UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	) Master File No. 09-CV-0777 (LBS)
IN RE BEACON SECURITIES LITIGATION	)
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This Document Relates To:	)
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IN RE J.P. JEANNERET ASSOCIATES., INC., et al.	)
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BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION

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STATEMENT OF THE ISSUE

The brief of the Secretary of Labor ("Secretary") addresses the following issues:

1. Whether the Secretary's separate suit provides a basis to deny class certification under the "superiority" prong of Federal Rule of Civil Procedure 23.

2. Whether arguments that Defendant Ivy Asset Management LLC and its defendant managers ("Ivy Defendants") were not acting as fiduciaries in providing investment advice to Defendant Beacon Associates Management Corporation ("BAMC"), which managed the pooled plan assets held by the Beacon Funds, are relevant to the class certification determination, are permitted under the law of the case, or have merit under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(21)(A)(ii), and the Secretary's regulation, 29 C.F.R. § 2510.3-21(c)(1).

INTEREST OF THE SECRETARY

The Secretary of Labor ("Secretary") has primary enforcement and interpretive authority for Title I of ERISA. See 29 U.S.C. §§ 1134, 1135. Accordingly, the Secretary has a strong interest in the proper construction of ERISA's fiduciary provisions and the Secretary's powers of enforcement, which were enacted to ensure the prudent management of plan assets and to safeguard the security of retirement benefits. See 29 U.S.C. §§ 1002(13), 1136(b); 1132(a)(5); Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 687-691 (7th Cir. 1986) (en banc). Plaintiffs' motions for class certification in their private suits and the "superiority" issue concerns the Secretary's ability to partner with private plaintiffs in complex, resource-intensive litigation where their interests overlap. The Secretary has a strong interest in assuring that Congress' intended use of a private-public enforcement scheme for ERISA is not impaired by an overly expansive view of the "superiority" prong of the class certification requirements.

Furthermore, the Ivy Defendants' brief on the class certification issue disputes, for the third time in this litigation, that they acted as plan fiduciaries under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), and its accompanying Department of Labor regulation, 29 C.F.R. § 2510.3-21(c)(1), which delineate when a person who renders investment advice with regard to plan assets acquires fiduciary status. The Secretary has a strong interest in ensuring that the ability of private plaintiffs, as well as her own ability to bring suit to enforce ERISA's fiduciary duty provisions, are not inhibited by an unduly narrow construction of her own regulation, especially where the "law of the case" has already established the Ivy Defendants' fiduciary status under a correct construction of the applicable law, assuming the truth of the Plaintiffs' allegations.

STATEMENT OF THE CASE

The In re Beacon Plaintiffs filed their initial complaint on January 27, 2009 and the In re Jeanneret Associates Plaintiffs filed their initial complaint on April 17, 2009 (collectively, "Private Plaintiffs"). In response to motions to dismiss, and after extensive briefing by the private parties, this Court issued an opinion denying in part the motion to dismiss the In re Beacon complaint. In re Beacon Assocs. Litig., 745 F .Supp. 2d 386 (S.D.N.Y. 2010).[1]

After an intensive investigation, the Secretary later filed her own complaint, Solis v. Beacon, 10-cv-8000, on October 21, 2010 ("Solis case"), alleging similar ERISA claims against most of the same Defendants. The complaint alleges that the Defendants were imprudent in recommending and monitoring plan assets invested with Bernard Madoff, who has been convicted for masterminding the largest "Ponzi scheme" securities fraud in U.S. history, and that

[1] Judge MacMahon subsequently rendered a similar decision in the In re Jeanneret Associates case. Order Severing ERISA Case, In re Jeanneret Assocs. Litig., 09-cv-3907, 09-cv-8278 [Doc. 60] (Jan. 4, 2011).

the Defendants made misrepresentations and failed to disclose material facts relating to these investments to the plans and their fiduciaries. Upon filing the complaint, the Secretary requested "related" status under the local Rules. The request for "related" status aimed to reduce any duplication of judicial and Defendants' resources. See L. Civ. R. 1.6 (recognizing the duty of attorneys in related cases to "avoid unnecessary duplication of judicial effort"); L. Civ. R. 13 (related cases have been "transferred for consolidation or coordinated pretrial proceedings when the interests of justice and efficiency will be served"). The In re Jeanneret ERISA claims were transferred to this Court so that all the ERISA claims, including the Secretary's, are now in the same court. Order Severing ERISA Case, In re Jeanneret Assocs. Litig., 09-cv-3907, 09-cv-8278 [Doc. 60] (Jan. 4, 2011). The Court also granted the Secretary's request to impose the same schedule on the Secretary as the Private Plaintiffs. The Secretary has coordinated with the Plaintiffs in both cases throughout the litigation of her Solis case.

Currently pending before the Court are the Private Plaintiffs' motions for class certification pursuant to Federal Rule of Civil Procedure 23(b). Plaintiffs argue that they meet all four prongs of Rule 23(a). Additionally, as relevant here, they argue that the Court may certify the action under Rule 23(b)(3), which requires that, in order to certify a class action, the court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In opposing the motion for class certification, the Defendants contend that, because the claims in the private cases will be adjudicated in the Secretary's Solis case, which could provide a full recovery for the plans comprising the classes in these cases, the class actions requested by the Private Plaintiffs are unnecessary and therefore class certification should be denied under the

"superiority" prong of Rule 23(b). See, e.g., Memorandum of Law of Beacon Associates Management Corp., Joel Danziger and Harris Markhoff in Opposition to the Plaintiffs' Motion for Class Certification, 09 Civ. 0777, at 15; Ivy's Defendants Memorandum of Law in Opposition to the Plaintiffs' Motion for Class Certification in Board of Trustees of the Buffalo Laborers' Security Fund, Welfare Fund and Welfare Staff Fund v. J.P. Jeanneret Associates. Inc., No. 09 Civ. 8362, at 31-33; Opposition of Defendants J.P. Jeanneret Associates, John P. Jeanneret and Paul L. Perry to the Beacon Plaintiffs' Motion for Class Certification, No. 09 Civ. 0777 [Doc. 384], at 29-30 (filed Dec. 9, 2011).

