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United States District Court,
S.D. New York.

In re BEACON ASSOCIATES LITIGATION.
This Document Relates to: All Actions.
In re J.P. Jeanneret Associates, Inc. et al.
This Document Relates to: All Actions
Beacon Associates Management Corp., Plaintiff,
v.
Beacon Associates LLC I, Defendants.
Ernest A. Hartment et al., Plaintiffs,
v.
IVY Asset Managmeent L.L.C. et al., Defendants.
Board of Trustees of the Buffalo Laborers Security Fund, Welfare Fund and Welfare Staff Funds, 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.
Hilda L. Solis, Secretary of the United States Department of Labor, Plaintiff,
v.
Beacon Associates Management Corp., et al., Defendants.
Stephen C. Schott, as Trustee for the Stephen C. Schotta 1984 Trust, Plaintiff,
v.
Ivy Asset Management Corp. et al., Defendants.
Supreme Court, New York County, New York
The People of the State of New York By Eric Schneiderman, Attorney General of the State of New York, Plaintiff,
v.
Ivy Asset Management LLC, Lawrence Simon and Howard Wohl, Defendants.
Donna M. McBride, individually and derivatively on behalf of Beacon Associates LLC II, Plaintiff,
v.
Kpmg International et al., Defendants,
and
Beacon Asssociates LLC II, Nominal Defendant.
Alison Altman et al., Plaintiffs,
v.
Beacon Associates Management Corp., et al., Supreme Court, Nassau County, New York
Joel Sacher and Susan Sacher, derivatively on behalf of Beacon Associates LLC II, Plaintiffs,
v.
Beacon Associates Management Corp. et al., Defendants,
and
Beacon Associates LLC II, Nominal Defendant.
Charles J. Hecht, derivatively on behalf of Andover Associates LLC I, Plaintiff,
v.
Andover Associates Management Corp. et al., Defendants,
and
Andover Associates LLC I, Nominal Defendant.
The Jordan Group LLC, derivatively on behalf of Beacon Associates LLC I, Plaintiff,
v.
Beacon Assocaites Management Corp. et al., Defendants,
and
Beacon Associates LLC I, Nominal Defendant.
Florida Circuit Court, Fifteenth Judicial Circuit, Palm Beach County
Harvey Glicker, et al., Plaintiffs,
v.
Ivy Asset Management Corp., et al., Defendants.

Nos. 09 Civ 777(CM), 09 Civ. 3907(CM), 09 Civ. 6910(CM), 09 Civ. 8278(CM), 09 Civ. 8362(CM), 10 Civ 8000(CM), 10 Civ. 8077(CM). | Index Nos. 450489/2010, 650632/2009E, 652239/2010, 5424/2009, 6110/2009, 3757/2011. | Court File No. 502010CA029643 XXXX MBAB. | May 9, 2013.

DECISION AND ORDER APPROVING SETTLEMENT AND GRANTING PLAINTIFFS' COUNSELS' JOINT MOTION FOR AWARD OF ATTORNEYS' FEES

McMAHON, District Judge.

***1** The above-captioned actions, brought in this court and in the New York State Supreme Court in New York and Nassau Counties, are among the plethora of lawsuits arising out of the Bernard Madoff disaster. These actions are among the so-called "feeder fund" lawsuits; in this case, they focus on the activity of defendant Ivy Asset Management ("Ivy"), through whom the other

defendants—Beacon Associates, Andover Associates, and J.P. Jeanneret Associates ("Jeanneret"), together with various affiliates—invested client funds in the Madoff Ponzi Scheme.

This court, which superintended the Jeanneret actions from the beginning, inherited the Beacon actions in January, upon the retirement of The Hon. Leonard B. Sand.

The various New York and Florida state court actions appearing in the caption are temporarily before this court in the context of a motion to approve a global settlement of all actions in which Ivy is named as a defendant. The settlement extends to all defendants in all of those actions. This court's approval is required for the Rule 23 class actions that were filed and prosecuted here (SDNY Civil Action Nos. 09 Civ. 0777, 39078 and 8362). The State Court actions (principally derivative suits) and the other federal actions (notably the Hartman Action, brought by the Trustees of 17 ERISA benefit funds) were settled simultaneously. Certain aspects of the settlements in the non-Rule 23 cases (notably a cap on attorneys' fees that would not ordinarily require court approval) were voluntarily made contingent on this court's approval. Adopting the parties' nomenclature, I will hereinafter refer to these lawsuits as the "Settling Actions."

I do not here intend to recite the history of the Madoff scandal; it is too well known to bear repeating. Decisions by Judge Sand and me denying the motions to dismiss in *In re Beacon* and *In re Jeanneret* recount the asserted background of the investment decisions that are the subject of this litigation. The reader is referred to them for background information.

For the reasons set forth below, the settlement, the Plan of Allocation, and the request for reimbursement of expenses are all granted without modification. The request for attorneys' fees is granted with one modification, explained below. The objections are disallowed.

BACKGROUND

I. Settlement

After laborious negotiations, including several full-day mediations sessions involving all parties interested in these actions—a group that included the NYAG and the United States Department of Labor ("DoL"), as well as the Class, Derivative, and Individual Plaintiffs (hereinafter, the "Private Plaintiffs")—a settlement in the amount of $219,857,694 was reached. The Settlement was expressly made subject to the execution of a Settlement Agreement between the Parties to the Madoff Trustee Proceeding in the United States Bankruptcy Court for the Southern District of New York, pursuant to which the Madoff Trustee has agreed to approve the claims of the Beacon and Andover Funds in certain stipulated amounts. This means that the Madoff Bankruptcy Estate will also make payments to the investors whose interests are represented by the Private Plaintiffs in the Settling Actions.

***2** The Gross Settlement Amount consists of $216,500,000 in cash, plus the waiver of management fees of $3,357,694 accrued by the Beacon Defendants. Ivy is putting up $210,000,000 of the Settlement Amount; Jeanneret $3,000,000; and Beacon cash and waived fees totaling $6,857,694.

From this Gross Settlement Amount, $7 million is to be paid to the DoL and $5 million to the NYAG. Court-approved attorneys' fees and expenses, notice and administration expenses and taxes and tax expenses will then be deducted. If the court approves the fee and expense request in its entirety, this settlement would represent approximately 70% of the net dollars invested by the plaintiffs with Madoff (using the formulation endorsed in the Madoff Bankruptcy proceedings). *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 235–42 (2d Cir.2011). The settlement, coupled with the recoveries these investors can anticipate from the bankruptcy estate, is expected to return to the Private Plaintiffs collectively all or nearly all of the money they invested with Madoff.

Not a single voice has been raised in opposition to this remarkable settlement, or to the Plan of Allocation that was negotiated by and between the Private Plaintiffs, the NYAG and the DoL.[1] I approved the settlement orally at the Fairness Hearing, held on March 15, 2013, and I endorse that approval in writing today.

The settlement, taken as a whole, is fair, reasonable, and adequate. In fact, the Private Plaintiffs and regulators have collectively achieved a remarkable result. Counsel and the regulatory agencies who participated in its negotiation are to be congratulated.

A. The Settlement is Procedurally Fair.
The settlement was reached after protracted arms-length negotiations conducted over the span of nine months by experienced counsel after meaningful discovery. It was reached despite the high bar imposed by defendants' insistence that any settlement resolve the full scope of their exposure in all lawsuits anywhere, and that the settlement of investors' claims be completed in conjunction with the resolution of the Madoff Trustee Proceeding. All formal negotiations were conducted with the assistance of two independent mediators—one to mediate disputes between defendants and the investors and another to mediate claims involving the Bankruptcy Estate. Class Representatives and other plaintiffs were present, in person or by telephone, during the negotiations. The U.S. Department of Labor and the New York State Attorney General participated in the settlement negotiations. Rarely has there been a more transparent settlement negotiation. It could serve as a prototype for the resolution of securities-related class actions, especially those that are adjunctive to bankruptcies.

