with fund manager J. Ezra Merkin. There, the Madoff Trustee sued to enjoin consummation of the settlement on the grounds that any recoveries should go to the Bankruptcy Estate, and not to Merkin's clients. *Picard v. Eric T. Schneiderman, et al.*, Adv. Pro. No. 12-01778 (BRL) (Bankr. S.D.N.Y.). It is unclear whether the NYAG's Merkin Settlement will be consummated, or how long it will take for the District Court proceedings and likely appeals to be resolved, in direct contrast to the immediate benefits to Class Members here. Similarly, the Madoff Trustee has also sought to block an $80 million settlement involving the Fairfield Greenwich feeder funds. *Picard v. Farifield Greenwich Ltd., et al.,* Adv. Pro. No. 12-02047 (Bankr. S.D.N.Y.)

All the firms who came together to forge this deal—as they did for their client—have also come together to submit a single umbrella fee request. The firms each litigated for their clients or Classes consistent with the Courts' recognition that the many Classes and their varying claims needed separate counsel. Many cases are involved and settled here, but the lawyers have come together with a collective fee application to get this substantial recovery to finality; to make payout to their clients. In sum, the requested fee will compensate all Private Plaintiffs' Counsel at an amount lower than Lead Plaintiffs negotiated with Lowey before they were appointed, following a competitive bidding process. Lowey's 22% fee with a lodestar multiplier cap was lower than the percentages other Plaintiffs negotiated with their counsel. The concessions made by Private Plaintiffs' Counsel at the prompting of the DOL, reduce the fee

request by nearly $5,000,000. The requested fee is less than the collective lodestar of the Private Plaintiffs' Counsel, and represents approximately 18.5% of the total value of the Settlement.[17] No matter what lens the Court uses, the fee request is reasonable.

C. Lead Plaintiffs Support the Fee Request

Lead Plaintiffs (and other Class Representatives) have attested to their view that the fee request is fair and reasonable in light of the work performed, the result obtained, the risks of the litigation, and the contingent nature of the representation. *See* Hart Decl., Exs. C–E; LeVan Decl., Exs. A–B; Mezzetti Decl., Exs. 1–2. Their approval of the fees which come from the common fund and were reduced after negotiations with the DOL support Court approval of the award.

D. The Factors to be Considered by the Court

The Second Circuit in *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir. 2000), directed that courts in this Circuit should consider the traditional criteria that reflect a reasonable fee, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) any public policy considerations. *See also Guippone,* 2011 WL 5148650, at *9. These factors support the requested fee.

[17] The fee request is approximately 18.5% of the total value created by the settlement before deducting payments to the DOL and NYAG (*i.e.*, $40,771,538 equals 18.5% of the total value created by the Settlement, including the cash payment of $216,500,000 plus the additional value of $3,357,694 waiver of any claim to accrued management fees by the Beacon Defendants). Preventing Danziger and Markhoff from paying their legal fees out of the Beacon and Andover Funds was innovative and time-consuming, and added real value. We characterize the request as 20%, but in the details it proves to be lower.

i. The Time and Labor Expended by Counsel

Class Counsel have worked with other Private Plaintiffs' Counsel, all of whom have expended considerable time and resources litigating these cases. Since the Madoff fraud was disclosed, Private Plaintiffs' Counsel and their para-professionals have collectively devoted over 118,475.74 hours to this Action. *See* Hart Decl., ¶¶ 85, 87, 93, 94. As discussed in the Counsel Declarations, Private Plaintiffs' Counsel litigated these actions aggressively, including, *inter alia*: (i) conducting an extensive factual investigation into the events and circumstances underlying the claims in the Complaints; (ii) obtaining and reviewing relevant press releases and news reports; (iii) thoroughly researching and analyzing the law regarding the claims asserted against the Defendants and the potential defenses thereto; (iv) conducting extensive motion practice, including Defendants' motions to dismiss and Plaintiffs' motions for Class Certification; (v) engaging in substantial discovery; (vi) negotiating with the Defendants, including at in-person meetings and telephonically, concerning every aspect of this complex Settlement, which included exchanging countless drafts of the Stipulation; and (vii) negotiating with all Plaintiffs and Regulators to craft a Plan of Allocation for the benefit of Investors. *See* Hart Decl., ¶ 100.