The Secretary strongly disagrees that her lawsuit renders a class action in the private cases inferior to the same private actions proceeding without class-action status. To the contrary, she believes that any denial of class certification based on an existing parallel government action would undermine ERISA's private enforcement mechanisms and impede the Secretary's exercise of her prosecutorial discretion and her ability to enforce ERISA, as discussed further in this brief.[2]

Additionally, in their opposition brief, the Ivy Defendants collaterally attack the Court's "law of the case" as to the Ivy Defendants' fiduciary status under ERISA. Their fiduciary status is also an important issue in the Secretary's Solis action and will affect the legal analysis of the Secretary's claims against those Defendants. The Secretary previously addressed this issue in amicus filings during the motion to dismiss and reconsideration stage in this case.

[2] In addition, the Secretary notes that the Court may not need to decide the Rule 23(b)(3) "superiority" question if it decides that the private cases meet the requirements for class actions under Rule 23(b)(1), as the Plaintiffs in In re Beacon also contend. This brief does not address issues arising under Rules 23(a) or (b)(1) bearing on the class certification determination.

ARGUMENT

I. THE SECRETARY'S SEPARATE SUIT PROVIDES NO BASIS TO DENY CLASS CERTIFICATION TO THE PRIVATE PLAINTIFFS UNDER THE RULE 23(b)(3) SUPERIORITY INQUIRY

A. ERISA's Private-Public Enforcement Structure

ERISA explicitly contemplated a dual public and private enforcement system. Herman v. S. Carolina Nat'l Bank, 140 F.3d 1413, 1423-425 (11th Cir. 1998); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983). "ERISA gives plan beneficiaries and the Secretary independent rights of action, do not require private plaintiffs to file charges with the Secretary before suing, and nowhere forecloses private actions after the Secretary files suit, or, the Secretary's suit after a private action commences." S. Carolina Nat'l Bank, 140 F.3d at 1426 n.22; accord Beck v. Levering, 947 F.2d 639, 640-42 (2d Cir. 1991) (in the context of a class action, stating that ERISA section 502(a) "authorizes the Secretary of Labor to bring suit concurrently with private plaintiffs to recover appropriate damages").

Congress' design of this dual enforcement system was plainly purposeful. Congress could have made the Secretary's enforcement action exclusive of any private right of action. Compare e.g., Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 6 (1985) ("[i]t is also clear that enforcement of the [Occupational Health and Safety Act] is the sole responsibility of the Secretary"). Congress also could have barred parallel private and public suits either: by requiring the Secretary to stand in the plans' shoes as a fiduciary when it sues, see Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 340 (4th Cir. 2007) (contrasting the statutory role conferred on the Secretary of Labor versus the Pension Benefit Guaranty Corporation), or by creating a private right of action that is contingent on an agency determination that the claim has merit or that subordinates the right to bring or maintain such an

action to the agency's decision to pursue the litigation on its own. Compare Fair Labor Standards Act § 16(c), 29 U.S.C. § 216(c) (an action by the Secretary cuts off employees' private right of action under section 16(b)); Surface Transportation Assistance Act, 49 U.S.C. § 31105(b) (alleged whistleblower must file complaint with the Occupational Safety and Health Administration and allow for investigation before filing suit). Congress chose none of those more restrictive enforcement schemes, but instead placed private actions of the sort brought by the Private Plaintiffs here on a par with, and independent from, any action the Secretary might bring for the same statutory violations. As ERISA's enforcement provisions are "comprehensive and reticulated," the omission of any bar against parallel private and public suits proceeding on separate tracks, with neither yielding nor being subordinated to the other, was intentional. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985).

ERISA's legislative history clearly contemplated ERISA plaintiffs' having the right to sue as a class action. E.g., H. Rep. No. 93-533 (October. 2, 1973) ("[c]lass actions shall be brought where requirements for class actions could be met"); S. Rep. No. 93-383 (August. 21, 1973) ("[t]he bill provides that participants or beneficiaries may bring class actions under certain circumstances"); Message from the President of the United States Transmitting Recommendations for Pension Reform (April 11, 1973) (the proposed legislation "would give additional investigative and enforcement powers to the Secretary of Labor, and would permit pension fund participants and beneficiaries to seek remedies for breach of fiduciary duty through class action suits"); see generally Coan v. Kaufman, 457 F.3d 250, 259-61 (2d Cir. 2006) (recognizing that Congress ultimately did not require an individual participant to fulfill class action requirements to sue on behalf of his plan but stating that Congress clearly contemplated that plaintiffs and courts can use the class action mechanism for fiduciary breach litigation). It

would be contrary to Congress' intended enforcement system and its contemplation of private class actions to infer some conflicting or mutually exclusive enforcement between the Secretary's action and a plaintiffs' class action.