B. The Settlement is Substantively Fair.
The settlement ticks off all the important "*Grinnell* factors":

> 1. The actions involved difficult and complex factual issues, especially because the defendants were not themselves the alleged perpetrators of the underlying securities fraud (Madoff), but were themselves Madoff customers, who cast themselves as among his victims, and whose "sin" was variously described as (i) their failure to recognize Madoff's duplicity, or (ii) their failure to share with their clients their suspicions about Madoff's *bona fides.* The theories of liability were novel and untested.
>
> ***3** 2. Both Private Plaintiffs' Counsel and the regulators had access to considerable discovery, and so were in an excellent position to evaluate what the settlement really offered to the investors.
>
> 3. There were a number of open legal questions concerning the liability of third parties like Ivy and Jeanneret, which made settlement an attractive alternative to litigation—especially since many of Madoff's investors were older people who do not need to wait years and years to get back the money that was stolen from them in his extraordinary Ponzi scheme.
>
> 4. There was no risk at the District Court level that the action could not be maintained as a class action through trial,[2] but Judge Sand's class certification orders were before the Second Circuit and there was no guarantee that they would not be overturned if the Circuit chose to entertain Ivy's Rule 23(f) petitions (though this court believes that was a highly unlikely proposition).
>
> 5. Ivy could easily have withstood a greater judgment.
>
> 6. The recovery in this case is unlike anything this court has ever seen, affording well over 50% recovery to the Madoff investors involved in these lawsuits. It is, in a word, unprecedented.

Factors 1, 2, 3, and 6 strongly favored settlement; Factor 4 was neutral. Only Factor 5 might have counseled against settlement; but given the Settlement Amount, the prospect of years of litigation before investors would see any money, and the cost of obtaining full recovery rather than a 70% recovery, the game was simply not worth the candle. The fact that the investors are all but certain to recover additional sums through the efforts of the Madoff Trustee also counsels in favor of approving the settlement.

> 7. Above all, the members of the class overwhelmingly approve of the settlement.

The Court-approved Notices that were sent to Class Members to apprise them of the settlement and the procedures devised by the parties for disseminating same to the Class Members proved to be remarkably effective. The notices were in fact reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The proof of the pudding is that an astonishing 98.72% of the Rule 23(b)(3) Class Members who were eligible to file a proof of claim did so (464 out of 470), and only one Class Member opted out (that Class Member was not entitled to recover anything under the Plan of Allocation). I have never seen this level of response to a class action Notice of Settlement, and I do not expect to see anything like it again.

Additionally, of the 83,022 Rule 23(b)(1) Class Members who received notice, only one filed an objection to the terms of the settlement.

The strong support for the settlement demonstrated by the Class Members and the absence of any serious objection indicates that the real parties in interest—the investors who were ensnared in the Madoff Ponzi scheme—are satisfied with the results achieved by the settlement. The only objection recorded to the settlement is, in effect, to the contents of the Notice, since the objector (Duttweiler) principally protests that she has insufficient information about the resources of the defendants. But the court has previously concluded that the Notice provided all the information that a Class Member needed in order to decide whether to participate in the settlement. The fact that this Class Member's objection was not echoed by anyone else reinforces my inclination to reject the Duttweiler Objection, and I do so.

***4** The court also approves the Plan of Allocation. In this case, there were multiple classes and groups of investors. Recovery had to be allocated among four separate investment vehicles (Beacon, Income Plus, Andover, and the Direct, or DIMA, Investors). The parties balanced many factors, including the net amount invested with Madoff through each vehicle, the timing of investments and lost opportunity costs (particularly important to those investors who received more in distributions from Madoff than they actually invested), fees paid to defendants, SIPC advances, and money paid to resolve the Madoff Trustee litigation. The negotiations over the Plan of Allocation included a separate, one day mediation. The regulators were actively involved in the process of setting up the Plan of Allocation. No one has objected to it or suggested any reason why it is inadequate, except for Objector Duttweiler, who thinks it inappropriate for the regulators to receive any payment out of the Settlement Fund. I disagree; the taxpayers have borne considerable costs as a result of the investigations into Madoff and those who, like defendants, dealt with him. Reimbursement for at least part of those costs is entirely appropriate. I thus approve the entire Plan of Allocation, including allocation of $5 million to the NYAG and $7 million to the DoL.

In short, there is no reason to reject the settlement and every reason to approve it. And I do.

II. Attorneys' Fees and Expenses

Approving the settlement was the easy part.

The real issue before the court is whether the requested fee award should be approved. The NYAG and several other parties have objected to that award, arguing that it should be substantially reduced.

After considerable thought, I am prepared to accept the negotiated fee award, with one minor but, in my view, necessary adjustment to the fees to be paid to the attorneys in the Class Actions. I also grant the unopposed motion for an award of expenses in the amount of $1,213,292.58, plus additional expenses that may have accrued in the Class Actions. I note that the expenses of Hartman Counsel and Ross & Orenstein are being paid by their clients, and are not subject to court approval, even as part of the overall settlement.

A. Principles Governing Approval of Fee Applications

We start by recognizing several propositions.

The first is that 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. 1029, 2011 WL 5148650, at *8 (S.D.N.Y. Oct. 28, 2011). In this case, we are in the unusual posture that the fee request is being made on behalf of all Private Plaintiffs' Counsel, even those who are not litigating in this court (principally the plaintiffs in various derivative actions) or who were retained to litigate direct actions and are not representing Rule 23 classes (the Hartman Plaintiffs). This is an artifact of the global nature of the settlement; counsel have agreed to participate in a carefully negotiated "common fund" settlement, rather than billing their respective clients separately.

***5** The second is that a court overseeing a class action can only approve a fee request that is fair and reasonable.

The third is that the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional "lodestar" calculation as a method of testing the fairness of a proposed percentage award. *See, e.g., In re Bisys Sec. Litig.*, No. 04 Civ. 3840, 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007). In this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund. *See, e.g., Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 9194, 2010 WL 4877852, at *21 (S.D.N.Y. Nov.30, 2010) (collecting cases).

B. Relevant Facts: What Private Plaintiffs' Counsel Did

Herewith the factual background leading to the application for fees in these cases.

Both the Beacon and the Jeanneret actions were client-driven from the beginning, unlike all too many class actions, which are lawyer-driven. The Lead Plaintiffs in *In re Beacon* and *In re Jeanneret* held a multi-law firm "beauty contest," in which a number of firms competed for the position of Lead Counsel. The beauty contest was won by Lowey Dannenberg, which offered to serve as Lead Securities Counsel for fees the *lesser* of (i) four times the hourly rate as calculated under the lodestar method, or (ii) 22% of any amount recovered. The 22% number represented a significant reduction from the size of fee awards that are routinely approved in this Circuit—although I hasten to add that it does not automatically make the fee a reasonable one.

Both Judge Sand and I approved the retention of Lowey Dannenberg as Lead Counsel—specifically, as Lead Counsel in *In re Beacon,* Lead Securities and Derivative Counsel in *In re Jeanneret,* and Liaison Counsel in all the coordinated actions. Kessler Topaz Meltzer & Check, LLP were appointed Lead Counsel in the *Buffalo Laborers* Action, which was the ERISA case in *Jeanneret.* Cohen Milstein Sellers & Toll PLLC were appointed ERISA Class Counsel in *In re Beacon.* Other subclasses were identified in In re Beacon and counsel were appointed to represent those subclasses—Bernstein Liebhard LLP to represent the "Investor Class" and Wolf Haldenstein Adler Freeman & Herz (which was already prosecuting three separate derivative actions in the Supreme Court: Nassau County[3]) to represent a different "Investor Class."

Neither Judge Sand nor I placed any special conditions on these appointments in terms of cost containment. In retrospect, I wish that I had imposed conditions to keep down the cost of document review, and I undoubtedly will in the future when approving the appointment of Lead Counsel (this will be discussed further below).

