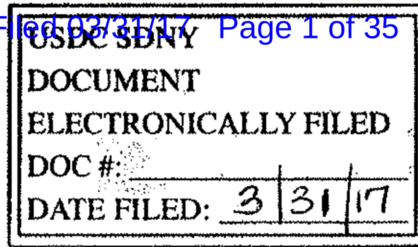
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE J.P. MORGAN STABLE VALUE FUND ERISA LITIGATION

12-CV-2548 (VSB)

MEMORANDUM & OPINION

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VERNON S. BRODERICK, United States District Judge:

Plaintiffs bring claims pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), alleging that Defendants breached their fiduciary duties and engaged in transactions prohibited by ERISA. Before me is Plaintiffs' motion for certification of a class and two subclasses under Federal Rules of Civil Procedure 23(a) and 23(b)(1), or in the alternative, 23(b)(3), and for appointment of class counsel. (Doc. 201.) Defendants J.P. Morgan Chase & Co., JPMorgan Chase Bank N.A., J.P. Morgan Investment Management Inc. a/k/a J.P. Morgan Asset Management ("JPMAM"), and J.P. Morgan Retirement Plan Services (collectively, Defendants or "JPMC") oppose the motion. (*See* Doc. 240.) For the reasons stated below, Plaintiffs' motion, (Doc. 201), is GRANTED, the proposed class, the two proposed subclasses and a third subclass, the Caterpillar Subclass (defined below) are hereby certified pursuant to Rules 23(a) and 23(b)(3), and The Law Offices of Michael M. Mulder and Schneider Wallace Cottrell Konecky & Wotkyns LLP are appointed as co-lead class counsel pursuant to Rule 23(g).

I. Factual Background

A. *Parties and Claims*

Plaintiffs are investors who participated in various 401(k) retirement plans and allocated a portion of their retirement savings through those plans to certain stable value funds (the "Stable Value Funds") sold and/or managed by JPMC. The named plaintiffs, of which there are twelve, invested in five of JPMC's stable value funds through nine 401(k) retirement plans, each overseen by a different employer plan sponsor. (CAC ¶¶ 24-36; *see also* Stangle Rpt. ¶ 15.)[1] Plaintiffs seek to represent participants in more than 300 retirement plans which were invested in 78 Stable Value Funds. (Stangle Rpt. ¶ 15.)

Plaintiffs allege that Defendants violated ERISA in two fundamental ways. First, Plaintiffs allege that JPMC managed Plaintiffs' investments imprudently in violation of its fiduciary duties by causing its Stable Value Funds to invest heavily in the Intermediate Bond Fund ("IBF") and the Intermediate Public Bond Fund ("IPBF"). (Kim Decl. Ex. S.)[2] JPMC managed the IBF and IPBF in the same way and invested them both in risky, highly leveraged assets, including, among other things, mortgage-related assets. (Pomerantz Reb. ¶ 1;[3] CAC ¶¶ 254-59). Second, Plaintiffs allege that the JPMC entities, as fiduciaries for the relevant plans and their participants and beneficiaries, breached their obligations under ERISA §§ 404(a)(1)(B), 404(a)(1)(C), and 404(a)(1)(A) to comply with the duties of prudence and diversification and to discharge their duties solely in the interests of plan participants and beneficiaries, and for the

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[1] "CAC" refers to the Consolidated and Amended Complaint. (Doc. 182.) "Stangle Rpt." refers to the Rebuttal Expert Report of Bruce E. Stangle, Ph.D, (Doc. 240-1), which is attached as Exhibit A to Defendants' Memorandum of Law in Opposition to Motion for Class Certification ("Ds' Opp."). (Doc. 240.)

[2] "Kim Decl." refers to the Declaration of Jason H. Kim in Support Of Plaintiffs' Motion for Class Certification Re: Consolidated and Amended Complaint. (Doc. 204.)

[3] "Pomerantz Reb." refers to the Rebuttal Expert Report of Steve Pomerantz, Ph.D. (Doc. 240-3.)

exclusive purpose of providing benefits to the plan participants and beneficiaries. (CAC ¶¶ 260-65.)