Discussing a comparable scheme under the antitrust laws, the Supreme Court has recognized that "private and public actions were designed to be cumulative, not mutually exclusive." Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689-90 (1961) (internal quotation marks and citation omitted). In fact, courts, including the Second Circuit, consistently permit parallel class actions and government suits. E.g., Beck, 947 F.2d at 640-42.

Protecting the independence of such parallel private and governmental actions, courts have consistently rejected characterizations of the Secretary as merely a representative of private plaintiffs' interests. Fitzsimmons, 805 F.2d at 690-91 (rejecting the representational argument). Instead, the Secretary's enforcement authority is to act exclusively in the public interest.

> Private ERISA litigants seek to redress individual grievances. However, in suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

S. Carolina Nat'l Bank, 140 F.3d at 1423. "Each court [to have addressed this issue] recognized that the Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants who seek to redress individual grievances or recoup plan losses for their personal benefit as plan beneficiaries." Id. at 1424; accord Fitzsimmons, 805 F.2d at 690. "While the Secretary may sue to protect the financial integrity of the pension plan, and thus act in a representative capacity, he also has other responsibilities, duties and interests in bringing his action." Id. at 691 n.12.

Indeed, the Secretary's interests might diverge from those of private plaintiffs, because,

for instance, the Secretary is interested in establishing, through its enforcement action, legal precedent in a case raising a significant statutory or regulatory issue, in addition to victim-specific relief. See Reich v. Valley Nat'l Bank of Arizona, 837 F. Supp. 1259, 1299-301 (S.D.N.Y. 1993) (recognizing the Secretary's prosecutorial discretion to sue in order to further her statutory or regulatory interpretations); see also E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 296 (2002) (holding that when "the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief") (emphasis added). As a result, the Secretary and private plaintiffs may pursue different litigation strategies, or have different levels of interest in seeking a purely monetary settlement. Moreover, the Secretary is mandated to pursue civil penalties for her enforcement actions, which is a uniquely governmental remedy beyond the make-whole relief that the plaintiffs can seek. 29 U.S.C. § 1132(l).

The need for a "watchdog" that represents interests outside of the class is not uncommon in class actions. See, e.g., Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1799 (3d ed. 2011) (recognizing the need for outside "watchdogs" through interventions in class actions); cf. Lewis v. Gross, 663 F. Supp. 1164, 1173 (E.D.N.Y. 1986) (recognizing that class actions may benefit from participation from a diverse group of class representatives). As the Second Circuit recognized, because the private plaintiffs may not seek to enforce ERISA to its fullest extent, the Secretary is authorized under ERISA's civil enforcement provisions "to bring suit concurrently with private plaintiffs to recover appropriate damages." Beck, 947 F.2d at 642. When the Secretary brings her own suit in parallel with ongoing private litigation, it generally, as in these cases, is based on a prosecutorial decision that ERISA enforcement is best served in that instance

by employing her investigatory powers and litigation resources and is brought to ensure that the court consider, in the public interest, the full range of ERISA remedies. The Secretary's suit is not, however, meant to displace the ability of private litigants to pursue their case as a class action. To the contrary, the Secretary recognizes in these cases that working in coordinated fashion with class counsel may be the best way to achieve her litigation goal, given the very real limits on the government's resources and personnel in any given case.

B. The Class Action is a Procedurally Proper Method for Parties to Pursue their Private Interests Alongside the Secretary's Pursuit of the Public Interest

As the private plaintiffs' interests are distinct from the Secretary's interests, class certification for a class representative who can champion those distinct private interests on behalf of named and unnamed class members is often critical, or else individual plaintiffs would be forced to sue separately in order to further those interests. Congress did not intend ERISA's dual enforcement structure to favor the Secretary's enforcement suit over a private class action. Therefore, as the Third Circuit has opined in the similar Fair Labor Standards Act context, courts cannot improperly read into the statute and class certification requirements a restriction on any class of plaintiffs' right to litigate their own interests by forcing their class litigation to "be channelled through" the Secretary's litigation. Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 544-45 (3d Cir. 1973).

In this case, for both named and unnamed plans in the class, there are distinct advantages to the class action vehicle unavailable in the Secretary's action. Class representatives and plan counsels act under Rule 23 as fiduciaries to the class of plan plaintiffs. Allen v. Int'l Tuck and Engine Corp., 358 F.3d 469, 471 (7th Cir. 2004). Class counsels therefore, are subject to fiduciary obligations and judicial oversight and must act solely in the interest of the plans they

represent. E.g., Dubin v. Miller, 132 F.R.D. 269, 273 (D. Colo. 1990). Similarly, the class action representative is obligated to provide due process rights to unnamed class members and be accountable to those interests. E.g., Phillips Petro. Co. v. Shutts, 472 U.S. 797, 809-811 (1985) ("an absent class-action plaintiff is not required to do anything.… [h]e may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection"). Moreover, significant issues, such as the allocation of any recovery among the various plans and claims, are particularly suitable for class resolution and the safeguards and efficiency it provides. E.g., In re Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 192 (D.N.J. 2003).