Private Plaintiffs' Counsel in the Beacon and Jeanneret cases (including the Hartman Plaintiffs, who were not part of any class action and who, while consolidated with the rest of the Beacon cases for discovery purposes, were proceeding on their own track and were litigating ERISA-related issues) responded to two motions to dismiss in each case—one filed prior to May 2010 (when the NYAG filed his complaint in the New York State Supreme Court) and one filed shortly thereafter. They attended at least seventeen conferences with Magistrate Judge Peck, who was appointed by Judge Sand and myself to superintend discovery. (I have the transcripts of all conferences in my chambers.) Counsel in the class actions coordinated the review of documents already produced to the regulators that will be discussed below; the Hartman Plaintiffs' Counsel conducted their own parallel review of those documents. All Private Plaintiffs' Counsel responded to discovery requests from defendants—Class Counsel to requests for class-related discovery; the Hartman Plaintiffs to requests for discovery about the seventeen ERISA employee benefit plans that were plaintiffs in their direct action. All counsel participated in the arduous settlement negotiations, with Lowey Dannenberg taking the lead—not just in dealing with the defendants, but in coordinating the negotiating strategies of the various Private Plaintiffs, who were not allied in interest much of the time.

***6** Needless to say, no one was planning to work *pro bono.* The cases were taken on contingency.

During the settlement negotiations, the plaintiffs themselves engaged in a separate mediation session over attorneys' fees, during which all Private Plaintiffs' Counsel (including counsel in actions that are (1) not subject to Rule 23 approval, and even (2) not pending in this court!) agreed to accept a stipulated amount in fees, subject to the approval of this court. The proposed payments to the DoL and NYAG that were to be made as part of the settlement were deducted from the sum against which fees for Private Plaintiffs' Counsel would be calculated, as was a payment of $4 million to Named Plaintiffs in the Class Actions. Put otherwise, the Gross Settlement Fund was reduced by $16 million (yielding an Adjusted Settlement Fund) before any percentage was applied in order to calculate a fee. Then, at the insistence of the DoL—which participated actively in the negotiations, and which supports approval of the request—*Private Plaintiffs' Counsel agreed as a group to cap the sum of all fee awards at 20% of that Adjusted Settlement Fund.* This represents a significant reduction in the total amount of fees to be paid by the Madoff investors since, absent these negotiations, Lowey Dannenberg alone would have ordinarily been entitled to seek approval of a fee of 22% of the Gross Settlement Fund (almost $5 million in additional fees)—with everyone else's attorneys being paid on top of that amount!

The parties agree that the Secretary of Labor played a

critical role in reducing the Fee Award Cap from 22% to 20%.

At the end of the day, the proposed total fee award amounts to $40,771,538, plus expenses of $1,213,292.58. The breakdown, together with a lodestar calculation from each firm, is attached to this opinion as Appendix A.

C. Objections to the Fee Request

Objections to the request for fees have been filed by the NYAG, an attorney purporting to represent four of the Beacon and Andover investment funds in which some of the plaintiffs invested, and two individual investors (Siegel and Medrick). For the most part the objections are mere copycat objections of the one filed by the NYAG, on which I will focus most of the discussion.

The NYAG mounts two separate objections to the fee award. One, predictably, is to the number of hours expended and the amount being charged for those hours-so-called *Goldberger* objections. Those will be dealt with in due course.

The other, however, is unique to this situation and to the involvement of the NYAG in the Madoff investigations. It needs to be separately discussed.

(i) The NYAG Investigation and Settlement Negotiations

The so-called "Madoff feeder fund" cases, including *In re Beacon* and *In re Jeanneret*, were filed within months of the December 2008 revelation that Madoff had been engaged in a Ponzi scheme for virtually the entire life of Bernard Madoff Investment Services (BMIS). BMIS was in bankruptcy; Madoff was under indictment; and investors were casting about for deep pockets to reimburse them for the loss of the profits (real and imaginary) that they had accrued (or thought they had accrued) because they had been permitted to invest with the wizard who seemingly never lost any money in the market. The securities fraud complaints, filed under the Private Securities Litigation Reform Act (PSLRA), proceeded on the slow and deliberative track dictated by Congress back in 1995. In other words, for long stretches of time, nothing happened because nothing was allowed to happen; the statute effectively prohibits a court from fast-tracking or managing the progress of a securities fraud case. ERISA class actions were also filed, but as has become customary in this court, they were consolidated with and put on the same slow track as the securities fraud cases. The Hartman Plaintiffs (trustees of 17 ERISA benefit funds) declined to rely on the class action track and retained separate counsel to pursue a private, direct action, although that, too, was consolidated with *In re Beacon* for purposes of discovery.

***7** In April 2009, during the long period when the PSLRA effectively imprisoned the actions pending in this court in a state of suspended animation, then-Attorney General Andrew Cuomo opened an investigation into the Madoff-related activities of feeder fund defendant Ivy Asset Corporation, a subsidiary of The Bank of New York. Proceeding with (relative) dispatch, since he was subject to no congressionally-mandated stay—and possessed of subpoena power, which Private Plaintiffs lacked—the NYAG conducted a year-long investigation into Ivy and several other entities. The investigation involved the production of over 11 million documents and 37 depositions. The discovery convinced the NYAG that Ivy had fraudulently misled clients about Madoff for more than a decade, while knowing or strongly suspecting that his was not a legitimate operation. Among those who were misled, according to the NYAG, were the managers of Beacon, Andover, and Income Plus Funds, who had collectively invested over $227 of client assets with Madoff.

In May 2010, the NYAG filed a 55 page complaint against Ivy and two of its former principals, Lawrence Simon and Howard Wohl, detailing the facts uncovered during its investigation. The complaint identified numerous letters and oral statements sent or made by Ivy to Beacon, Andover, and/or Income Plus that affirmatively misrepresented Ivy's views about Madoff, supporting each allegation of non-disclosure with quotations from internal Ivy emails and documents, and from deposition testimony.

In the months prior to filing the complaint, the NYAG and Ivy engaged in settlement negotiations. According to the NYAG, Ivy indicated that it would pay an aggregate of $140 million to settle the NYAG's claims—but only as part of a settlement that, among other things, contemplated the global resolution of all claims by investors in the Beacon, Andover, and Income Plus Funds; Beacon, Andover, and Income Plus themselves; and all Direct (DIMA) Investors, including those who had invested with Jeanneret. In short, Ivy told the NYAG that it would pay $140 million to obtain the settlement it ultimately obtained here for the payment of $210 million.

Had the NYAG been able to effect a settlement, the entire $140 million would have been paid to the investors who are represented in the Private Plaintiffs' Actions—i.e., the Madoff victims who will be receiving payment from the Settlement Fund just approved by this court. There would have been no attorneys' fees, because there would have been no need to pay any attorneys—the NYAG, acting *in parens patriae*, would have created the common fund.

Unfortunately, there was no settlement. Ivy's offer was plainly a conditional offer and the condition—global peace—was not fulfilled. So negotiations broke off and the NYAG complaint was filed.

The existence of the negotiations between Ivy and the NYAG was not disclosed to any of the Private Plaintiffs, whose various lawsuits (see the caption at the head of this opinion) were starting to come to life in this court, the New York State Supreme Court (in two counties), and the state court in Palm Beach County, Florida. No effort was made during the winter and spring of 2010 to bring anyone else into the NYAG/Ivy discussions, or to figure out a way to make the global settlement happen. Apparently no effort was made to involve the Madoff Trustee in Bankruptcy, either, even though his prodigious efforts on behalf of the Madoff "investors" make him the elephant in the room whenever private actions involving Madoff investors are under discussion. Because Beacon and Andover were involved in the NYAG investigation, it appears that they or their attorneys were aware of Ivy's settlement offer, but they never told anyone about it, either—although the law firm that purports to represent four of the Beacon and Andover Funds (Herrick Feinstein) insists that it was pushing for mediation rather than litigation all along because it knew that Ivy had already suggested a serious figure to resolve the cases against it. (Memorandum of Law at Docket # 344, pages 10–11.)