Plaintiffs also claim that the JPMC entities engaged in transactions prohibited by ERISA §§ 406(a)(1)(A), 406(a)(1)(D), and 406(b)(1)-(3), (CAC ¶¶ 266-79), and the proposed JPMorgan Stable Value Fund (the "ACSAF/JPM Stable Value Fund") subclass Plaintiffs make additional claims against all Defendants for engaging in transactions prohibited by those provisions, (*id.* ¶¶ 280-92). Finally, Plaintiffs plead in the alternative that the JPMC entities other than J.P. Morgan Chase & Co. are liable under ERISA § 405(a) for knowing participation in a breach of fiduciary duty. (*id.* ¶¶ 293-95.)

B. *Stable Value Funds*

Stable value funds are common investments for participants in 401(k) retirement plans. According to the Stable Value Investment Association, as of 2012 stable value funds were offered in roughly half of all 401(k) plans and accounted for $701.3 billion assets under management. (Kim Decl. Ex. A, at 5.) Stable value funds are structured to protect against interest rate volatility, are considered conservative and low risk investments compared to other investments offered in 401(k) plans, (*see e.g.*, Kim Decl. Ex. A, at 5, 12; *see also, e.g.*, *id.* Exs. E, F; Pomerantz Rpt. ¶ 10[4]), and typically are offered as a "low risk, liquid" option under ERISA, *see* 29 C.F.R. § 2550.404c-1, (*see* Kim Decl. Ex. B). JPMC stated guidelines for stable value fund management are consistent with these characteristics. (*See, e.g.*, Kim Decl. Exs. G-I.) JPMC's fund management objectives with respect to at least some of its Stable Value Funds were to "protect the principal balance of participant accounts" and to "generate stable, positive

[4] "Pomerantz Rpt." refers to the Preliminary Expert Report of Steve Pomerantz, PhD, (Docs. 209-4-209-6), filed with the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification re: Consolidated and Amended Complaint ("Ps' Mem."). (Doc. 209.)

book value returns that exceed those of alternative principal protection vehicles, such as money market funds, during normal market conditions," as well as to outperform a specific benchmark. (*See* Kim Decl. Exs. G, H, I, J.)

Stable value funds are often compared to money market funds, but assume certain risks not present in money market funds—most pertinently, interest rate risk. (Pomerantz Rpt. ¶ 10.) However, stable value funds are able to guarantee redemption of the investor's principal and accrued interest at book value[5] through what is called an insurance "wrap," which is provided by a third-party insurer. (*Id.* ¶ 19.) To protect investors against volatility, stable value funds amortize over time the difference between the book value and market value of the fund's underlying assets through a crediting rate formula. (*Id.* ¶ 18.) Each insurance "wrap" contract has its own crediting rate formula, which determines the amount of interest paid to investors and is based on the returns paid by the underlying securities, fees, and periodic adjustments due to the difference in book and market value. (*Id.* ¶ 20; Stangle Rpt. ¶ 23.) "The wraps or 'benefit responsive contracts' are the common denominator among stable value funds which provide the prized principal preservation." (Kim Decl. Ex. D.) To protect against loss of principal, wrap contracts often contain investment guidelines—to be followed by the investment manager for investing in various fixed income securities—for wrapped portfolios. (Stangle Rpt. ¶¶ 22, 56.) Although wrapped assets comprise a substantial portion of stable value funds' investments, (*see* Kim Decl. Ex. F), stable value funds do not invest exclusively in wrapped portfolios, but instead invest in other assets such as short term investment funds ("STIFs") and guaranteed investment contracts ("GICs"), (Stangle Rpt. ¶ 22). Each of the Stable Value Funds at issue in this case had a wrapped asset portfolio, also known as a synthetic GIC, as well as an STIF. (*Id.* ¶ 22, 32.)

[5] The initial price of a security is often known as the book value of the security. (Pomerantz Rpt. ¶ 120.)