Unlike a class action representative, the Secretary does not sue solely "as a representative of the persons aggrieved." Gen. Tel. Co. of the Northwest, Inc. v. E.E.O.C., 446 U.S. 318, 328-31 (1980). Her pursuit of the public interest, therefore, does not always align with the purely private interests of the private plaintiffs, whereas the class vehicle is expressly designed to protect and represent the absent class members. In Trbovich v. United Mine Workers of Am., 404 U.S. 528 (1972), the Supreme Court recognized that a private party and the Secretary of Labor in a Labor Management Reporting and Disclosure Act (LMRDA) case may have divergent interests when on the same side of a case because the Secretary's obligation is to also promote broader public interests. "Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation." Id. at 539. Moreover, even when a government agency sues for victim-specific relief, the agency acts on behalf of both private and public interests, and the agency, and not the victim, is in "command of the process" and may proceed despite the wishes of the victim. Waffle House, 534 U.S. at 291, 297-298 (recognizing that the agency is "not a proxy" and "does not stand in the employee's shoes");

compare Fed. R. Civ. P. 23(b)(3)(A)-(B) & Advisory Committee Notes 1966 amends., cmts. to subdivs. (b)(3), ¶ 4 (discussing the importance of the actual injured parties retaining litigation control). As evidence of the potentially divergent approaches in this case, Private Plaintiffs have sought relief against additional individual defendants (Adam Geiger and Fred Sloan) and the Secretary has requested mandatory civil penalties.

Thus, private suits, including class actions otherwise satisfying the requirements of Rule 23 (without regard to whether the Secretary has brought her own enforcement action), "provide a most effective weapon in the enforcement of the [ERISA] laws and are a necessary supplement to [the Secretary's] action." Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310, 315 (1985) (internal quotation marks and citation omitted).[3] See S. Carolina Nat'l Bank, 140 F.3d at 1426 n.23 (noting the constraints on the government's resources and the consequent importance of private enforcement in an ERISA case); see also H.R. Conf. Rep. No. 101-386, 1989 WL 168141, 1989 U.S.C.C.A.N. 3018, at *3035-3036 (recognizing both limits on the Department of Labor's resources for enforcement and that "the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans.") (amending parts of ERISA's civil enforcement provisions).

Accordingly, the Secretary's exercise of prosecutorial discretion to bring suit should not be used against her to tax the government's limited resources and impede its ability to coordinate with private plaintiffs who can better shoulder the representation of private interests while the

[3] Bateman Eichler involved the question whether implied private rights of action by defrauded tippees to enforce the securities laws should be barred by an unclean hands (in pari delicto) defense, rather than whether they should be permitted to proceed as class actions. Nonetheless, the Court's reliance on efficiency considerations, especially the government's reliance on private actions to supplement limited government enforcement resources, applies as well to the class certification question posed by this ERISA case.

Secretary focuses on advocating for the public interest in her role as a watchdog. Cf. Hunton & Williams v. U.S. Dept. of Justice, 590 F.3d 272, 274, 277-78 (4th Cir. 2010) (recognizing the government's "valuable right to partner with other parties in litigation"). The Secretary believes that such coordination within the framework of a class action is warranted in this complex case and permits her to best marshal the government's limited resources through cooperative planning and division of labor with class counsel. See Waffle House, 534 U.S. at 291-92 ("[t]he statute clearly makes the [agency] the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. … it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief"); In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 817 (3d Cir. 1995) (because "the combination of the individual cases also pools litigation resources and may facilitate proof on the merits[,] . . . the prospects for obtaining [class] certification have a great impact on the range of recovery one can expect to reap from the action"); In re Relafen Antitrust Litig., 231 F.R.D. 52, 81 n.22 (D. Mass. 2005) ("[b]ecause aggregating claims increases the litigation stakes, the parties can be expected to expend more resources to litigate a class action than an individual case") (quoting Theodore Eisenberg and Geoffrey Miller's Attorney's Fees in Class Action Settlements: An Empirical Study).

The class action mechanism can provide an important function in ERISA's private-public enforcement scheme, facilitating, as in these cases, the Secretary's interest in working with Private Plaintiffs who "present a single coherent voice with impact equal to" the co-Defendants opposing the claims in a unified manner. In re REA Exp., Inc., 10 B.R. 812, 814 (Bankr. S.D. N.Y. 1981). If the Private Plaintiffs must proceed as individual plans, the Secretary will likely find it more difficult to coordinate efforts and share burdens with multiple plaintiffs' attorneys,

no one of which will be in position to play the unifying role expected of an experienced class counsel charged with representing the interests of the entire class. Indeed, Defendants' opposition to class certification in the present cases may be viewed as an effort to defeat Plaintiffs' claims procedurally rather than on the merits by hindering the ability of Private Plaintiffs to bring a forceful, coherent case against them.

Moreover, if the Defendants' arguments were adopted, private plaintiffs, in hopes of controlling their own destinies, might be incentivized to race to the courthouse and settle claims prematurely before the Secretary, who must investigate before bringing suit, makes her litigation intentions known. This could well hamper cooperation in developing cases during the plaintiffs' and Secretary's investigations prior to suit. Compare Bateman Eichler, 472 U.S. at 310, 315 (relying on the SEC's views on the impact on enforcement in formulating rules governing private actions under the securities law); accord Randall v. Loftsgaarden, 478 U.S. 647, 664 (1986) (recognizing that a "diminution in the incentives" for defendants to comply with the law would "seriously impair the deterrent value of private rights of action").