(ii) ***Proceedings in this Court Following the Filing of the NYAG Complaint***

***8** The filing of the NYAG's complaint led to a round of frenzied activity in the Beacon and Jeanneret actions that were pending in this court. As originally filed, the complaints in these actions alleged that Ivy had failed to uncover Madoff's fraud; they did not allege that Ivy had uncovered the fraud early on but kept that knowledge to itself. The pleadings in both federal class actions were bereft of the detailed and damning allegations contained in the NYAG complaint; they were of the "missed red flags" genre of pleading. This was entirely understandable, since the PSLRA's congressionally-mandated waiting periods and automatic stay of discovery pending the expiration of a notice/waiting period, the appointment of lead counsel, and the resolution of motions to dismiss the original complaints had robbed the Private Plaintiffs of any opportunity to learn via discovery what Ivy had been forced to disclose to the NYAG.

But as soon as the NYAG filed its complaint, both the Beacon and the Jeanneret complaints were amended to reflect the results of the year-long, subpoena-aided, public regulator-led investigation. Eventually, Judge Sand and I denied a second round of motions to dismiss that were directed to those amended complaints—which, as both of us recognized, relied heavily for their well-pleaded allegations on the discoveries made by the NYAG.

Denial of the motions to dismiss finally unleashed Lead Counsel and ERISA Class Counsel (who had also successfully fended off motions to dismiss) to begin discovery in the federal actions, superintended by Magistrate Judge Andrew J. Peck of this court. Of principal relevance to the dispute over counsel fees, Judge Peck directed class counsel to review the documents that had been produced to regulators before making any document requests of their own. He also ordered that this be done on an expedited schedule.

Securities and ERISA Lead Counsel, obedient to the court's directive, devised a plan for reviewing the millions of documents that had already been reviewed by the NYAG. This plan included protocols for dividing the documents among the various law firms involved and for eliminating duplication in the documents themselves. Private Plaintiffs' Counsel did not assume that the NYAG had found all the important documents among the 11 million that had been produced to it; they conducted a *de novo* review. Private counsel also examined some 3 million documents that had been produced to other regulators; it is highly likely that this lot included many duplicates of documents that had been produced to the NYAG, though no one can confirm this fact.

The NYAG insists that private counsel uncovered not a single significant document that it had not already located in the production made during its Ivy investigation; Private Plaintiffs' Counsel insist that they found numerous additional documents of evidentiary value. I am sure that the Private Plaintiffs found some documents that the NYAG overlooked—and since the NYAG did not conduct any investigation into Jeanneret, that alone was a

source of some new evidence. I am equally sure that the NYAG managed to find much of the significant documentary evidence in the case during its investigation.

***9** In addition to document discovery, Private Plaintiffs' Counsel had to familiarize themselves with the 37 depositions taken by the NYAG. This of course cut down substantially on the merits-based litigation that would have been required had these lawsuits continued.

Lead Counsel in the securities and ERISA class actions also moved for class certification in both *In re Beacon* and *In re Jeanneret.* Defendants were entitled to, and took, considerable class discovery in order to fashion opposition to those motions. The Beacon motion as granted by Judge Sand; I stayed the Jeanerette motion after full briefing because settlement negotiations had gotten serious.

Private Plaintiffs' Counsel also responded to substantive discovery requests. The lion's share of that work appears to have been borne by counsel for the Hartman Plaintiffs, who were required to, and did, produce detailed information about their 17 clients from a variety of sources. Indeed, counsel for the Hartman Plaintiffs spent twice as much time responding to discovery requests from defendants as they did reviewing document produced by plaintiffs to the regulators in this case.

In Nassau County, motions to dismiss three derivative actions were filed and denied, as were motions for reargument. As is customary in the state court, interlocutory appeals were taken from all three denials (the appeals have been briefed and remain pending. There was considerable additional motion practice, including motions for stays of proceedings and for a change of venue in at least one of the cases to Westchester County—as well as a motion made in this court to lift a litigation stay imposed by (I believe) Judge Sand.

In all, counsel for the Private Plaintiffs briefed a total of 26 motions. Three interlocutory appeals were taken in the Nassau County cases. The parties had prepared to take some 20 depositions in the ERISA cases when the settlement mediation process began. Private Plaintiffs' Counsel, not the NYAG, demonstrated the will to litigate. And that is what ultimately led to the commencement of serious settlement negotiations. The potential cost of dealing with the multipronged attack from the Private Plaintiffs has to have been a significant factor motivating Ivy to return to settlement mode—a mode from which it had walked away prior to the filing of the NYAG complaint—and in inducing the other defendants to enter into settlement negotiations.

Contrary to the NYAG's assertion, the pendency of its action in the New York State Supreme Court does not appear to have played any role in inducing the defendants to commence serious settlement negotiations. That is undoubtedly because the NYAG displayed no interest in actually litigating the charges it had filed against Ivy. Once the action was filed, the NYAG effectively stopped doing anything at all. I have obtained a copy of the docket sheet from the NYAG's civil action, filed in the Supreme Court, New York County. It contains a total of eight docket entries. Nothing whatsoever happened after the complaint and the answer were filed. No motions were filed; there was no further discovery. No one served a Request for Judicial Intervention, which is the usual mechanism for moving a case along in the State Supreme Court. The lawsuit served as nothing more than a placeholder.

***10** It is undisputed—indeed, it is conceded by the NYAG—that the Private Plaintiffs carried the laboring oar in the settlement negotiations, which began late in 2011 and took approximately 9 months to be concluded. Those efforts are described in more detail above. The NYAG and the DoL participated in those negotiations—both in negotiations to settle the lawsuits, and in what the NYAG disparagingly refers to as "time consuming ancillary negotiations" that resulted in the overall settlement and fee award request. The DoL participated more actively in the "time consuming ancillary negotiations" than did the NYAG, and was identified by the Private Plaintiffs as being exceedingly helpful in bringing matters (especially the amount of an agreed fee request) to a successful conclusion. Private Plaintiffs' Counsel have a lower opinion of the helpfulness of the NYAG in connection with these ancillary matters, but I will proceed on the assumption that he participated in the negotiations and did not hinder the resolution of the matters.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Objections

Objections to the request for attorneys' fees have been filed by the NYAG; by the law firm of Herrick Feinstein,

which apparently represents four funds (Beacon Associates LLC I, Beacon Associates LLC II, Andover Associates LLC I, and Andover Associates QP LLC); by Beacon 23(b)(3) class members Howard M. Siegel and Charles T. Medrick; and by Max Folkenflik, an attorney who is himself a party to the fee request.

The objections break down into two categories.

The NYAG (echoed by other objectors) argues that the requested fee award is excessive because the efforts of Private Plaintiffs' Counsel added at most $76 million to a pot of $140 million that had already been obtained by the NYAG from Ivy—the principal target of the NYAG's 2009–2010 investigation.

Herrick Feinstein also argues that the award is unreasonable because counsel spent an excessive number of hours "duplicating" work already done by the NYAG and other regulators before agreeing to mediate claims that Beacon and Andover (if no one else) were willing to mediate rather than litigate from the outset. The NYAG echoes the contention that the number of hours expended by Private Plaintiffs' Counsel were excessive and cannot reasonably be compensated, even on the basis of a settled fee request that was mediated and is endorsed by the United States Secretary of Labor.

Mr. Folkenflik objects to the fact that some of the attorneys who are participating in the fee request are getting too much money. He does not object to the three quarters of a million dollars that is his share of the joint fee request, although I cannot see that he did much of anything to earn his proposed fee.

The principal objector is the NYAG. I will deal with his objections first; I will then add a section addressing the Herrick Feinstein, Siegel/Medrick, and Folkenflik objections.

The objections originally filed by the so-called "Banfield" group of investors (Docket # 339) have been resolved consensually. The objection of Christine Duttweiler (Docket # 354–3) have already been rejected.

II. The Objection That The Fee Award Should Be Calculated Off the Difference Between Ivy's Original Settlement Offer to the NYAG and The Ultimate Settlement Amount is Denied

***11** I reject the NYAG's contention that the fee award for Private Plaintiffs' counsel should be reduced because their work contributed at most $76 million to the settlement pot that had already been funded to the tune of $140 million in it as a result of the efforts of the NYAG.

When the Private Lawsuits revved up for litigation, and when settlement negotiations commenced, the settlement pot did not contain $140 million. The settlement pot was empty. It is, therefore, not correct for the NYAG to assert that it had obtained a $140 million settlement before the private lawsuits effectively got off the ground.