Some also had traditional GICs. (*Id.*)

C. *The 78 JPMC Stable Value Funds*

The Stable Value Funds offered by JPMC at issue in this case are structured in two ways: as a separately managed account ("SMA"), which is a stable value fund established and managed for one 401(k) plan, or as a commingled fund, which is a stable value fund composed of pooled assets from a number of 401(k) plans. (Kim. Decl. Ex. A, at 5; Stangle Rpt. ¶ 21.) Seventy-six of the JPMC Stable Value Funds were SMAs and two, the Stable Value Asset Fund ("SAIF") and the JPMorgan Stable Value Fund (the "ACSAF/JPM Stable Value Fund") were commingled funds. (Stangle Rpt. ¶ 27, Ex. 1; *see also* CAC ¶ 2; Ps' Mem. 6-7.) The proposed subclasses relate to the SAIF and the ACSAF/JPM Stable Value Fund. Each of the 78 Stable Value Funds invested heavily in the IBF and, in the case of the ACSAF/JPM Stable Value Fund, the IPBF, (Kim Decl. Ex. S; Ds' Opp. 10), both of which were managed by JPMC, (Kim Decl. Ex. R, at 8-9). Victoria Paradis, Managing Director and Head of the Stable Value Fund Management Group at JPMC testified that the "common denominator" across the 78 Stable Value Funds was their investment in IBF, (Kim Decl. Ex. S), and Paradis estimated that, in the aggregate, approximately ████ of the Stable Value Funds' assets under management were invested in IBF. (Kim Decl. Ex. S.) The precise level of any given Stable Value Fund's investment in the IBF and IPBF varied over time. (Pomerantz Reb. ¶¶ 4-8.)

The IBF and IPBF in turn invested in approximately 4 "sub funds" which were each commingled funds also managed by JPMC. (Kim Decl. Ex. R; Pomerantz Rpt. ¶¶ 37, 45.) JPMC's investment strategy involved: 1) investment, through the IBF, in the "sub funds" which owned mortgage-backed securities (the IPBF did not invest in the same Mortgage Private Placement Fund); and 2) use of significant margin by both the IBF and IPBF. (Pomerantz Rpt.

¶ 30.) Because JPMC controlled the investment strategy at the IBF and IPBF level (as well as the sub funds in which they invested), JPMC effectively managed most of the assets of the 78 Stable Value Funds without needing to actively manage each individual stable value fund. (*Id.* ¶ 28.)

D. *JPMC's Alleged Breaches of Fiduciary Duties and Resulting Injury to Class Members*

Plaintiffs allege that because of JPMC's imprudent investment strategies, the IBF lost ██ ████ in market value from October 2007 through September 2009 compared to its benchmark which is the Lehman Intermediate Aggregate Index, later known as the Barclays Intermediate Aggregate Index. (Pomerantz Rpt. ¶ 78; *see also, e.g.*, CAC ¶¶ 15-16.) Plaintiffs argue that there is a direct link between this market value loss and the losses experienced by investors in JPMC's Stable Value Funds resulting from decreased crediting rates.[6] (Pomerantz Reb. ¶¶ 12-23.) According to Plaintiffs, the decline in value of the IBF and IPBF's investments meant that the ratio of market value to book value dropped substantially—to between ████████ (compared with 95 percent for the average stable value fund). (Ps' Mem. at 13.)

E. *Proposed Class, Sub-classes and Class Counsel*

Plaintiffs seek to certify the following class:

> All participants of ERISA plans, as well as beneficiaries of those plans, who were invested directly or indirectly in any JPM Stable Value Fund that invested in the JPM Intermediate Bond Fund and/or the Intermediate Public Bond Fund between January 1, 2009 and December 31, 2010 and whose stable value fund investment performance underperformed the Hueler index or similar objective benchmark. Excluded from the Class are the jurists to whom this case is assigned, as well as their respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter, as well as their officers and directors; any person, firm, trust, corporation, officer, director, or other individual or entity in which a Defendant has a controlling interest or that is related

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[6] Crediting rates are reset periodically, (Stangle Rpt. ¶ 23), and one way to more closely reconcile market value and book value is to lower crediting rates, (Pomerantz Rpt. ¶¶ 20-22; *see also id.* ¶¶ 85, 90).

> to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party.

