UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: BEACON ASSOCIATES LITIGATION	09 Civ. 777 (LBS) (AJP)
BUFFALO LABORERS SECURITY FUND, WELFARE FUND AND WELFARE STAFF FUND et al., Plaintiffs, v. J.P. JEANNERET ASSOCIATES, INC., et al., Defendants.	**MEMORANDUM & ORDER** 09 Civ. 8362 (LBS)

SAND, J.

Plaintiffs are the trustees of three Taft-Hartley multi-employer benefit plans that lost money when they invested plan assets with Bernard Madoff ("Madoff"). Plaintiffs bring claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against Defendants J.P. Jeanneret Associates, Inc. ("JPJA"), John P. Jeanneret, Paul L. Perry (collectively, the "Jeanneret Defendants") and Defendants Ivy Asset Management LLC ("Ivy"), Lawrence Simon, Howard Wohl, Adam Geiger, the Ivy Manager Approval Committee, the Ivy Investment Committee, the Ivy Strategic Operating Committee (collectively, the "Ivy Defendants") for various breaches of fiduciary duty connected to Plaintiffs' Madoff investments.

Plaintiffs have moved this Court to certify a class, pursuant to Federal Rule of Civil Procedure 23, composed of similarly situated employee benefit plans that also lost money after investing plan assets with Madoff. For the reasons provided below, the motion is granted.

I. Background[1]

This case arises out of the massive fraudulent scheme that Madoff orchestrated through his investment firm, Bernard L. Madoff Securities LLC ("BLMS"). Plaintiffs—the trustees of the Buffalo Laborers' Security Fund, the trustees of the Buffalo Laborers' Welfare Fund and the trustees of the Buffalo Laborers' Welfare Staff Fund (collectively the "Buffalo Laborers Funds")—represent three multi-employer benefit funds that lost money when they invested fund assets with Madoff either directly, by investing with BLMS, or indirectly, by investing in the Income Plus and Andover "feeder funds" that pooled investor money and then invested it with Madoff.

All three of the Buffalo Laborers Funds invested with Madoff while engaged in an investment advisory relationship with JPJA, a New York corporation that specializes in providing investment advice and management services to pension and profit sharing plans. Pursuant to the Discretionary Investment Management Agreements ("DIMAs") that Plaintiffs signed when they became JPJA clients, JPJA agreed to serve as the investment manager for plan assets and, in that capacity, to "supervise and direct" the investment of plan assets in accordance with the written investment guidelines attached to each DIMA. Levan Decl. Ex. 1, at 2; Fagg Decl. Ex. 148, at 2; Fagg Decl. Ex. 149, at 2.

JPJA in turn contracted with Ivy, a Delaware limited liability company that provided investment advice to other asset managers and investment advisors and that, during the relevant period, provided investment advisors such as JPJA access to Madoff's investment services. Under the terms of the 1991 JPJA–Ivy contract, Ivy agreed to *inter alia* "research, identify,

[1] The Background section is based on Plaintiffs' allegations in the First Amended Consolidated Class Action Complaint, filed March 21, 2010.

monitor, evaluate and meet with potential investment managers" for JPJA's clients; recommend investment managers to JPJA; advise JPJA "as to the availability of opportunities to invest client funds with particular investment managers" such as Madoff; and monitor and evaluate the performance of those investment managers who currently managed JPJA's clients' funds. Levan Decl. Ex. 3, at 2. In return, Ivy received from JPJA between 50% and 60% of the management fees of those clients who invested with Ivy-recommended managers such as Madoff. *Id.* at 5–6.

After Madoff's fraud was made public on December 11, 2008, Plaintiffs filed suit on behalf of the Buffalo Laborers Plans and a putative class of other employee-benefit plans that lost money as a result of Madoff's fraud. In the First Amended Consolidated Class Action Complaint ("Complaint"), filed with the Court on May 21, 2010, Plaintiffs accused the Jeanneret and Ivy Defendants of breaching their duty as ERISA fiduciaries to the plans and claimed that it was a result of these breaches that the plans suffered losses in connection to their Madoff investments. Specifically, Plaintiffs accused Defendants of breaching their duty as ERISA fiduciaries by failing to sufficiently investigate or monitor Madoff's management of plan assets. They accused Jeanneret Defendants of breaching their fiduciary duty by failing to adequately monitor or supervise Ivy's work as an investment advisor to the plans. Plaintiffs also alleged that Defendants violated ERISA's prohibited transaction provision, ERISA § 406(a), 29 U.S.C. § 1106(a), by receiving fees from the plans based on the falsely inflated value of the Madoff investments. In addition, they asserted a disgorgement claim against the individual Ivy Defendants, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Defendants moved to dismiss the complaint in its entirety. On January 4, 2011, Judge McMahon granted in part and denied in part the motions to dismiss, and transferred the case to this Court. Order Transferring ERISA Case (09 Civ. 8278) and Transferring Same to the Docket