Ivy may well have offered $140 million to settle with the NYAG sometime prior to the filing of the NYAG's complaint, but it did so on a condition the NYAG was either unwilling or unable to fulfill—namely, that all the lawsuits filed against Ivy be resolved at the same time. As a result, Ivy took its offer off the table and began litigating—not with the NYAG, which has not demonstrated the slightest interest in actually preparing its case for trial, but with the Private Plaintiffs. Their counsel—all of them blissfully unaware of Ivy's pre-suit offer to the NYAG—worked assiduously to assimilate the knowledge that the NYAG had compiled during the year when Class Counsel were statutorily barred from taking any substantive steps toward pursuing the merits, and to produce discovery from and make and oppose motions on behalf of their clients. It is noteworthy that Ivy's conditional settlement offer was not put "on suspense;" it was withdrawn, while Ivy (and the other defendants) litigated the viability of the Amended Class Action Complaints, the Derivative Actions, and the Hartman Complaint with Private Plaintiffs' Counsel.

The cases on which the NYAG relies for the proposition that counsel's "piggybacking" onto its work should result in any fee award's being calculated as a percentage of the amount by which the ultimate settlement exceeded Ivy's original offer are neither binding on this court nor factually apposite.

For example, in *Swedish Hospital Corp v. Shalala*, 1 F.3d 1261 (D.C.Cir.1993), the class action complaints were not even filed until after the underlying issue—whether HHS was obliged to pay the copying expenses of the hospital plaintiffs—had already been decided and "represented binding precedent in this Circuit." *Id.* at 105. Here, there has been no final adjudication of defendants' liability on the merits, as was the case in *Swedish Hospitals*; there was no law of the case to apply to latterly-filed class actions. No matter how strong the NYAG believes its fraud claims against Ivy to be, I have already noted that

these cases raised novel issues relating to the liability, not of Bernard Madoff Investment Services ("BMIS"), but of so-called third party "feeder funds," whose clients invested with BMIS, and which were arguably themselves victims of Madoff's fraud. It is true that the Private Plaintiffs would have had to prove elements that the NYAG did not—notably reliance and scienter—in order to prevail, but all plaintiffs, including the regulators, had numerous litigation hurdles to surmount. And the NYAG was not helping them surmount those hurdles, since the NYAG was not litigating its claims at all.

***12** Similarly, in *In re First Databank Antitrust Litigation*, 209 F.Supp.2d 96 (D.D.C.2002), the private class actions were litigated in tandem with a proceeding brought by the FTC. The court approved a settlement in the form of a consent judgment in the FTC case. That judgment implemented a complex plan of divestiture of the defendant's assets, disgorgement of profits, and payment of civil penalties. The FTC represented to the court that it and the defendant had the disgorgement of profits was intended to be "for the purpose of settling the [private] class action lawsuits," and that of the total amount, $16 million had been agreed to (or, as the court put it, $16 million was the amount "to which defendants had already committed themselves") before the class plaintiffs filed their lawsuit. There is no indication in the record that this money was ever withdrawn; plaintiffs' counsel were required only to negotiate the supplemental recovery over and above what was already "on the table." The opinion also suggests that class counsel did not engage in any meaningful motion practice or discovery; it appears that the FTC did the lion's share of litigating, which is exactly the opposite of what happened here.

Here, by contrast, (1) no separate settlement with the NYAG preceded the negotiation of the global settlement—and, indeed, the NYAG was unable to consummate any sort of settlement on its own; (2) the feeder fund class actions were filed months before the NYAG filed its lawsuit, although because of the constraints imposed by the PSLRA and consolidation, they had not been allowed to proceed on the merits; (3) the $140 million for which the NYAG wants to take sole credit was taken off the table precisely because the NYAG was unwilling or unable to consummate the kind of global deal that was negotiated principally by the Private Plaintiffs; and (4) Private Plaintiffs' Counsel were negotiating from scratch, since they had no idea (because the NYAG did not disclose) that Ivy had once offered $140 million to settle the case.

I do not in any way minimize the important the work done by the lawyers at the NYAG office. Their investigation unquestionably jump-started the process that resulted in the extremely favorable settlement I have here approved. But I will not allow the NYAG to take credit for a settlement that, for whatever reason, it did not obtain. And once that prospect of settlement disappeared, so, for all intents and purposes, did the Attorney General.[4]

I am especially disinclined to punish private counsel by subtracting the portion of the ultimate settlement fund represented by Ivy's undisclosed and ultimately withdrawn settlement offer because I consider what was presented to this court for approval to be nothing short of extraordinary. Private Plaintiffs obtained a generous, global settlement, one that covers a significant portion of their clients' losses with no penalty to those plaintiffs in the Madoff Bankruptcy (in which they remain eligible to recover from the bankruptcy estate). It is a settlement that has proved acceptable not only to the members of the classes and to every private plaintiff, but also to the Department of Labor and the Madoff Trustee.

***13** The NYAG cannot take credit for bringing about this happy result, because he did not herd all the cats that needed to be rounded up in order to bring it to fruition. I am not aware of any other Madoff-related case in which counsel have found a way to resolve all private and regulatory claims simultaneously and with the concurrence of the SIPC/Bankruptcy Trustee. Indeed, I am advised by Private Plaintiffs' Counsel that the Madoff Trustee is challenging settlements reached by the NYAG in other feeder fund cases (Merkin, Fairfield Greenwich)—which makes the achievement here all the more impressive.

So I deny the NYAG's motion (and the copycat objections) asking that I calculate the reasonable fee award off a base of $76 million instead of $219 million (or $207 million). If the fee request is to be reduced, it will be because counsel is asking for too much in light of the *Goldberger* factors. I turn to them now.

III. Except in One Respect, the *Goldberger* Factors Support the Requested Fee Award

The factors to be considered in deciding what constitutes a reasonable fee include the followings: (1) time and labor expended by counsel; (2) risks of litigation; (3) magnitude and complexity of litigation; (4) requested fee in relation to the size of the settlement; (5) quality of representation;

and (6) public policy considerations. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir.2000).

The only factor that warrants extended discussion is the first, so I will leave it for last.

A. Risks of Litigation/Magnitude and Complexity of Litigation

The risks of litigation and the magnitude and complexity of the litigation conflate. The issues relating to the liability of third parties (the Madoff "feeder funds") for losses suffered by Madoff investors as a result of the fraud committed by Bernard Madoff are, as I have said earlier, novel and uncertain. The defendants here are not accused of being accessories to the Madoff fraud; rather, the theory of the various amended complaints was that the fund managers knew or should have known that Madoff was engaged in a Ponzi scheme. There is some evidence, discussed in the pleadings, that managers at various funds suspected as much, but whether that would have sufficed to impose liability on third parties for imprudent investments is not a matter that has been definitively litigated. The subsidiary issues, particularly in the ERISA context, are entirely novel. And all of these matters were taken on contingency, so in view of the novelty of the issues there was some possibility that counsel would recover nothing at all.

The pendency of the NYAG's entirely dormant lawsuit does not seem to have put any additional pressure on the Ivy Defendants to settle (especially given what appear to be very real impediments to jurisdiction, see below and n. 3, *supra*), but it probably reduced somewhat the risk of proving some elements of fraud. But the NYAG's lawsuit could not have *eliminated* the litigation risk. As Private Plaintiffs point out, the NYAG cannot sue for damages owed to private plaintiffs. *See Connecticut v. Physicians Health Services*, 287 F.3d 110 (2d Cir.2002); *People of the State of New York by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 38 (2d. Cir.1982). The Private Plaintiffs in these cases thus could not have simply "piggybacked" their way to victory by allowing the NYAG to litigate his case (assuming he had shown any inclination to do so) and abiding the result. Even if he had standing to pursue an action for injunctive relief, the NYAG would not have had to prove either reliance or scienter in order to prevail—both necessary to plaintiff's recovery in the securities fraud cases—so the Private Plaintiffs had absolutely no choice but to litigate their matters actively if they wanted their money back. Which they did.