(Doc. 201.) In addition, Plaintiffs seek to certify two subclasses.[7] The first proposed subclass—the "SAIF Subclass"—is defined as follows:

> All participants of ERISA plans, as well as beneficiaries of those plans, who were invested directly or indirectly in the JPM Stable Asset Income Fund ("SAIF") from between January 1, 2009 and December 31, 2010, and whose stable value fund investment underperformed the Hueler Index or similar objective benchmark. Excluded from the Class are the jurists to whom this case is assigned, as well as their respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter, as well as their officers and directors; any person, firm, trust, corporation, officer, director, or other individual or entity in which a Defendant has a controlling interest or that is related to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party.

(*Id.*) The second proposed subclass—the "ACSAF/JP Morgan Stable Value Fund Subclass"—has a class period that begins on September 17, 2007. (*Id.*) The ACSAF/JP Morgan Stable Value Fund Subclass is defined as follows:

> All participants of ERISA plans, as well as beneficiaries of those plans, who were invested directly or indirectly in the American Century Stable Asset Fund [("ACSAF")] immediately before JPMAM took over the Fund and received its assets in the ACSAF/JPM Stable Value Fund on or about September 17, 2007 and continuing to December 31, 2010, and whose stable value fund investment underperformed the Hueler Index or similar objective benchmark. Excluded from the class are the jurists to whom this case is assigned, as well as their respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter, as well as their officers and directors; any person, firm, trust, corporation, officer, director, or other individual

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[7] As explained in detail below, (*see infra* Section 4.A.3), in light of certain potential defenses regarding the Caterpillar Plan and to facilitate classwide treatment of the same, I have certified a third subclass, hereinafter referred to as the "Caterpillar Subclass" with the following definition: "All participants of the Caterpillar Plan, as well as beneficiaries of those plans, who were invested directly or indirectly in JPM's Caterpillar Stable Principal Fund or any other JPM Stable Value Fund that invested in the JPM Intermediate Bond Fund and/or the Intermediate Public Bond Fund between January 1, 2009 and December 31, 2010 and whose stable value fund investment performance underperformed the Hueler index or similar objective benchmark. Excluded from the Class are the jurists to whom this case is assigned, as well as their respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter, as well as their officers and directors; any person, firm, trust, corporation, officer, director, or other individual or entity in which a Defendant has a controlling interest or that is related to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party."

> or entity in which a Defendant has a controlling interest or that is related to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party.

(*Id.*)

Finally, Plaintiffs seek an order appointing The Law Offices of Michael M. Mulder and Schneider Wallace Cottrell Konecky & Wotkyns LLP as co-lead class counsel pursuant to Federal Rule of Civil Procedure 23(g). (*Id.*)

II. Procedural History

This action was initiated on April 3, 2012, when Plaintiff Richard Whitley ("Whitley") filed his complaint. (Doc. 1.)[8] Five related actions were filed between July 11, 2013 and September 19, 2014.[9] In the more than three years since the first case was filed the parties have filed numerous motions, including a motion to consolidate, (*see* Doc. 130). With that motion pending, on December 8, 2014, the parties agreed to consolidate all six actions and to file a consolidated complaint. (*See* Docs. 178, 179.)

Plaintiffs filed their third amended complaint, the Consolidated and Amended Complaint, on December 16, 2014. (Doc. 182.) On January 13, 2015, I entered the parties' stipulated scheduling order that, among other things, set deadlines for discovery (including with respect to class-related discovery) and for briefing on Plaintiffs' motion for class certification. (Doc. 191.) On February 10, 2015, Plaintiffs filed their class certification motion and supporting declarations and memorandum of law, (*see* Docs. 201, 202, 204, 209), and following class-related discovery,

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[8] This case was originally assigned to Judge John G. Koetl, and was reassigned to me on January 31, 2014.