of the Hon. Leonard B. Sand, Jan. 4, 2011. Defendants moved for reconsideration of Judge McMahon's Order. On September 26, 2011, we granted in part and denied in part the motion for reconsideration. *Buffalo Labor Sec. Fund v. J.P. Jeaneret Assocs.*, Nos. 09 Civ. 777 (LBS), 09 Civ. 8362 (LBS), 09 Civ. 8278 (LBS), 2011 U.S. Dist. LEXIS 109592 (S.D.N.Y. Sept. 26, 2011). We dismissed Plaintiffs' prohibited transaction claim, but sustained the rest of Plaintiffs' claims. *Id*. at *15–35. Plaintiffs now move to certify, pursuant to Rule 23(b)(3), a class consisting of:

> "all trustees of employee benefit plans covered by ERISA (acting in their fiduciary capacity on behalf of the plan and for the benefit of all participants and beneficiaries of the plans for which they serve as trustees) where such plans obtained the investment management services of J.P. Jeanneret Associates, Inc. and that, as a result of such services, invested with Bernard L. Madoff, either directly with Bernard L. Madoff Investment Securities, LLC, or indirectly through the Income-Plus Investment Fund or Andover Associates Management Corp., and that suffered a loss in connection with such investments." Pls.' Mem. Supp. Am. Mot. Class Certif. ("Pls.' Supp. Memo") at 1.

II. Standard of Review

Plaintiffs seeking class certification bear the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements for class certification set forth in Federal Rule of Civil Procedure 23. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). When assessing whether plaintiffs have met this burden, courts must take into account "all of the relevant evidence admitted at the class certification stage." *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.*), 471 F.3d 24, 42 (2d Cir. 2006). A district judge may certify a class only after determining that "whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *Id.* at 41. "[T]he obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a

Rule 23 requirement." *Id.* However, "in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement." *Id*.

In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" when assessing motions for class certification. *Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). "[I]f there is an error to be made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.'" *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 275 (S.D.N.Y. 2008) (quoting *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968)).

III. Discussion

Plaintiffs seeking to certify a class must demonstrate that it satisfies the four prerequisites for class certification set forth in Rule 23(a): (1) "that the class is so numerous that joinder of all members is impracticable" (numerosity); (2) that "there are questions of law or fact common to the class" (commonality); (3) that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (typicality); and (4) that "the representative parties will fairly and adequately protect the interests of the class" (adequacy). Fed. R. Civ. P. 23(a).

Plaintiffs must also demonstrate by a preponderance of the evidence that the class satisfies the particular requirements of the subdivision of 23(b) under which they seek to maintain the class. In this case, Plaintiffs seek certification pursuant to 23(b)(3). They must therefore show that: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" (predominance); and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority). Fed. R. Civ. P. 23(b)(3).

A. Numerosity

Rule 23(a)(1) calls for class certification when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Generally speaking, courts will find that the 'numerosity' requirement has been satisfied when the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer." *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998). However, "[d]etermination of practicability depends on all the circumstances surrounding a case, not on mere numbers." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). "Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id.* When estimating the size of the class, Plaintiffs may "rely on reasonable inferences drawn from the available facts." *In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y. 1999). The court does not require "evidence of exact class size or identity of class members" to satisfy the numerosity requirement. *Robidoux*, 987 F.2d at 935.

In this case, Plaintiffs claim that the class is composed of approximately 200 plan trustees. However, this number is overstated, since some of the plans represented in the proposed class share overlapping and, in some cases, identical boards of trustees. When the class size is reduced to avoid counting the same trustees twice, the class appears to number, based on the evidence Plaintiffs provide, roughly 100 rather than 200 members. *See* Meltzer Decl. Supp. Am. Mot. Class Certif. Ex. A. 100 is nonetheless still well above the 40-member threshold at which courts in this Circuit generally presume numerosity to be satisfied. *Consolidated Rail Corp. v.*

Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995). Ordinarily, therefore, the size of the class alone would be enough for us to conclude that the numerosity requirement is satisfied.