***14** Because the NYAG did not actively litigate its case once the complaint was filed, according to publicly available records. Thus, there is little reason to compare this case to *In re Renaissance Holdings ltd. Sec. Litig.*, No. 05 Civ. 6764, 2008 WL 236684 (S.D.N.Y. Jan. 18, 2008), where my colleague, Judge Pauley, concluded that the risk of non-recovery was small because the SEC had commenced its own parallel investigation. The one thing the NYAG could have done to advance the interests of the Private Plaintiffs—get a settlement without having to file a lawsuit—it conspicuously failed to do. From the moment Ivy withdrew its offer, the Private Plaintiffs' hope of recovery rested squarely on the shoulders of private counsel.

B. Quality of Representation

The quality of representation is not questioned here, especially for those attorneys (principally from Lowey Dannenberg) who worked so hard to achieve this creative and, in my experience, unprecedented global settlement.

C. Size of Fee in Relation to Size of Settlement

This being an unusual case, the size of the fee in relation to the size of the settlement can be measured in several different ways.

The fee request is for $40,771,538. That represents either 18.5% or 20% of the settlement amount, depending on whether one includes or deducts the payments that are to be made to the DoL and the NYAG as part of the settlement. Either way, the negotiated amount to pay all the plaintiffs' lawyers in all of these cases is a lower percentage of the recovery than was negotiated by Lowey Dannenberg during the Lead Counsel "beauty contest." Because I reject the NYAG's contention that it obtained the first $140 million in settlement funds, I necessarily reject its argument that the fee request is a patently unreasonable 53% of the settlement achieved by Private Plaintiffs' Counsel.

20% of the settlement amount is not only within the range of amounts awarded in similar actions where court approval of fees is required, it is actually below the range of 25%–33% that is often allowed in this court. *See, e.g.*, *Velez*, 2010 WL 4877852, at *21. The requested fee award, when viewed in its totality, is lower as a percentage of the settlement fund than is customarily seen

in this court. It is lower than the amount to which Lead Counsel Lowey Dannenberg would have been entitled under its agreement with Lead Plaintiffs (which was, of course, subject to court approval), yet it also includes fees for counsel in the ERISA class actions and for the attorneys who are representing the plaintiffs in the various direct and derivative actions pending in all the various courts, including principally the Hartman Plaintiffs.

As a purely technical matter, the only fees that must be approved by this court are the fees for work performed in the *In re Beacon* and *In re Jeanneret* class actions (whether securities or ERISA). The proposed fees for counsel in those actions that are statutorily subject to this court's approval pursuant to Rule 23 total $28,625,000 which is about 70% of the requested fee award, and about 13.8%, or a little over one-eighth, of the Settlement Amount (including the Beacon fee waiver) after deduction of the sums to be paid to the DoL and the NYAG. When only the Rule 23 fee applications are viewed separately, the amount is far below the percentage of settlement that is customarily asked for and approved in this Circuit.

***15** The rest of the $40.7 million fee request comes from counsel who are under no obligation to submit their fees to this court for approval—except insofar as they have voluntarily agreed to do so in order to effectuate a settlement that will obtain an expeditious (relatively speaking) and highly favorable recovery for their clients. Of that $12.1 million, 60% is to go to counsel in the Hartman Individual Actions. This amount represents about 53.5% of their lodestar, and is below what their clients agreed to pay them in order to induce them to undertake the representation (and get out from participation in the class actions). The amounts to be paid to the other attorneys reflect the paucity of proceedings in any of the other actions, except for the three derivative actions before Justice Bucaria in Nassau County Supreme Court, where the Wolf Haldenstein firm engaged in a substantial amount of procedural litigation, including interlocutory appeals of denials of motions to dismiss.

As can be seen in the chart annexed as Appendix A to this opinion, the proposed fee award compares favorably with lodestar recovery. The Second Circuit encourages a crosscheck against counsel's lodestar. *See In re Bisys Sec. Litig.*, 2007 WL 2049726, at *2 (citing *Goldberger*, 209 F.3d at 50). In this case, Private Plaintiffs' Counsel and their paralegals have spent, in the aggregate, 118,475.74 hours in the prosecution of this case. The lodestar amount, using the hourly rates proposed by counsel, is $48,967,217.35—a negative collective multiplier of 0.8325.[5]

D. Public Policy Considerations

Settlement is to be encouraged—and that includes settlement of fee applications. This particular settlement was mediated and overseen by a representative from the United States Department of Labor. It results in an award of less in fees than the Lead Plaintiffs had been prepared to submit for approval to this court, and less in fees than Private Plaintiffs had been prepared to pay. Lead Plaintiffs support the fee request. The private Hartman plaintiffs support the request. A number of individuals who invested with the "objecting" Beacon and Andover Funds support the request (and object to the objection, which comes from they know not whom). Almost no class members have objected to the fee award.

Finally, it is highly significant to the court that the Department of Labor endorses the fee request and was instrumental in negotiating the percentage down from 22% to the 20% here requested.

In short, *Goldberger* factors 2 through 6 strongly favor allowing the fee request. The only remaining issue is whether the number of hours expended and the hourly rates charged for those hours are reasonable.

E. Reasonableness of Hours Worked and Rates Charged

As noted, the total number of hours expended by all counsel in all matters comes to something close to 118,000. That is, admittedly, a lot of attorney and paralegal hours.

Of that total, just under 30,000 hours were spent reviewing documents produced by the defendants, including principally documents that were also reviewed by the NYAG during the course of its investigation. Approximately two thirds of those 30,000 hours were expended by attorneys from the firms that were appointed to represent various classes and subclasses, working under the lead of the Lowey Dannenberg firm. As Lead and Liaison Counsel, it developed a protocol and divided the responsibility for reviewing documents previously produced by defendants to all regulators (not just the NYAG). This document review was conducted principally by Lowey Dannenberg, Wolf Haldenstein,

Kessler Topaz, and Cohen Milstein.

***16** Counsel from Keller Rohrback and Lewis Feinberg, representing the Hartman Plaintiffs, did not participate in the coordinated document review with the attorneys representing the class plaintiffs (as indeed they had no obligation to do), but proceeded to do their own discovery on behalf of their clients—although Judge Sand and I consolidated the Hartman Actions with *In re Beacon* and *In re Jeanneret* for discovery purposes. The Hartman Plaintiffs proceeded on the assumption that their case would either settle or be tried separately from the class actions and that their counsel (who were also working on contingency) would be paid from the fund created by that separate settlement or verdict. Their work accounts for approximately one third of the hours spent on reviewing documents produced by defendants.

The rest of the time for which all of these attorneys seek reimbursement was spent doing all of the other things that were discussed exhaustively above: reviewing and producing documents that were requested from the various plaintiffs; responding to interrogatories; preparing for and participating in depositions (which did not duplicate the NYAG depositions); reviewing and responding to motions or making motions; and participating in the arduous settlement negotiations. While I am certain that not every hour billed was absolutely necessary, the NYAG and other objectors have offered no good reason why the fee request should be cut as a result of time spent on any of those activities, which were not in any way duplicative of work performed by the NYAG. The NYAG simply states, in wholly conclusory fashion, that it could not possibly have taken so many hours to perform these myriad tasks, especially given the fact that it handed Private Plaintiffs their case on a silver platter.

But the fact that the NYAG's work was instrumental in allowing the Private Actions to proceed does not reflect badly on plaintiffs' counsel, as my colleague Judge Kaplan observed in *In re Lehman Bros. Securities and ERISA Litigation*, 09 MD 2017, a case in which private counsel were similarly able to take advantage of someone else's investigation and detailed report (in that case, a bankruptcy examiner) in crafting a viable pleading. Judge Kaplan concluded that class counsel's heavy reliance on the examiner's lengthy report in fashioning their case warranted a reduction in the multiplier to be applied to the lodestar in that case—from 2.18, as proposed by counsel, to 1.5. But he refused to penalize private counsel by denying them compensation simply because they were able to "piggyback" (if I may use a loaded term) on the work of the Lehman Bankruptcy Trustee. I am no more inclined to punish Private Plaintiffs for taking advantage of the work done by the NYAG than Judge Kaplan was.