ii. The Risks of the Litigation

1. The Contingent Nature of the Representation Supports the Requested Fee

The Second Circuit has recognized that "despite the most vigorous and competent of efforts, success is never guaranteed." *Grinnell*, 495 F.2d at 471. Securities and ERISA class actions are difficult and risky propositions. *See supra* p. 16. "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14,

2004). The risk associated with contingent litigation in particular is an important factor here. With only two exceptions, Private Plaintiffs' Counsel undertook these Actions on a contingent-fee basis. Those two counsel; Folkenflik & McGerity and Anthony Gordon are also to be paid from any fee awarded as part of the packaged global fee solution forged. Fees already paid to counsel will be reimbursed to their clients. Except as noted, Private Plaintiffs' Counsel have not been compensated for any time or expenses since these Actions began, and would have received no fees or expenses had their efforts not culminated in a Settlement that provides monetary benefits to the Classes. *See* Hart Decl., ¶¶. 111, 112.

2. Litigation Risks, the Magnitude and Complexity of the Litigation and the Quality of Representation

There are a multitude of significant risks to continuing these actions, *i.e.*, establishing scienter, fiduciary status, reliance and damages. *See* Hart Decl., ¶ 70. Historically, there are numerous class actions in which lead counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise. These Actions involve difficult and complex issues and would entail a lengthy, expensive road to trial and likely appeals in absence of this Settlement. *See supra* pp. 5–9. The quality of the representation by Private Plaintiffs' Counsel and the standing of counsel at the bar are important factors that support the reasonableness of the requested fee. *See Ressler v. Jacobson,* 149 F.R.D. 651, 654 (M.D. Fla. 1992). It took tremendous skill and perseverance to achieve a settlement at this level in these coordinated Actions. Co-Lead Counsel are nationally known leaders in the fields of securities and ERISA class actions and complex litigation. *See* Hart Decl., Ex. A; LeVan Decl., Ex. D; Mezzetti Decl., Ex. 3. These Actions were and would continue to be vigorously defended by Defendants, who are represented by highly qualified attorneys. *See Velez,* 2010 WL 4877852, at *16-17; *Maley*, 186 F. Supp. 2d at 372. This factor supports approval of the fee request.

3. Public Policy Considerations

"In complex class actions, able counsel for Plaintiffs can be retained only on a contingent fee basis." *Maley*, 186 F. Supp. 2d at 372. Society benefits from strong advocacy to eradicate fraud, so public policy favors granting the fee and expense application. *See Taft v. Ackermans,* No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *11 (S.D.N.Y. Jan. 31, 2007). Public policy favors incentivizing sophisticated lawyers to undertake difficult and worthy litigations to conclusion, as done here, and supports "fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions." *Ressler,* 149 F.R.D. at 657.

E. The Requested Fees Are Reasonable Under the Lodestar Cross-Check

The Second Circuit encourages a cross check against counsel's lodestar. *Goldberger,* 209 F.3d at 50. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Grinnell,* 495 F.2d at 470 (citation omitted). Performing the lodestar cross-check confirms that the fee requested by Co-Lead Counsel on behalf of all Private Plaintiffs' Counsel is manifestly reasonable. Private Plaintiffs' Counsel and their paralegals have spent, in the aggregate, 118,475.74 hours in the prosecution of this case through November 30, 2012.[18] *See* Hart Decl., ¶ 94 (chart of total hours and lodestar for each firm).[19] The resulting lodestar through November 30, 2012 at current rates for Private Plaintiffs' Counsel collectively is $48,967,217.35, and results in a **negative collective multiplier** of 0.8326. Negative multipliers are readily approved. *See In re Marsh ERISA Litig.,* 265 F.R.D. at 146

[18] November 30, 2012 was chosen as a control date for calculating lodestar. Additional time has been and will continue to be spent by counsel.

[19] The hourly rates, set forth in the Counsel Declarations, are reasonable. *See Velez*, 2010 WL 4877852, at *22 (2010 decision approving current hourly rates of $750.00 and noting that they are "below the rates charged by firms of this caliber (principally defense firms) that litigate regularly in this district; they have also been approved in other matters in this district."); *In re Marsh ERISA Litig.*, 265 F.R.D. at 146 (approving rates of $775 per hour).