[9] One of the cases, *Knee v. J.P. Morgan Retirement Plan Services, LLC*, No. 13-CV-6337, was filed in this District. Two of the cases, *Evans v. JPMorgan Chase Bank, N.A.*, No. 14-CV-2276 and *Stolwyk v. JP Morgan Chase Bank, N.A.*, No. 14-CV-2273, were filed in the Western District of Missouri. Two of the cases, *Adams v. J.P. Morgan Retirement Plan Services, LLC*, No. 14-CV-7593 and *Ashurst v. J.P. Morgan Retirement Plan Services, LLC*, No. 14-CV-7594, were filed in Missouri Circuit Court and were removed to the Western District of Missouri. The four Missouri cases were transferred to this Court between April and September 2014.

on May 27, 2015, Defendants filed their memorandum in opposition to Plaintiffs' class motion,[10] (Doc. 240), and on June 26, 2015, Plaintiffs filed their reply memorandum, (Doc. 250). Both parties have submitted expert reports in support of their respective positions.[11] On February 15, 2017, Plaintiffs submitted a letter providing supplemental authority in further support of their motion for class certification, (Doc. 372), and Defendants submitted a response letter on February 17, 2017, (Doc. 373).

III. Applicable Law

A. *Class Certification*

A "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). For the exception to apply to any given case, the plaintiffs must "affirmatively demonstrate" compliance with Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 350. Plaintiffs "bear[] the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 323 (S.D.N.Y. 2012) (party seeking certification must show by a preponderance that proposed class or subclass meets each requirement under Rule 23). These requirements "effectively limit . . . class claims to those fairly encompassed by the named plaintiff[s'] claims." *Wal-Mart*, 564 U.S. 349 (internal quotation marks omitted).

[10] On April 10, 2015, prior to Defendants submitting their opposition to Plaintiffs' class motion, the parties stipulated to the dismissal of an additional defendant, JPMAC Holdings Inc. (Doc. 230.)

[11] In accordance with the briefing schedule set in my May 3, 2016 memo endorsement, (Doc. 327), as modified at the May 13, 2016 pre-motion conference, (*see* Dkt. Entry May 13, 2016), the parties briefed their respective motion for summary judgment, (*see* Docs. 330, 340), and those motions are now pending.

Plaintiffs must demonstrate compliance with each of the Rule 23(a) requirements and at least one subsection of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). In evaluating motions for class certification courts first examine the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, and the failure to meet any one of these requirements means that the class may not be certified. *See id.* at 613-14. If the requirements of Rule 23(a) are met, courts next determine whether the proposed class fits into one of the categories of class actions described in Rule 23(b). In addition, as part of this process a court also may certify a subclass, or subclasses, if the subclass meets the requirements of Rule 23(a) and 23(b). *See* Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are treated as a class under this rule.").

"Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" under the rule, *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997); however, a court's evaluation of the Rule 23 prerequisites is "rigorous" and frequently may "overlap with the merits of the plaintiff's underlying claim," *Wal-Mart*, 131 S. Ct. at 2551-52. This is because a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff[s'] cause of action." *Id.* (internal quotation marks omitted); *see Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (class inquiry frequently and appropriately involves consideration of the merits). Plaintiffs must provide "enough evidence, by affidavits, documents or testimony" to satisfy the court that each Rule 23 requirement has been met. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*In re IPO*"). Although plaintiffs have the burden of demonstrating compliance with Rule 23, doubts concerning the propriety of class certification should be resolved in favor of class certification. *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 275 (S.D.N.Y. 2008) ("If there is to be

an error 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." quoting *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968)); *see Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 464 (2d Cir. 2013) (noting that, on appellate review, less deference is afforded a decision denying class certification than to a decision granting certification).

B. *ERISA and Breach of Fiduciary Duty*

To state a claim for breach of fiduciary duty under ERISA requires demonstrating that the defendant was: (1) a fiduciary; (2) acting in his capacity as a fiduciary; and (3) who breached his fiduciary duty. *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 353 (S.D.N.Y. 2009).[12] Plaintiffs also must prove that Defendants' breaches caused their losses. *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 99 (2d Cir. 1998).

ERISA imposes a "prudent man" standard on fiduciaries entrusted with the administration of employee benefits plans. *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Invest. Mgmt. Inc.*, 712 F.3d 705, 715 (2d Cir. 2013) ("*Morgan Stanley*") (citing 29 U.S.C. § 1104(a)(1)). This standard requires that fiduciaries discharge their duties "solely in the interest of the participants and beneficiaries" and imposes a duty to act "for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the [employee benefits] plan;" a duty of prudence; a duty of diversification; and a duty to act "in accordance with the documents and instruments governing the [respective employee benefits] plan insofar as such

[12] A fiduciary is any individual or entity that "'exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,' or 'has any discretionary authority or discretionary responsibility in the administration of such plan.'" *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. at 354 (quoting 29 U.S.C. § 1002(21)(A)).

documents and instruments are consistent with other portions of ERISA." *Id.* (internal quotation marks and alterations omitted) (quoting 29 U.S.C. § 1104(a)(1)). These obligations have been referred to as "the highest known to the law." *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir. 2007) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). A fiduciary that breaches these obligations "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a).