Given the number of lawsuits, the number of motions that had to be litigated, the number of in-court conferences, and the number of perfectly legitimate tasks involved in responding to discovery requests that were addressed to plaintiffs by the defendants (this is especially true for the Hartman Plaintiffs), I cannot say that the fee request attributable to these activities is unreasonable—particularly since all counsel except for Lowey Dannenberg and Kessler Topaz will be taking a haircut on lodestar in order to obtain immediate recovery for their clients.

***17** Could the cases have been litigated more efficiently? Without a doubt.

Does the result justify the fee? Absolutely.

So I turn to the one item that sticks in the craw of the Objectors—the 30,000 hours spent by two groups of attorneys (Class Counsel and Counsel for the Hartman Plaintiffs) reviewing documents that the defendants had originally produced to the NYAG and/or other regulators. The NYAG and Objectors contend that this work was purely duplicative of the NYAG's infinitely more efficient efforts, such that it is presumptively unreasonable to compensate Private Plaintiffs' Counsel for undertaking it. Furthermore, the NYAG insists that it found all the really useful evidence in the case; as proof, the NYAG notes that its complaint served as a template for the amended complaints that were served in the various Private Plaintiffs' Actions (including the class actions).

But I cannot fairly conclude, as Objectors wish me to, that the "duplicative" review of documents by Private Plaintiffs' Counsel is objectionable and non-compensable, because *counsel were required by the court to review the documents that had already been reviewed by the NYAG!* Magistrate Judge Peck quite sensibly refused to permit Private Counsel to make new document requests until they had first familiarized themselves with the documents previously produced to, *inter alia*, the NYAG.

Furthermore, as pointed out by the Hartman Plaintiffs' counsel, the NYAG may have reviewed the same documents as Private Plaintiffs' Counsel, and done so first, but there is no evidence in the record before me that

he offered plaintiffs' counsel any information that would have assisted them in circumscribing their work—other than its selection of quotable quotes for its complaint. And because the NYAG (assuming it ever had any intention of actually litigating its lawsuit) did not have to prove many of the issues confronting the Private Plaintiffs (reliance, scienter, anything having to do with ERISA fiduciary status), it was not necessarily looking for the same things that Private Plaintiffs hoped to find when reviewing the same documents. Private Plaintiffs' Counsel would have been remiss to rely on the NYAG's review given the different litigation burdens they bore.

So we must put to one side any suggestion that Private Plaintiffs' Counsel did something wrong by not "relying" on the NYAG's document review and foregoing familiarizing themselves with the documents that had been produced to regulators.

I am left to opine on the reasonableness of the time expended in this aspect of counsel's work. The 30,000 hours put in by dozens of lawyers and paralegals employed by private counsel on the review of defendants' documents vastly exceeds the number of hours put in by the much smaller number of NYAG staff members who reviewed documents during his year-long investigation into Ivy. The difference is striking even when you divide this number between the Class Plaintiffs and the Hartman Plaintiffs (who conducted their own document review, since they were litigating independently of any class), the numbers—10,500 hours expended by counsel in Hartman, and nearly twice that by Class Counsel—although the most striking disparity by far is the difference between the time expended by counsel for the Hartman Plaintiffs reviewing previously-produced documents and the time expended by Class Counsel reviewing the same documents!

***18** Like my colleague Judge Kaplan in *Lehman*, I wonder whether all of the hours for which recovery is sought were efficiently and usefully devoted to this matter. Unlike him, I cannot rely on the fact that the regulator on whose efforts the Private Plaintiffs built their case had devoted a like number of hours to his investigation in order to corroborate the order of magnitude of plaintiffs' efforts in furtherance of this case.

There are, of course, reasons that would account for at least some of the difference between the number of hours spent by the NYAG team on its document review and the number of hours spent by Hartman Counsel and by Class Counsel. I can attribute part of the disparity to the fact that these hours include hours that Private Counsel spent reviewing documents that were produced to regulators other than the NYAG. I can attribute part of it to the fact that it includes documents produced by defendants who were not investigated by the NYAG at all (principally the Jeanneret Defendants). And I can attribute part of the disparity to the fact, noted above, that Private Plaintiffs' Counsel were looking for different and additional types of evidence when they reviewed the documents produced to the regulators.

I can also attribute some of the disparity to the fact that Magistrate Judge Peck put the Private Plaintiffs on a "rocket docket" schedule for reviewing the regulatory document productions and directed them to devote as many personnel as necessary to that endeavor in order to meet his (short) deadline for its completion. It has been my experience, both in private practice and on the bench, that haste often makes waste, and that expedited discovery, while sometimes necessary, can often end up taking more hours, and costing more money, than does a more leisurely pursuit of evidence.

The sum of these differences probably wipes out most, if not all, of the disparity between the amount of time the NYAG spent reviewing Ivy's documents and the amount of time that Keller Rohrbach and Lewis Feinberg spent reviewing defendants' documents.

It does not, however, account for the fact that Class Counsel spent significantly more time on this task as the Hartman Plaintiffs' Counsel did. Not only did the attorneys working in the Class Action regulatory document review rack up twice as many hours as did the attorneys working on behalf of the Hartman Plaintiffs, they did so at significantly higher blended rates—ranging from $300 to $456 per hour, as against the blended rate of $275 per hour for document review by counsel for the Hartman Plaintiffs.

I have struggled for several weeks with this whole issue of compensation for document review. Had I thought ahead to the end of the case at the beginning, I would have included in my order appointing Lead Counsel specific directives about how much this court was prepared to authorize in terms of an hourly rate for document reviewers—and it would likely have been significantly below even the $275 blended rate achieved by Keller Rohrback and Lewis Feinberg. There is little excuse in this day and age for delegating document review (particularly primary review or first pass review) to anyone other than extremely low-cost, low-overhead

temporary employees (read, contract attorneys)—and there is absolutely no excuse for paying those temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes.

***19** But I did not think ahead, and I did not include any such limitation in my order appointing Lead Counsel, and neither did Judge Sand. I believe it unfair to impose such a rule *ex post facto.* So I will not.

But since I am left with the firm conviction that Class Plaintiffs expended unnecessary hours reviewing the regulatory documents (and have the example of Keller Rohrback/Lewis Feinberg against which to compare their work), I am going to reduce by 25% the fee requested by the five Class Action Firms for the work they did reviewing documents that had been produced to the regulators. That is, each firm must reduce the number of hours billed for this one activity by 25%:

- Lowey Dannenberg from 4559 to 3419.25
- Kessler Topaz from 6139 to 4626.75
- Bernstein Liebhard from 1473 to 1104.75
- Cohen Milstein from 5320 to 3990
- Wolf Haldenstein from 3381 to 2,535.75 (this covers hours charged to both the Federal securities and state derivative actions)

Each firm must reduce the dollar amount of its share of the fee request accordingly—which will reduce the overall amount of fees awarded (I will let counsel do the math for me).

I would likely have imposed a harsher remedy, but I believe that the concession extracted during settlement negotiations by the DoL—which convinced Private Plaintiffs' Counsel to reduce their request to less than the 22% of recovery originally negotiated between Lead Counsel and Lead Plaintiffs in the securities class actions—takes care of the matter to the satisfaction of the court.

With this adjustment, I conclude that the fee request is reasonable and appropriate and I grant the motion for an award of attorneys' fees.

There has been no objection to the request for expenses. That motion is granted in its entirety.

F. Other Objections

I have already disallowed the Duttweiler and NYAG objections.

At oral argument on March 15, 2013, I denied the Folkenflik objection as untimely and granted the motion to strike it, for substantially the reasons set forth in the Memorandum of Law in support of the motion to strike, which was filed by all counsel in all actions. I adhere to that oral decision today and disallow the objection. It really does not lie in Mr. Folkenflik's mouth to object to what anyone else is getting paid, since he is being compensated generously for doing very little.

The objection to the fee award filed by Herrick Feinstein on behalf of four Beacon and Andover Funds is denied. I have already dealt with the principal aspects of their objection; I have rejected the notion that the amount of the undisclosed, unconsummated, highly conditional settlement offer made by Ivy to the NYAG should be excluded from the base on which the Private Plaintiffs' fee award is calculated, and I have blessed as reasonable (for the most part) the hours expended by counsel (in the circumstances of the case).