Defendants argue, however, that what really matters for purposes of the numerosity analysis is not the number of individual trustees who make up the class but instead the number of individual plans represented in it. This is the case, they argue, because it is the plans, not the trustees, that will determine the practicability of joinder. Whether a plan has one, two, or five trustees, the joinder of its claims to the litigation will impose identical discovery burdens and will require the same degree of coordination among lawyers. Furthermore, because under ERISA an individual plan trustee may bring suit only as a representative of the interests of the plan as a whole, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985), adding additional trustees to the class will further no additional interests and result in no additional relief for the participants and beneficiaries of the plan. Hence, the critical number for numerosity purposes, Defendants argue, is 29—the number of plans represented in the proposed class—rather than 100—the number of plan trustees. This number is not sufficiently large to trigger the presumption in favor of numerosity applied to classes of 40 or more. Nor, they argue, is it a sufficiently large number to make joinder impracticable.

We agree with Defendants that, when evaluating the practicability of joinder, it is the number of plans and not the number of trustees that matters, for the reasons outlined above. However, we do not agree that 29 is too small a number of plans to satisfy the numerosity requirement, given the significant burden that joinder of the claims of the 29 plans represented in the proposed class would impose on the Court and on the parties. The extensive discovery production involved in the related case, *Hartman v. Ivy*, 09 Civ. 8278 (LBS), brought by the trustees of seventeen ERISA plans that invested with Madoff, demonstrates the serious discovery

burden that joinder would impose. *See, e.g.*, Meltzer Decl. Ex. C ("Affidavit of Havila C. Unrein In Response to the Courts' Endorsed Letter Filed Feb. 10, 2002") (detailing the millions of pages of documents produced as a result of, and the tens of thousands of hours devoted to, discovery in the *Hartman* action). *Hartman* involves the joinder of only 17 joined plans. The burden would only be greater in litigation involving almost twice as many plans.

Furthermore, class members appear to be somewhat dispersed geographically, adding to the difficulties of joinder. The 29 plans represented in the proposed class represent six New York counties and we assume that the trustees who represent them are at least as widely dispersed. "Geographic dispersion across multiple counties in New York generally supports a finding of numerosity." *Novella v. Westchester County*, 443 F. Supp. 2d 540, 546–547 (S.D.N.Y. 2006). *See also Robidoux*, 987 F.2d at 936 (finding class composed of individuals scattered throughout Vermont to be sufficiently dispersed geographically to support class certification); *Boyland v. Wing*, No. 92 Civ. 1002, 2001 U.S. Dist. LEXIS 7496 (E.D.N.Y. Apr. 6, 2001) (finding dispersion across the five boroughs of New York City supports numerosity).

We note that, as Defendants point out, the significant size of the claims at stake in the litigation suggest that individual litigants have sufficient financial incentive, and financial resources, to litigate their claims individually. *See, e.g.*, *Ansari v. New York Univ*., 179 F.R.D. 112, 116 (S.D.N.Y. 1998) (potential award of $90,000 "is hardly the type of de minimus recovery that would discourage individual class members from joining [plaintiff's] lawsuit or from filing suits on their own behalf"). We nevertheless conclude that, given the significant burden that would be imposed on both the Court and the litigants by individual lawsuits, Plaintiffs have satisfactorily demonstrated the impracticability, although not the impossibility, of joinder. *Cent. States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco*

Managed Care, L.L.C., 504 F.3d 229, 244–245 (2d Cir. 2007) ("The numerosity requirement in Rule 23(a)(1) does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate."). Numerosity is satisfied.

B. Commonality

A plaintiff may meet his burden as to commonality by showing that the class members' "grievances share a common question of law or of fact." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (per curiam)). Not just any common questions will do, however. As the Supreme Court recently clarified, commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury" and that the common questions are of sufficient importance to the case "that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–2551 (2011).

Plaintiffs have met this burden. With respect to the Ivy Defendants, common questions will resolve the three central elements of the claims against them. "To state a claim for breach of fiduciary duty under ERISA, at minimum the Complaint must allege 1) that defendant was a fiduciary who, 2) was acting within his capacity as a fiduciary, and 3) breached his fiduciary duty." *In re Morgan Stanley Erisa Litig*., 696 F. Supp. 2d 345, 353 (S.D.N.Y. 2009).