Finally, any gains in judicial efficiency created by the Secretary's suit may be illusory. The Secretary does not have "privity" with private plaintiffs and res judicata does not apply. Fitzsimmons, 805 F.2d at 699; accord Meyer v. Macmillan Pub. Co., Inc., 526 F. Supp. 213, 217 (S.D.N.Y. 1981). Nevertheless, in the expectation that Private Plaintiffs will be granted class action status, pre-trial matters and trial schedules, overseen by this single Court, have been coordinated, and Department of Labor attorneys and Private Plaintiffs counsels have worked together to resolve any internal differences in viewpoint before presenting positions to the

Court.[4]

Without class certification, some of the 104 or so plans in this case, with their thousands of participants and beneficiaries, might well forego litigation for lack of adequate resources or effective legal representation, leaving potentially meritorious claims unremedied (or entirely dependent on the outcome of the Secretary's case); but presumably many others could proceed individually and separately in addition to the Secretary's litigation. Not only could the challenges of coordination and the avoidance of duplicative discovery and briefing multiply for the Secretary and the Court with the belated appearance of new counsel seeking to come up to speed on behalf of the now fragmented "class" of plans, but, if litigated separately, the potential for inconsistent decisions would multiply as well.[5]

Accordingly, if Defendants' motion to deny class certification is granted, the advantages of the class action mechanism, coupled with the fact that the Secretary's and plaintiffs' cases are "related" and thus promotes their working in tandem, will be lost for no good reason that the Secretary can discern. On the other hand, neither the interest in justice nor in judicial efficiency

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[4] As evidence of this coordination, counsel for the Secretary and Private Plaintiffs have shared work product in accordance with their common interest in remedying plan losses from the Defendants' fiduciary breaches, and have entered into a written "common interest agreement". See Russell, 473 U.S. at 142 n.9 ("the common interest shared by all four classes [of ERISA plaintiffs, including the Secretary] is in the financial integrity of the plan"); In re Cardinal Health, Inc. Secs. Litig., C2 04 575 ALM, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007). However, sharing a common interest does not mean the parties are completely aligned on every matter.

[5] If the denial of class certification leads to additional plaintiffs coming forward with their own newly-filed cases, there is nothing to prevent them from being brought in any federal court where the plaintiff has venue. See 29 U.S.C. § 1132(e)(2) (case "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found"). At a minimum, this could spawn a spate of transfer litigation to decide whether the cases all get moved to this Court or stay in different courts. E.g., Schott v. Ivy Asset Management Corp., No. 10-CV-01562-LHK, 2010 WL 4117467, at *10 (N.D. Cal. Oct. 19, 2010) (recognizing the difficult and close decision on agreeing to transfer a case against Ivy for Madoff-related losses to this Court).

will be promoted by shifting more of the litigation burden to the Secretary and those plans willing to bear the costs of litigation on their own without being able to spread them among the entire affected class.

C. The Defendants' Cases Are Easily Distinguishable

The Defendants cite several cases to support their argument, but they ignore three critical factual differences from the class certification issue before this Court. First, in most of these cases, courts denied class certification because the governmental parties had already reached settlement. See Thornton v. State Farm Mut. Auto Ins. Co., Inc., No. 1:06-cv-00018, 2006 WL 3359482, at *4 (N.D. Ohio Nov. 17, 2006) ("[t]he Attorneys General for 49 states expended substantial effort to come to a nationwide agreement with State Farm"); Kamm v. California City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975); Brown v. Blue Cross and Blue Shield of Michigan, Inc., 167 F.R.D. 40, 46 (E.D. Mich. 1996); Com. of Pa. v. Budget Fuel Co., Inc., 122 F.R.D. 184, 185-86 (E.D. Pa. 1988); Wechsler v. S.E. Props., Inc., 63 F.R.D. 13, 16-17 (S.D.N.Y. 1974).

Second, in the courts' view, the governmental interests conflicted with the private action in many of the cases on which Defendants rely. Typically, the courts denied certification after determining that private litigation would have undermined the enforcement of the statutes at issue, especially in situations where the governmental party was about to settle the case or opposed the class certification. See Thornton, 2006 WL 3359482, at *3 ("if courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it") (emphasis added); id. ("[t]he Attorney General makes an informed decision whether it is in the interest of class members to settle a difficult case or go to trial"); Brown, 167 F.R.D.

at 42 n.2, 45 (noting that the state in the "public benefit" determined that a settlement was "contingent upon th[e] Court not certifying the present lawsuit as a class action"); Budget Fuel Co., Inc., 122 F.R.D. at 185-86 (ruling on the state's objections to the prayer for class certification in the private complaint); Wechsler, 63 F.R.D. at 17 (emphasizing the fact that the state attorney had assured the court that its settlement of its action is a sufficient remedy).

Third, the cases cited by the Defendants did not arise under ERISA. As previously discussed, ERISA's "comprehensive and reticulated" enforcement scheme is meant to accommodate parallel actions by the Secretary and private class actions to remedy fiduciary breaches on behalf of plans. Russell, 473 U.S. at 146. As discussed, courts acknowledge the Secretary's dual interests in both victim-specific relief and statutory enforcement in the public interest with respect to labor statutes, like ERISA; in other circumstances, class actions may not be appropriate if the governmental agency actually represents the private plaintiff and is not asserting broader public interests. Cf. U.S. v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 986-87 (2d Cir. 1984) (recognizing that in parens patriae actions governmental entities adequately represent individual plaintiffs).

The cases cited by Defendants, therefore, are not directly on point to the present circumstances. Unlike the cases cited by the Defendants, the Private Plaintiffs and their counsels determined that a class action is the best method to represent their private interests, and the Secretary, in her watchdog role, has determined that a cooperative effort with class counsel conserves her enforcement resources while preserving and furthering the public interests in this case. Plainly, this is not a case where the government objects to class certification. The Court should not second-guess the Secretary's and Private Plaintiffs' collective judgment based on Defendants' misplaced and entirely self-serving citation to inapposite authority.