IV. <u>Discussion</u>

JPMC argues that the Plaintiffs' proposed class and subclasses fail to satisfy the requirements for class certification set forth in Rule 23. JPMC challenges each requirement of Rule 23(a) except numerosity and argues that Plaintiffs do not satisfy any subdivision Rule 23(b). I address each requirement in turn.

A. *Rule 23(a) Prerequisites*

Federal Rule of Civil Procedure 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if" the numerosity, commonality, typicality, and adequacy prerequisites are met. Numerosity requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Commonality means that "there are questions of law or fact common to the class." *Id.* 23(a)(2). Typicality ensures that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id.* 23(a)(3). Adequacy means that "the representative parties will fairly and adequately protect the interests of the class." *Id.* 23(a)(4). Although not specifically enumerated in Rule 23(a), courts also imply a requirement of "ascertainability," *In re IPO.*, 471 F.3d at 30, which requires that the class be definite enough for a court to determine

whether a particular individual is a member. *See Bd. of Trs. the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 269 F.R.D. 340, 345-46 (S.D.N.Y. 2010) ("*AFTRA*").

1. Numerosity

As a general rule, courts find that the numerosity requirement is satisfied if a proposed class comprises 40 or more members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998). Defendants do not dispute that Plaintiffs' proposed class and subclasses meet the numerosity requirement set forth in Rule 23(a)(1). (*See generally* Ds' Opp.) The proposed class members likely number in the hundreds of thousands. (*See* Ps' Mem. 16-17 & n.42; *see also* Ds' Opp. 1 ("Plaintiffs seek certification of a class of over 300,000 participants . . . ."); Kim Decl. Ex. C.) The proposed subclasses, made up of participants in two commingled funds and a separate SMA, each likely contain thousands of participants. (*See, e.g.*, Kim Decl. Exs. F, Q; Ds' Opp. Ex. F.) In light of the fact that the proposed class and subclasses vastly exceed the threshold for presumptively satisfying the numerosity requirement (and because joinder would be impracticable), I find that Plaintiffs have demonstrated numerosity by a preponderance of the evidence. *See Consol. Rail Corp.*, 47 F.3d at 483 (finding that numerosity satisfied whether class consisted of 300 or 700 members, because either number "vastly" exceeds the presumptive 40 member threshold).

2. Commonality and Typicality

Although it is true that a single common question satisfies Rule 23(a)(2), the commonality requirement is not satisfied by the mere existence of *any* single common issue; rather, a common issue of law or fact that is sufficient to satisfy Rule 23(a)(2) is one that is "capable of classwide resolution . . . mean[ing] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*,

564 U.S. 350. "In other words, the relevant inquiry is whether a classwide proceeding is capable of 'generat[ing] common *answers* apt to drive the resolution of the litigation.'" *Jacob v. Duane Reade, Inc.*, 602 F. App'x 3, 6 (2d Cir. 2015) (summary order) (quoting *Wal-Mart*, 564 U.S. at 350 (emphasis in original)).

In some cases, such as this one, the "commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining . . . whether the named plaintiff[s'] claim[s] and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 564 U.S. at 349 n.5 (internal quotation marks omitted); *accord Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015). "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." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir. 2007) (internal quotation marks omitted).

Typically, "the question of defendants' liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries.'" *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 74 (S.D.N.Y. 2006) (quoting *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002)). Plaintiffs argue that there is no reason to deviate from this general principle in this case because the purported breaches of fiduciary duty relate to investments in the IBF and IPBF which is common to all class members, across each individual Stable Value Fund, SMAs, and the commingled funds. (Ps' Mem. 12, 17-20; Ps' Reply Mem. 2.) Thus, according to Plaintiffs, there are common questions of law and fact and their claims are typical of the class because the key issues with respect to fiduciary duty liability under

ERISA all relate to JPMC's management of the IBF and IPBF.