Common questions of law and fact will determine the first of these elements—namely whether Ivy qualified as a fiduciary to the plans under the definition provided in ERISA § 3(21)(A)(ii). ERISA § 3(21)(A)(ii) provides in relevant part that "a person is a fiduciary with respect to a plan to the extent . . . he renders investment advice for a fee or other compensation,

direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A). 29 C.F.R. § 2510.3-21(c)(1) defines what it means to "render investment advice." It states in relevant part:

> A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of [ERISA] only if:
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
> (ii) Such person either directly or indirectly. . . .
>
> B. Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

Determining whether or not Ivy qualified as a fiduciary to the plans because of the investment advice it provided JPJA will therefore depend upon the answer to three common questions: first, was the advice that Ivy provided to JPJA—as a fiduciary to the plans—provided on a regular basis? Second, was the advice provided pursuant to an agreement with JPJA that it would serve as a "primary basis for investment decision with respect to plan assets?" Third, was Ivy's advice provided pursuant to an agreement with JPJA that it would be "individualized…to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments?" 29 C.F.R. §2510.3-21(c)(1)(ii)(B).[2] Because Defendants have provided no

[2] Ivy Defendants argue that the question of Ivy's fiduciary status is "an inherently individualized" question that cannot be answered with common proof because Plaintiffs will have to demonstrate that the advice Ivy provided with respect to each plan was actually individualized and actually served as a primary basis for that plan's investment decisions. This argument rests upon an incorrect reading of the regulation, however. What 29 C.F.R. §2510.3-21(c)(1)(ii)(B) requires is not that the advice was in fact individualized and used as a primary basis for investment decisions for the plan. Instead, it merely requires that the advice be provided "pursuant to a mutual

evidence that Ivy's relationship with JPJA or the nature of its agreement with JPJA differed depending upon the identity of the plan about which Ivy provided the advice, we conclude that these are all questions that are common to the class as a whole.

The second and third elements of Plaintiffs' claims—whether the Ivy Defendants were acting in their capacity as ERISA fiduciaries when they committed the actions alleged in the Complaint and whether their actions constituted a breach of their fiduciary duties of prudence and loyalty—will also depend upon common questions of law and fact. Whether Ivy was acting in its capacity as an ERISA fiduciary will largely depend upon an analysis of the agreement between Ivy and JPJA establishing the scope of Ivy's fiduciary duties as advisor to the plans. *F.W. Webb Co. v. State St. Bank & Trust Co.*, No. 09 Civ. 1241 (RJH), 2010 U.S. Dist. LEXIS 82759, at *28–29 (S.D.N.Y. Aug. 12, 2010) ("Where ERISA plan fiduciaries and a service provider enter into a written contract, that contract logically serves as the starting point and primary reference for any analysis of whether the service provider performed duties that give rise to fiduciary responsibilities under ERISA.").

Whether Ivy's actions or inactions constituted breach will also depend upon common questions: what did Ivy know about Madoff and when did it know it? What did Ivy tell JPJA about its suspicions about Madoff? What kind of due diligence did Ivy perform on Madoff's operations? These are all questions that, insofar as they establish Ivy's liability towards JPJA, the attorney-in-fact for all class members, are common to the class as a whole.

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agreement arrangement or understanding . . . . [with the] plan or a fiduciary with respect to the plan." The failure to in fact provide individualized advice does not, in other words, relieve an investment advisor of his fiduciary duties under ERISA. As a result, what Plaintiffs will have to prove, in order to establish the liability of the Ivy Defendants is the existence of a certain kind of agreement, not a certain kind of advice. This is a question that can be answered on the basis of common proof.

The claims against the Ivy Defendants therefore satisfy the commonality prerequisite of Rule 23(a). The same is true of the claims against the Jeanneret Defendants. Defendants do not contest their status as ERISA fiduciaries to the plans. Common questions of law and fact will, however, determine two, contested, elements of Plaintiffs' claim against the Jeanneret Defendants: whether the Jeanneret Defendants were acting in their fiduciary capacity when they committed the acts alleged in the Complaint and whether their actions constituted a breach of fiduciary duty under ERISA. Resolution of the first of these issues will depend upon common proof: namely, the largely identical DIMAS that each of the plans signed when they became clients of JPJA. Buffalo Laborers' Omnibus Reply Ivy Defs' Jeanneret Defs' Opp'n Mot. Class Certif. at 7 n.5 (quoting John Jeanneret NYAG Deposition Transcript (May 6, 2009)). Common questions of law and fact will be critical to resolving the question of breach as well. What the Jeanneret Defendants knew about Ivy's unwillingness or inability to conduct due diligence on Madoff; what the Jeanneret Defendants knew or should have known about Madoff's fraud; and whether their failure to investigate Madoff further constitutes a breach of their fiduciary duties under ERISA—these are all questions that common to the class as a whole. Because "determination of [their] truth or falsity will resolve an issue that is central to the validity of" the claims against Defendants, *Dukes*, 131 S. Ct. at 2551, commonality is satisfied.