II. The Law of the Case Forecloses the Ivy Defendants' Fiduciary Status Arguments, which Lack Merit in any Event

As part of their attack on class certification, the Ivy Defendants also make a substantive argument concerning their fiduciary status under ERISA and the sufficiency of the Private Plaintiffs' legal theories. The Court should reject this argument for three reasons: first, it is a purely merits argument not directly related to the class certification question presently at issue before the Court; second, it is an impermissible back-door attempt to relitigate "law of the case" that the Ivy Defendants have already lost multiple times; and third, the argument lacks merit now for the same reason that the Court rejected it when first raised and when it denied reconsideration on that question.

A. The Fiduciary Status Question is Not Relevant to the Class Certification Question

While there is some inquiry into the merits at the class certification stage, any merits inquiry must be directly relevant to a Rule 23 requirement. This Court should "not assess any aspect of the merits unrelated to a Rule 23 requirement" and must assure that the "class certification motion does not become a pretext for a partial trial of the merits." Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Sec. Litig.), 471 F.3d 24, 41 (2d Cir. 2006).

It is clear that the arguments disputing the Ivy Defendants' fiduciary status are not directly related to the legal requirements for class certification. The suitability of a class turns on considerations like numerosity, adequacy of representation, and commonality of the legal issues, not whether the "basis for relief" – which the Ivy Defendants dispute -- has been established from the outset of litigation. Compare Ivy Defendants' Memorandum of Law in Opposition to the Plaintiffs' Motion for Class Certification in In re Beacon Assocs. Litig. ("Ivy Beacon Class Cert. Opposition"), No. 09 Civ. 0777, at 71 ("[t]his theory - which does not provide a basis for relief under ERISA - cannot support class certification") with Gale v. Chicago Title Ins. Co., 274

F.R.D. 361, 370-71 (D. Conn. 2011) ("[i]t is 'settled that the named plaintiff need not demonstrate a probability of success on the merits or show in advance that he or suffered damages in order to serve as the class representative'") (quoting 1 Newberg on Class Actions § 3:31 (4th ed. 2010)). The merits of the fiduciary status question can be resolved in a case where the class has been certified as well as in the many cases that will result if certification is denied. Accordingly, the Court should not consider the fiduciary status question in the context of deciding whether the proposed classes should be certified under Rule 23.

B. The Law of the Case Precludes Revisiting the Ivy Defendants' Status as Fiduciaries

Even if the Ivy Defendants' fiduciary status question were relevant in some way to the class certification question, their legal arguments are merely improper attacks on this Court's prior decisions on their motion to dismiss and their motion for reconsideration. See Beacon Assocs. Litig., 745 F. Supp. 2d at 423-24; Order Denying Motion for Reconsideration [Doc. 206]; Order Severing ERISA Case, In re Jeanneret Assocs. Litig., 09-cv-3907, 09-cv-8278 [Doc. 60] (Jan. 4, 2011). Once again, the Ivy Defendants argue that because they provided advice to the plan fiduciary Beacon Defendants and not directly to the plans, they cannot be fiduciaries under ERISA. E.g., Ivy Defendants' Joint Memorandum of Law in Support of Motion of Ivy Asset Management LLC, the Bank of New York Mellon Corporation and Certain Affiliated Individuals to Dismiss the Consolidated Amended Complaint, No. 09 Civ. 7777, at 39 [Doc. 88] (filed Dec. 11, 2009); compare with Ivy Beacon Class Cert. Opposition, at 71 (stating that plaintiffs "argue that the Ivy Defendants are fiduciaries by virtue of agreeing to provide advice to the Beacon Funds and 'not to any individual plans.' … [t]his theory - which does not provide a basis for relief under ERISA - cannot support class certification").

It was precisely this argument that this Court repeatedly rejected in its prior decision. See

Beacon Assocs. Litig., 745 F. Supp. 2d at 423-24 (rejecting Ivy's argument that Ivy was not a fiduciary because it "provided advice to BAMC [manager of the Beacon Funds] rather than to the ERISA plans that invested in the Beacon Fund[s]"); id. at 424 ("Ivy's advice was rendered pursuant to agreements with BAMC and JPJA, and no party contends that BAMC and JPJA were not ERISA fiduciaries"); id. at 426 n.28 ("[t]here can be no doubt that Ivy's advice provided a primary basis for the Beacon Funds' investment decisions relating to Madoff"); see also Order Denying Motion for Reconsideration, In Re Beacon Assocs. Litig., 09-cv-777 [Doc. 206] (Dec. 7, 2010); Order Severing ERISA Case, In re Jeanneret Assocs. Litig., 09-cv-3907, 09-cv-8278 [Doc. 60] (Jan. 4, 2011).

In their motion for reconsideration, the Ivy Defendants clearly understood the Court's opinion and legal conclusions on this issue, when they stated that "[t]he Court held that Ivy was an ERISA fiduciary because it rendered investment advice for a fee. The investment advice at issue was advice to BAMC relating to Madoff as an asset manager." Ivy Defendants' Memorandum of Law in Support of the Motion for Reconsideration, No. 09 Civ. 7777, at 21 [Doc. 188] (filed Oct. 19, 2010) (emphasis added). The Court then denied the motion for reconsideration in full. Order Denying Motion for Reconsideration, In Re Beacon Assocs. Litig., No. 09-cv-777 [Doc. 206] (Dec. 7, 2010); see also Ivy Defendants' Memorandum of Law in Support of the Motion for Partial Dismissal, Solis v. Beacon Assocs., No. 10-cv-8000 [Doc. 36], at 9-11 (filed Feb. 16, 2011) (describing the opinion in a similar fashion and incorporated into filings in related cases). It is abundantly clear to every party, including the Ivy Defendants, that the Court had recognized the Ivy Defendants' ERISA fiduciary status was founded upon investment advice rendered to the Beacon Defendants but not necessarily directly to each individual plan. This "law of the case" still holds true for any pertinent merits discussion at this

class certification stage.