However, the objection is also improper because as far as this court is concerned, Herrick Feinstein is a stranger to the litigation who has no legally cognizable authority to object on behalf of the funds.

***20** Herrick Feinstein purports to represent the four Funds, but there is no evidence in the record indicating that they were retained by the Fund Managers, who have sole authority to make decisions on behalf of the Funds—in fact, Herrick Feinstein concedes that it was not retained by the Fund Managers (who, by the way, have not objected to the fee award, since Beacon and Andover, as settling defendants, have stipulated that they will not take any position on the fee application). Therefore, Herrick Feinstein cannot possibly represent the Funds, and its representation that it does so is highly misleading.

Herrick has apparently told investors in the Funds and this court that its activities are allegedly being authorized by some sort of committee or committees, comprised of persons who collectively have substantial assets in the funds, and who are being consulted in connection with the Herrick Feinstein representation. But Herrick Feinstein has not disclosed, either to Private Counsel or to the Court

(or to certain curious Beacon Investors, who have submitted declarations to the Court in support of the fee award and explaining that they have been unable to learn who these "committee members" are) either the identities of the members of these committees who purportedly authorized the firm to file its objection or the legal basis on which those investors purport to act on behalf of "the Funds."

As far as this court is concerned, Herrick Feinstein has no status in this litigation, because no one who has identified himself to the court as a real party in interest has authorized the firm to appear. It is a meddler, nothing more. So even if its objection had merit—which it does not—I would not take cognizance of the objection.[6]

Finally, the Siegel and Medrick objections are simply copycat objections echoing the NYAG's objection to the fee request. Those objections are also disallowed.

CONCLUSION

I ask Lead and Liaison Counsel to submit a Final Order, adjusting the attorneys' fee award in accordance with my decision and otherwise granting all motions and disallowing all objections that were not resolved prior to the hearing.

I thank everyone for the amazing work that you did in resolving these matters. Your clients—all of them—have been well served.

I also express my appreciation to my colleagues in the New York State Supreme Court and in the state courts in Palm Beach County, Florida, whose support and cooperation permitted this matter to be resolved. The actions pending in those courts in which special appearances have been made by counsel for settlement purposes are now remitted to those courts for whatever final proceedings need to occur in light of today's decision and order.

This constitutes the decision and order of the court. The Clerk of the Court is directed to remove all outstanding motions in any of the cases listed in the caption from the Court's list of pending motions, as they have all been disposed of, in one way or another, by this opinion.

PLAINTIFFS' FIRM	LODESTAR THROUGH 1/31/13	PAYMENT UNDER FEE AGREEMENT (ASSUMING AAPPROVAL OF 20% OF NET SETTLEMENT)	CURRENT MULTIPLIER IF 20% AWARDED	LEAD COUNSEL MULTIPLIER AT FEE AGREEMENT (5/30/12)
Lowey Dannenberg Cohen & Hart, P.C. *Lead Counsel in In re Beacon, Lead Securities and Derivative Counsel in In re Jeanneret, Co–Liaison Counsel for All Actions with DOL*	**$14,201,725.10**	**$14,300,000.00**	**1.0069**	**1.16 (est.)**
Keller Rohrback L.L.P. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C.	**$13,730,226.85**	**$7,350,000.00**	**0.5353**	

ERISA Counsel to Hartman Individual Action Plaintiffs				
Cohen Milstein Sellers & Toll PLLC *ERISA Sub–Class Counsel in In re Beacon*	**$7,359,505.75**	**$6,140,000.00**	**0.8343**	
Kessler Topaz Meltzer & Check LLP (including local counsel Dealy & Silberstein, LLP) *Lead ERISA Class Counsel to Buffalo Laborers' Class, Income Plus Participant and Beneficiary Class, Andover Participant and Beneficiary Class, and Direct Participant and Beneficiary Class*	$4,709,238.00	$5,200,000.00	1.1042	1.16 (est.)% h
Wolf Haldenstein Adler Freeman & Herz LLP · (including *Jordan* co-counsel Deutsch & Lipner) *Three State Derivative Actions Before Justice Bucaria*	**$3,609,066.00**	**$2,600,000.00**	**0.7204**	
Wolf Haldenstein Adler Freeman & Herz LLP *Investor Plaintiffs' Sub–Class Counsel in In re Beacon*	**$2,353,261.50**	**$1,930,000.00**	**0.8201**	
Bernstein Liebhard LLP	**$1,734,688.75**	**$1,595,000.00**	**0.9195**	

Investor Plaintiffs' Sub–Class Counsel in In re Beacon				
Folkenflik & McGerity **	$773,605.00	$750,000.00	0.9695	
Fastenberg Intervenors				
Cotchett, Pitre & McCarthy, LLP	**$594,122.00**	**$425,000.00**	**0.7153**	
State Derivative Action Before Justice Lowe				
Ross & Orenstein LLC **	$414,612.50	$400,000.00	0.9648	
Gluck, Altman and Glicker Individual and Arbitration Actions				
Gordon & Gordon	**$91,157.00**	**$81,538.00**	**0.8945**	
Schott Individual Action				
Total:	**$49,571,208.45**	**$40,771,538.00**	**0.8225**	**N/A**

Footnotes

1 The court did receive one letter from a Christine Duttweiller, objecting to the payments to the DoL and NYAG, but I find no merit in the objection.

2 Judge Sand had already certified classes in the Beacon and Buffalo Laborers cases (while excluding from those classes the plaintiffs in *Hartman v. Ivy Asset Management,* 09 Civ. 8278). This court was asked to stay its hand on the class certification motions in *Jeanneret* pending the outcome of the settlement negotiations, and I did so, but the likelihood that I was going to certify a class was overwhelming.

3 The Nassau county derivative actions were brought by the firm of Hecht & Associates, P.C., which was "absorbed" (to use counsel's term) by Wolf Haldenstein during the pendency of this litigation. This left Wolf Haldenstein wearing two hats at the end of the day.

4 There is a serious question whether the NYAG even had standing to pursue the lawsuit he filed. The action was brought in *parens*

patriae, but the NYAG cannot bring claims for damages on behalf of private citizens; a state that sues in *parens patriae* must seek to redress an injury to an interest that is separate from that of individuals. *Connecticut v. Physicians Health Services*, 287 F.3d 110 (2d Cir.2002); *People of the State of New York by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 38 (2d. Cir.1982). So having failed to obtain a pre-suit settlement that could have been used to satisfy at least some of the claims of the Private Plaintiffs, the NYAG had no real ability to recover through litigation the money that plaintiffs had lost—even on behalf of citizens of the State of New York (and not all the class members and Private Plaintiffs are citizens of the State of New York). The NYAG could have attempted to obtain injunctive relief to forestall future violations of law in the public interest, but since Ivy was in the process of winding down its operations in May 2010, when the NYAG filed its lawsuit, the request for injunctive relief may very well have been moot. This issue need not be decided, but the weakness of the NYAG's position as a party to litigation might well explain its failure to take even a single step to move its lawsuit forward.

5 Under the plan of distribution agreed to among all participating counsel, Co–Lead Counsel Lowey Dannenberg (in the securities cases) and Kessler Topaz (in the ERISA cases) would recover a tiny fraction more than their lodestar amount if the fee award were approved, with other counsel recovering proportionally less. With the adjustment I am making to the fees attributable to the review of documents produced to regulators, Lead Counsel's fees should come in at just about lodestar.

6 The tiff over Herrick Feinstein's status revealed the even more interesting possibility that the NYAG lacks standing to object to the fee request. I do not intend to decide that issue, because I really do not need to—I have disallowed the objection on the merits—but in case anyone decides to take an appeal I do not want there to be any suggestion that it has been waived.

* Litigated as Hecht & Associates P.C. pre-merger with Wolf Haldenstein.

* * Under the fee agreement, the payments for Folkenflik & McGerity and Ross & Orenstein LLC are fixed even if the Court awards a different percentage.

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