C. Typicality

Typicality "requires that the claims of the class representatives be typical of those of the class and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Allegations that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be

represented" usually satisfy the typicality requirement "irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936–37. Typicality can be defeated, however, if the named plaintiffs are subject to "unique defenses that threaten to become the focus of the litigation." *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 70 (S.D.N.Y. 2009) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000)).

In this case, the named Plaintiffs are, like the other members of the class, trustees of ERISA employee benefit plans that invested in Madoff, either directly or through the Andover or Interest Plus feeder funds and lost money in connection with their Madoff investments. The three funds for which they serve as trustees all signed DIMAs with JPJA in which JPJA agreed to serve as the investment manager for plan assets and, in that capacity, to supervise and direct the investment of plan assets in accordance with the written investment guidelines attached to each DIMA. Levan Decl. Ex. 1, at 2; Fagg Decl. Ex. 148, at 2; Fagg Decl. Ex. 149, at 2. The plans they represent all lost money in connection to the Madoff investments. Their claims therefore arise from the same course of events as the members of the class as a whole. This is generally enough to satisfy the typicality prerequisite.

Defendants argue, however, that deposition testimony in which Plaintiffs testified that they had no understanding, as plan trustees, that the advice that Ivy provided JPJA about their plan would be individualized to the needs of the plan undermines Plaintiffs' ability to prevail on their claims against Ivy Defendants because it calls into question Ivy's fiduciary status under 29 C.F.R. § 2510.3-21(c)(1)(ii)(B). It thus, Defendants argue, leaves Plaintiffs subject to unique defenses that threaten to derail the litigation, undermining their typicality as class representatives.

We do not agree. As we noted above, in order to establish Ivy's fiduciary status under 29 C.F.R. §2510.3-21(c)(1)(ii)(B), Plaintiffs will have to establish, among other things, that Ivy and JPJA had an agreement that Ivy would provide JPJA advice that was individualized to the plans. *Infra* III.B. Whether or not the trustees of the plans for whom this advice was provided *understood* the nature of the agreement between Ivy and JPJA does not, it seems to us, have any relevance—or at the most very limited relevance—to the question of whether an agreement of this sort existed. The deposition testimony to which Defendants point does not therefore call into question Plaintiffs' typicality as class representatives.

Defendants also argue that evidence suggesting that none of the three plans which Plaintiffs represent in the litigation actually relied upon JPJA's advice when they decided to invest plan assets with Madoff undermines Plaintiffs' ability to establish either detrimental reliance or causation, thus rendering them subject to unique defenses that destroy their typicality as class representatives.

We agree that evidence of this sort complicates Plaintiffs' ability to establish reliance or causation. We are not persuaded, however, that it calls into question the typicality of Plaintiffs as class representatives. Defendants have provided no evidence to suggest that the fact that Plaintiffs relied on third-party advisors or on personal experience is in any way atypical of the class as a whole. Evidence suggests, in fact, that other members of the class decided to invest plan asset with Madoff on the basis of very similar advice and experience. *See, e.g.*, Jeanneret Defs.' Opp'n Buffalo Laborers Pls.' Mot. Class Certif. at 24. Typicality is satisfied.

D. Adequacy

The last of the Rule 23(a) requirements is adequacy of representation. A party seeking class certification must show that "the representative parties will fairly and adequately protect

the interests of the class." Fed. R. Civ. P. 23(a)(4). In order to make this showing, a party seeking certification must demonstrate two things: first, that "class counsel is experienced, qualified, and able to conduct litigation." *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 268 (S.D.N.Y. 2007); second, that the class representatives' "interests are [not] antagonistic to the interest of other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

Plaintiffs move to appoint the law firm of Kessler Topaz Meltzer & Check, LLP as class counsel. The firm has prosecuted this litigation since its inception. Defendants do not contest its experience, qualifications, or ability to conduct the litigation. We see no reason to doubt its adequacy. We also see no reason to doubt the adequacy of the proposed class representatives. As we noted in our discussion of typicality above, Plaintiffs have demonstrated that the class representatives "possess the same interest and suffer[ed] the same injury as the class members." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–628 (U.S. 1997) (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). They have thus demonstrated that their interests are generally aligned with those of the class.

Defendants argue that the interests of the proposed class representatives are nonetheless antagonistic to the interests of the other members of the class because many of the proposed representatives are fund trustees and are therefore under a fiduciary duty to promote the best interest of the fund they serve, rather than that of the class as a whole. We find this unpersuasive for the same reason we rejected a similar argument raised by Defendants in opposition to the motion for certification brought by similarly situated plan trustees in the related case, *In re Beacon. See In re Beacon Assocs. Litig.*, No. 09 Civ. 777 (LBS), 2012 U.S. Dist. LEXIS 34520,

at *46–47 (S.D.N.Y. Mar. 14, 2012). We thus conclude that Plaintiffs have satisfactorily established the adequacy requirement of Rule 23(a).