("The fee requested ... is significantly less than the lodestar, which strongly suggests that the requested fee is reasonable."); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013 (LAK) (AJP), 2007 WL 623808, at*8 (S.D.N.Y. Mar. 1, 2007) (where the multiplier is negative, the lodestar cross-check demonstrates that the requested fee "is reasonable because it will not bring a windfall to co-lead plaintiffs' counsel"); *In re Blech Sec. Litig.*, No. 94 Civ. 76 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (award was reasonable because it represented a negative multiplier).[20] Lowey and others will work on this matter until the settlement administration is complete. `Where "class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower." *Velez*, 2010 WL 4877852, at *23, (quoting *Bellifemine,* 2010 WL 3119374, at *19). The negative multiplier will be even greater by the task's end.[21]

V. THE EXPENSES SHOULD BE REIMBURSED

Private Plaintiffs' Counsel truly watched the Classes' pennies with every expenditure; always insisting on best prices for their clients. Counsel request the reimbursement of those in the current amount of $1,213,292.58 (they continue to accrue). *See* Hart Decl., ¶¶ 9, 94, 97, 99, 107, 110, 115. Plaintiff expenses are for collecting Plaintiff ESI and documents, document

[20] Handsome multipliers are routinely approved but are not at issue here. In *Velez*, 2010 WL 4877852, at *8, this Court approved a multiplier of 2.4 times the hourly fees, noting that the "multiplier falls well within (indeed, at the lower end) of the range of multipliers accepted within the Second Circuit." (citing *Maley,* 186 F. Supp. 2d at 369–71 (approving "modest multiplier" of 4.65 in securities fraud class action)). *See also In re AOL Time Warner Sec. and ERISA Litig.*, No. 02 Civ. 5575, 2006 WL 3057232, at *1 (S.D.N.Y. Oct. 25, 2006) (multiplier of 3.69 times; *In re Interpublic Secs. Litig.,* No. 02 Civ. 6527, 03 Civ. 1194, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) (multiplier of 3.96); *In re Lloyd's Am. Trust Fund Litig.,* 2002 WL 31663577, at *27 (multiplier of "just" 2.09 is "at the lower end of the range of multipliers awarded by courts in the Second Circuit.").

[21] Notice has been sent to Class Members informing them that Private Plaintiffs' Counsel intend to apply to the Court for an award of attorneys' fees not to exceed 20 % of the Settlement Fund after deducting the payments to the DOL and the NYAG plus $4,000,000 on which Plaintiffs' Counsel agreed not to seek a fee. The time to object to the fee request will expire on January 30, 2013, and if any objections are received, we will respond at the time set by the Court, but in the interim, we note that the many Counsel before the Court represent a substantial percentage of the Class Members, all of whom have endorsed the fee request.

hosting, computer research, copying charges, and other common expenses, as well as costs of the financial expert hired to assist in the plan of allocation are properly reimbursable from the recovery. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004); *Am. Bank Note Holographics, Inc. Sec Litig.*, 127 F. Supp. 2d at 433 (granting reimbursement of litigation expenses from settlement fund). In addition, the current estimate of settlement-related expenses is $324,504.92; the negotiated Expense Fund of $250,000 will be used to pay a portion of these expenses. *See* Hart Decl., ¶99. We respectfully request reimbursement of these expenses (plus additional expenses that may accrue by the time of final approval).[22]

CONCLUSION

We respectfully request that the Court: (a) grant final approval of the Settlement and Plan of Allocation, (b) amend the Class and Subclass definitions in the *Beacon* and *Buffalo Laborers* Actions for settlement purposes only; (c) certify additional classes in the *Beacon, Jeanneret* and *Buffalo Laborers* Actions for settlement purposes only; (d) find that the Notice program satisfied Due Process requirements; (e) award attorneys' fees and reimbursement of expenses, and (f) enter the Post-Fairness Hearing Approval Order, following which the Parties will take steps to have judgment entered in the State Derivative Action Courts, after which Final Judgment can be entered in this Court in accordance with the terms of the Stipulation.

[22]The expenses of the *Hartman* Counsel and Ross & Orenstein are being paid by those plaintiffs.

Dated: December 21, 2012

Respectfully submitted,

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