The "law of the case" doctrine cannot be circumvented in this manner. See Gale, 274 F.R.D. at 370-71. "As most commonly defined, the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983) (citation omitted). A prior decision should not be re-examined "absent cogent or compelling reasons," Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 8 (2d Cir. 1996) (internal quotation marks and citation omitted), such as "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice," Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks and citation omitted). The Ivy Defendants cannot and have not identified how their arguments satisfy any of these bases to overturn the "law of the case."

C. On the Merits, Ivy was an ERISA Fiduciary if, as Alleged, it Provided Investment Advice to Beacon in its Capacity as Fiduciary to the Plaintiff Plans, Whose Assets Beacon Held and Invested

Even if this Court were to entertain this improper second attempt at forcing a reconsideration of the Court's prior decision, the Ivy Defendants' arguments are without merit. As an initial matter, because the Secretary has already addressed the merits of this issue in the earlier stages of this litigation, we refer the Court to our prior submissions on Ivy's fiduciary status under ERISA and its regulations. See Brief of the Secretary of Labor as Amicus Curiae in Support of the Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Claims Asserted Against Ivy Asset Management LLC, et. al., In re Beacon Assocs. Litig., Case No. 09-CV-0777, at 7-8 (October 1, 2010) (addressing the same argument); Brief of the Secretary of Labor as Amicus Curaie in Support of the Plaintiffs' Memorandum in Opposition to Defendants'

Motion to Dismiss Claims Asserted Against Ivy Asset Management LLC, et. al., In re J.P. Jeanneret Assocs. Litig., Case No. 09-CV-3907, at 8-9 (October 1, 2010) (same); Brief of the Secretary as Amicus Curaie in Opposition to Defendants' Motion for Reconsideration, 09 civ. 0777, at 9 [Doc. 191] (filed Oct. 29, 2010) (same).

As they have all along, the Ivy Defendants contend that because the Beacon Funds are not "plans," they could not have provided "individualized investment advice to the plan" by providing advice to BAMC, the managing partner of the Funds and a co-defendant for the test for fiduciary status established in 29 C.F.R. § 2510.3-21(c)(1). See Ivy Beacon Class Cert. Opposition, at 65-66; compare In re Beacon Associates Litig., 745 F. Supp. 2d at 425 ("Ivy argues that its advice was not 'individualized' as to any particular ERISA plan").

The Ivy Defendants ignore the important and indisputable fact that the Beacon Funds is itself a fiduciary to the plans and BAMC, as its manager, was making fiduciary decisions as to the individualized interests in the assets of the Funds, including the plans' assets. 29 CFR § 2510.3-101(a)(2) ("plan asset regulation") ("when a plan acquires an equity interest in an entity [like the Beacon Funds] . . . [the plans'] assets include both the equity interest and an undivided interest in each of the underlying assets of the entity").[6] Under this regulation, "any person [such as the Beacon Defendants] who has authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan." Id. (emphasis added). Ivy clearly falls into the second prong of the regulation as it provided "investment advice" with respect to assets under the authority or control of the plans' fiduciary,

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[6] Here, plans invested in the Beacon Funds, which was a limited liability corporation, by purchasing interests in the Funds through capital contributions. In re Beacon Assocs. Litig., 745 F. Supp. 2d at 395-96. Therefore, they acquired an equity interest in Beacon within the meaning of the plan asset regulation.

BAMC.

The Ivy Defendants do not dispute this reading of this part of the regulations, but, instead consider such a reading "absurd" and in conflict with the five-part test set forth in the regulations. Ivy Beacon Class Cert. Opposition, at 65 n.90. The Secretary reasonably reads the plan asset and investment advice regulations together to treat investment advice to a plan's fiduciary (because it administers or controls the plan's assets) as "direct or indirect" advice to the plan itself within the meaning of 25 C.F.R. § 2510.3-21(c)(1)(ii). The "plan asset regulation" merely recognizes that the pooled vehicle holds plan assets and should be treated equally and subject to the same fiduciary obligations whether the assets belong to a single plan or are pooled with other plans' assets. "Final Regulation Relating to the Definition of Plan Assets," 51 FR 41262, 41263 (November 13, 1986). As the Department stated:

> It would appear to be inconsistent with the broad functional definition of "fiduciary" in ERISA if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rule of the Act by the interposition of a separate legal entity between themselves and the plans.

Id. Accordingly, for the same reason that any investment advisor to the investment manager of a single fund or a participant or beneficiary is considered as rendering investment advice to the underlying plan, e.g., Interpretative Bulletin 96-1; 29 CFR § 2509.96-1; see also 74 Fed. Reg. 3822, 3824, investment advice to the manager of a fund that pools the assets of multiple plans and is a fiduciary to each plan, would be subject to the same regulatory test under § 2510.3-21(c)(1) as correctly applied by this Court previously. In re Beacon Associates Litig., 745 F. Supp. 2d at 425; accord Advisory Opinion No. 95-17A, 1995 WL 406911, at *966 (June 29, 1995) (noting that "Banc One would be a fiduciary to a plan to the extent that it serves as … investment advisor … of a collective investment fund in which client plans invest").