We now turn to the requirements of Rule 23(b)(3).

E. Predominance

To satisfy the first Rule 23(b)(3) requirement of predominance, Plaintiffs must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To determine whether Plaintiffs have met this burden, we turn to the elements of the underlying causes of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184-2187 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."). In order to establish a breach of fiduciary duty under ERISA, Plaintiffs have to establish that Defendants (1) were fiduciaries as defined in ERISA §3(21)(A) and implementing regulations, and (2) that they were acting in their capacity as fiduciaries when they (3) breached their fiduciary duty. *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 353 (S.D.N.Y. 2009). Plaintiffs also must prove that Defendants' breaches caused their losses. *Silverman v. Mutual Benefit Life Ins. Co.*, 138 F.3d 98, 99 (2d Cir. 1998) (plaintiffs seeking compensation for breaches of fiduciary duty under ERISA "must show some causal link between the alleged breach . . . and the losses plaintiff[s] seek[] to recover").

With respect to both sets of Defendants, Plaintiffs have established that the first three elements of the claim will depend upon common questions. *See infra* III.B. Causation poses a more difficult question, however, given evidence, averred to in the discussion of typicality above, indicating that in many cases the actual decision to invest plan assets with Madoff was

not made by JPJA but instead by plan trustees, who in turn relied upon the advice of third-party advisors or upon their own experience with Madoff investments, or that of other plans.

Defendants argue that evidence of this kind means that proof of causation will have to be established on an individual rather than a class-wide basis and that as a result, common claims do not predominate. We do not agree. Plaintiffs allege that Defendants breached their fiduciary duties under ERISA not only by investing plan assets with Madoff, or causing plan assets to be so invested, but also by failing to divest those investments, or to cause those investments to be divested. Indeed, as fiduciaries, JPJA had an affirmative obligation to divest plan assets from investments that they came to learn were "unwise"—even when these investments were not themselves made under their fiduciary obligation. *Morrissey v. Curran*, 567 F.2d 546, 548 (2d Cir. 1977) (holding that ERISA trustees possess a responsibility to "review and liquidate… the unwise investment . . . made before ERISA took effect."); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983) (holding that, as fiduciaries, defendants were "under a continuing obligation to advise the Fund to divest itself of unlawful or imprudent investments" and their failure to do so "gave rise to a new cause of action each time the Fund was injured by its continued possession of individual policies, that is, each time it made a premium payment").

In order to establish the requisite causal link between Defendants' breach and the losses they seek to recover, Plaintiffs therefore do not have to demonstrate that they actually relied upon JPJA when choosing to initially invest plan assets with Madoff. Instead, they must demonstrate instead only "some causal link" between Ivy and JPJA's various alleged breaches and the decision to *maintain* plan assets with Madoff.

We find that the authority vested in JPJA by the DIMAs is sufficient to establish such a causal link on a class wide basis. Under the DIMAs, JPJA possessed the power to "invest and

reinvest" plan assets and to "buy, sell, exchange, convert and otherwise trade in any fixed income securities in accordance with the attached Investment Guidelines." Levan Decl. Ex. 1, at 2; Fagg Decl. Ex. 148, at 2; Fagg Decl. Ex. 149 at 2. As investment manager to the plans, JPJA possessed, in other words, the power to divest as well as invest plan assets with Madoff. The DIMAs therefore provide classwide proof of a causal link between JPJA's alleged breaches and any losses the plans may have sustained as a result. *See Prudential Ret. Ins. & Annuity Co. v. State St. Bank & Trust Co. (In re State St. Bank & Trust Co. Fixed Income Funds Inv. Litig.)*, MDL No. 1945, No. 07 Civ. 8488 (RJH), 2012 U.S. Dist. LEXIS 13556, at *126–127 (S.D.N.Y. Feb. 1, 2012) (finding that investment manager's failure to diversity plan assets sufficient to establish "some causal link" between the manager's breach of fiduciary duty and plan losses). *See also Allison v. Bank One - Denver*, 289 F.3d 1223, 1238–1239 (10th Cir. 2002) (finding evidence of investment manager's failure to make "adequate provision for the continued prudent management of plan assets" sufficient to establish the requisite causal link).

We therefore conclude that the issue of causation does not defeat predominance with respect to the claims against Jeanneret Defendants. We find the same to be true, by implication, of the claims against the Ivy Defendants. Ivy Defendants argue that "the burden is on the Plaintiffs to prove—for each plan—that but for Ivy's alleged [breaches], that plan would not have invested in Madoff." Ivy Defs'. Mem. Law Opp'n Class Certif. ("Ivy Opp'n") at 24. That is incorrect. The burden is on the Plaintiffs to prove, with respect to the claims against the Ivy Defendants, that but for Ivy's alleged breaches, the plans would not have *continued* to invest plan assets with Madoff. This is a burden that can be established on the basis of common proof: namely, evidence establishing that absent Ivy's breaches, JPJA would have exercised its authority as plan manager to divest plan assets from the Madoff investments.

Because we find that all of the elements of Plaintiffs' claims depend, in whole or in part, on common questions of law or fact, we conclude that Plaintiffs have met their burden of demonstrating predominance.

F. Superiority

To satisfy the final Rule 23(b)(3) requirement, Plaintiffs must demonstrate that the class action is a "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) provides a list of factors that courts should consider when analyzing whether the class action is in fact superior to other methods. These include: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (4) "the likely difficulties in managing a class action." *Id.* However, "[t]his list is not meant to be exhaustive and the Court has discretion to consider other relevant factors." *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 116 (E.D.N.Y. 2011). "At bottom, the superiority analysis requires (1) consideration of the alternative methods of adjudication available for the claims, (2) a comparison of the fairness to all whose interests are implicated between any alternative methods and a class action, and (3) a comparison of the efficiency of each method in adjudicating the claims." *Id.*

Ivy Defendants argue that Plaintiffs have not, and in fact cannot, demonstrate the superiority of the class action, given the existence of a parallel suit, brought by the Secretary of the Department of Labor ("Secretary") against many of the same defendants named in this case. *See* Complaint, *Solis v. Beacon Assocs. Mgmt. Corp.*, No. 09 Civ. 8000 (LBS) (S.D.N.Y. filed Oct. 10, 2010) ("DOL Compl."). The fact that the Secretary's suit raises many of the same

claims as those raised in the instant case and seeks the same relief that Plaintiffs seek in this case, Ivy Defendants argue, means that the claims of absent class members will be heard, even absent certification of the proposed class. It also means that absent class members will receive the relief to which they are due—without having to discount from this relief class counsel's legal fees. The existence of the parallel government action therefore means, Defendants argue, that the class action cannot be the superior means of adjudicating the controversy.

The Secretary, in an amicus brief filed with the Court, strenuously objects to this argument. She argues that a general rule, prohibiting the certification of Rule 23(b)(3) classes whenever there is a parallel government suit, would "undermine ERISA's private enforcement mechanisms and impede the Secretary's exercise of her prosecutorial discretion and her ability to enforce ERISA." Br. Secretary Labor Amicus Curiae Supp. Pls.' Mot. Class Certif. at 4. It would do so, the Secretary argues, by preventing the DOL from being able to coordinate its enforcement efforts with private class counsel—who, as the Secretary points out, are likely to be far better able of representing the interests of the class as a whole than would the multiple plaintiffs' attorneys with whom the DOL would otherwise have to coordinate. The rule could also, the Secretary suggests, establish a rush to judgment among private plaintiffs, anxious to be certified before the DOL files its suit, thereby further hampering coordination between private parties and the DOL. The existence of the parallel government suit, the Secretary argues, should not therefore lead the Court to conclude, both as a general matter and in this case specifically, that the class action is not a superior means of adjudicating the controversy.

We agree with the Secretary that a *per se* rule, precluding certification of an ERISA class under Rule 23(b)(3) whenever there exists a parallel DOL action could threaten the "interlocking, interrelated, and interdependent…scheme" of public and private enforcement.

Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 361 (1980). By establishing an unnecessary antagonism between government action and private class action suits—precisely the kind of suits that ERISA's legislative history suggests that Congress intended private plaintiffs to bring. *See Coan v. Kaufman*, 457 F.3d 250, 259–260 (2d Cir. 2006); *In re Beacon Assocs. Litig.*, No. 09 Civ. 777 (LBS), 2012 U.S. Dist. LEXIS 34520, at *74 n.9 (S.D.N.Y. Mar. 14, 2012). Like the Supreme Court, "[w]e are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