Ivy, as an investment advisor to a fiduciary of plans (BAMC), cannot hide behind the Beacon Funds' status as a separate legal entity to avoid the impact of its investment advice on each plan's investments. For these funds with significant plan investments, "there is [a] substantial expectation that the assets of the entity will be managed in furtherance of the investment objectives of the plan investors." Proposed Regulation Relating to the Definition of Plan Assets, 50 Fed. Reg. 961-01, 966, 1985 WL 82937 (Jan. 8, 1985). It logically follows that any investment advisor hired by a fiduciary of a pooled vehicle to provide investment advice concerning the managed pool of assets will be tailored to the fiduciary's objectives for that pool of assets. The statute, the Secretary, and the case law all contemplate the fact that plans can choose to be represented by a fiduciary of pooled assets, such as BAMC for the Beacon Funds, and an investment advisor such as Ivy can be a fiduciary by virtue of advising such a fiduciary of the pooled assets. E.g., 29 U.S.C. § 1132(a)(2)-(3); 29 C.F.R. § 2510.3-2 1(c)(1) ("arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan") (emphasis added); Advisory Opinion No. 84-04A, 1984 WL 23419, at *3 (January 04, 1984) ("we assume that RCB renders investment advice as defined in section 3(21)(A)(ii) of ERISA and regulation 29 CFR 2510.3-21(c) because the consulting services and recommendations it provides to a plan, will in fact be relied upon as a primary basis for either the longer range strategic decisions or the more immediate allocation decisions that are made by the plan, or by the plan's fiduciary") (emphasis added).

Any other conclusion would undermine ERISA's purposes. The agreements between Ivy and BAMC, along with the Beacon Funds' promotional materials, heavily advertise the Beacon Funds' reliance on Ivy as guiding its particular investments and Ivy's contribution to their pooled services. The Ivy Defendants' fees were also structured as a cut of each investment made by the

Beacon Funds for its plan clients based on Ivy's investment recommendations. Beacon Assocs. Litig., 745 F. Supp. 2d 425-26 (citing agreements). This fee structure recognized the reality that the individual plans were the true recipients of Ivy's services to BAMC and the Funds.[7]

Furthermore, the Ivy Defendants' juxtaposition of the Secretary's regulations as somehow in conflict ignores the basic tenet of regulatory interpretation that the specific takes precedence over the general. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007). In 29 C.F.R. § 2510.3-21(c)(1), the Secretary discusses the very general rule for the fiduciary test as applicable to investment advisors to plans. In 29 CFR § 2510.3-101(a)(2), the Secretary specifically addresses the application of the fiduciary obligations to pooled investment vehicles by treating those vehicles as "look through" entities, without emphasis on their separate corporate status. Proposed Regulation, 1985 WL 82937, at *962-63 (calling the regulation a "look through" provision for the application of ERISA's requirements). The specific rules in this section, including the rule that "any person who provides investment advice with respect to [assets in the pooled vehicle] for a fee (direct or indirect), is a fiduciary of the investing plan," controls or guides the general test for fiduciary status of "investment advisors." See Long Island Care, 551 U.S. at 170. Such a reading is consistent with the statute. See 29 U.S.C. 1002(21)(A) (recognizing that investment advice creates fiduciary status if it is advice "with respect to any moneys or other property of such plan" and not requiring that such advice be directed towards any specific plan). Permissible constructions of governing statues, when authoritatively rendered

[7] Ennis v. Montemayor, 14 F. Supp. 2d 379, 388-89 (S.D.N.Y. 1989), is inapposite. The primary holding was that an advisor to a pooled vehicle that did not hold plan assets under the regulations was not a fiduciary, and the secondary holding was that there was no alternative basis to deem the advisor to be a fiduciary as it did not directly advise the plans. Id. Because the Beacon Funds are alleged to satisfy the regulations and are deemed to hold plan assets, the first holding is inapposite, and the Plaintiffs need not rely on an alternative basis for fiduciary status based on any alleged direct advice to plans.

by the agency (including constructions made in litigation through a brief), are entitled to deference. E.g., Talk Am., Inc. v. Michigan Bell Tel. Co., 131 S.Ct. 2254, 2261 (2011).

This reasonable construction does not set up an "inherent conflict" for the Ivy Defendants. See Ivy Beacon Class Cert. Opposition, at 70. The Ivy Defendants do not identify any particular conflict that caused them to provide the investment advice to invest in the Madoff investment schemes, or explain why they would have (or should have) acted with greater care if they were giving advice directly to each plan rather than to their collective investment manager. In entrusting the Beacon Funds with plan assets to invest, each plan's trustees, as part of their fiduciary duties, would have determined that pooling assets was beneficial to the plan, and Beacon, in turn, would have sought Ivy's investment advice in its capacity as fiduciary to the individual plans. Ivy was well aware that that the Beacon Funds held plans' assets and that the Beacon Funds and BAMC were fiduciaries with respect to the plans' investments. Because the long-term health of the pooled funds as a whole is completely aligned with the plan investors' interests in the prudent management and investment of plan assets, any advice the Ivy Defendants provided to BAMC for the Beacon Funds was tantamount to providing the same advice to the constituent plans. There was, accordingly, no conflict in, or difference between, furthering the Beacon Funds' investment objectives and furthering those of its plan clients.

CONCLUSION

For these reasons, this Court should reject Defendants' stated objections to class certification, and it should not consider (or should reject on the merits) the Ivy Defendants' collateral attack on this Court's previous ruling regarding Ivy's fiduciary status.

Respectfully submitted,

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