Nor does the case law require us to so tamper. Indeed, in almost all the cases which Ivy Defendants cite to support their claim, it is not simply the existence of the parallel government action but the threat that certification of the Rule 23(b)(3) class poses to the success or enforcement of the government action that led courts to deny certification. Hence in *Thornton v. State Farm Mut. Auto Ins. Co*., No. 1:066-cv-00018, 2006 U.S. Dist. LEXIS 83972 (N.D. Ohio Nov. 17, 2006), a district court in the Northern District of Ohio denied certification to private plaintiffs who were seeking relief for injuries because those plaintiffs had already been offered the opportunity to participate in the government's settlement and had chosen not to do so. In such circumstances, the court held, certification was not warranted. *Id.* at *12-13 (finding that "a federal class action would duplicate and possibly negate action taken on the state level" because it would potentially undermine the efforts by Attorneys General in 49 states to arrive at a settlement with the defendant, State Farm Mutual Auto Insurance Co.). In *Brown v. Blue Cross & Blue Shield of Michigan, Inc*., 167 F.R.D. 40, 46 (E.D. Mich.. 1996), the Court denied certification of a class that threatened to unravel the conditional settlement that Michigan's State's Insurance Commissioner and Attorney General had reached with the defendant. *Id.* at

*41–47. Similarly, in *Kamm v. California City Development Co.*, 509 F.2d 205, 211 (9th Cir. Cal. 1975), the Ninth Circuit denied certification to a Rule 23(b)(3) class in part because it found doing so would negate the government's prior settlement efforts. *See also Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) (explaining that the Maryland Insurance Agency had investigated the accused practices and that "[i]n any event, as a supplement to administrative proceedings, the small claims courts" are perfectly adequate);

In those few cases in which certification was denied and no obvious conflict between the private class action and the government action emerged, the government action had concluded by the time the class action commenced, and it was in the context of relief already obtained that the court denied certification. *Wechsler v. Southeastern Props.*, Inc., 63 F.R.D. 13, 16-17 (S.D.N.Y. 1974); *Penn. v. Budget Fuel Co.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

In this case, by contrast, Plaintiffs do not seek additional relief on top of already provided government settlement of their claims. Nor do they in any other way appear to threaten or disturb the government's enforcement efforts. In the event that the private plaintiffs prevail on their claims against Defendants, the Secretary will not be barred by the doctrine of res judicata from pursuing her action. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc) ("The Government is not barred by the doctrine of res judicata from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."); *United States v. Katz*, No. 10 Civ. 3335, 2011 U.S. Dist. LEXIS 59159, at *15 (S.D.N.Y. June 2, 2011) ("The general rule is that governmental agencies are not bound by private litigation when the agency's action seeks to enforce a federal statute that implicates both public and private interests.").

We therefore conclude that the existence of the parallel government action does not bar certification of the class under Rule 23(b)(3). We also find that—given the inefficiencies that would be created by individual litigation—the class action provides a fairer and more efficient mechanism for adjudicating the controversy than the individual lawsuits that would be available to Plaintiffs were class certification denied. To force each investor to litigate separately, as this Court noted in *Cromer Fin. Ltd. v. Berger*, would "risk disparate results among those seeking redress, ... would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources." 205 F.R.D. 113, 133-134 (S.D.N.Y. 2001). The difficulties of managing the class action do not appear to be greater—and may in fact be considerably less—than the difficulties created by potentially hundreds of individual trials. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 529 (S.D.N.Y. 1996) ("[D]ifficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques.").

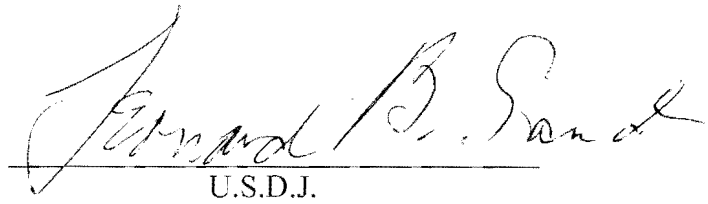
Accordingly we find that—because "[aggregating [Plaintiffs'] claims in a single action furthers the interests of judicial economy" *In re Nifedipine Antitrust Litig*., 246 F.R.D. 365, 372 (D.D.C. 2007), and because the government litigation poses no bar to class certification given the circumstances of this case—the superiority requirement of Rule 23(b)(3) is satisfied.

IV. Conclusion

For the foregoing reasons, Defendant's motion for class certification is GRANTED. Kessler Topaz Meltzer & Check, LLP are appointed class counsel, pursuant to Rule 23(g).[3]

SO ORDERED.

Dated: May 3, 2012
New York, NY



U.S.D.J.

[3] The Court has considered all of the parties' other arguments and found them to be moot or without merit.