Plaintiffs identify multiple common questions that they argue exist and drive this litigation. Specifically, Plaintiffs claim that relevant common issues include whether: (1) JPMC's overall stable value strategy was prudent in light of the "character and aims" of the stable value funds; (2) specific investment strategies with respect to the IBF and IPBF were prudent in light of the "character and aims" of stable value funds; (3) JPMC's investment of IBF funds in commercial private mortgages involved self-dealing transactions prohibited by ERISA; (4) Defendants breached the duty of loyalty under ERISA; and (5) the stable value investment strategies employed by Defendants caused injury to the class. (Ps' Mem. 18-19.)

Defendants argue that Plaintiffs cannot demonstrate commonality or typicality pursuant to Rule 23(a)(2), 23(a)(3), or 23(b)(3) because breach of fiduciary duty, causation, and damages cannot be resolved on a classwide basis. (Ds' Opp. 2-3.) First, Defendants argue that Plaintiffs are improperly attempting to "challeng[e] a portion of an investment option in isolation" and emphasize that each of the 78 Stable Value Funds must be evaluated as a whole and on a fund-by-fund basis, not solely with respect to their level of investment in IBF and IPBF. (Ds' Opp. 9-13.) According to Defendants, a wholistic, fund-by-fund analysis of each Stable Value Fund, is necessary under Rule 23(a), but when this approach is applied it defeats commonality and typicality because the 78 Stable Value Funds were invested in the IBF and IPBF to materially different degrees. (*Id.*) Additionally, Defendants argue that Plaintiffs cannot demonstrate commonality or typicality because each Stable Value Fund was distinct with regard to: (1) the timing of its investment in IBF and/or IPBF, (*id.* 13-16), and (2) its risk tolerance, goals, and investment guidelines, (Ds' Opp. 16-18).[13]

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[13] In addition, although the 78 Stable Value Funds had varying levels of investments in the IBF and IPBF, these differences raise issues of "degree rather than ones of kind," (Pomerantz Reb. ¶ 7), which can readily be assessed

With respect to the timing argument, Defendants argue that certification is inappropriate because the challenged investments predate certain Stable Value Funds; however, this ignores the fact that there is a lag time between when an investment decision is made and when investors receive a gain or loss from that decision, (*see* Kim Decl. Ex. D at 2 (noting that "the [Stable Value F]und's rate of return can lag changes in market interest rates due to the smoothing mechanisms of the wrap contract"); *see also* Pomerantz Reb. ¶¶ 8, 24). Accordingly, the modest temporal mismatch between the time when an investment decision is made and the time when it allegedly causes damage is inherent to the structure of any stable value fund, including the 78 Stable Value Funds here.

With respect to Defendants' argument that the 78 Stable Value Funds must be evaluated as a whole and on a fund-by-fund basis, the parties focus on the ERISA-implementing regulations that require a fiduciary give "appropriate consideration" to circumstances relevant to its investment duties, including that an investment decision "is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan." 29 C.F.R. § 2550.404a-1(b)(2)(i). Defendants argue that the Second Circuit decision in *Morgan Stanley*, which interprets the above ERISA provision, precludes certification here. (*See* Ds' Opp. 9-10.) In *Morgan Stanley*, the district court dismissed plaintiffs' ERISA suit for failure to state a claim where plaintiffs alleged defendant breached its fiduciary duty by investing a portion of the plan assets in certain mortgage backed securities. 712 F.3d at 721. The Second Circuit affirmed and stated "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *Id.* at 717-18. The Defendants read this passage as

when calculating damages.

precluding them being found liable for a breach of fiduciary duty based upon an assessment of the Stable Value Funds' level of investment in IBF and IPBF in isolation from the of the portfolio. (Ds' Opp. 10-12.)

In response, Plaintiffs point to the parenthetical "or, where applicable, that portion of the plan portfolio," 29 C.F.R. § 2550.404a-1(b)(2)(i), and argue that IBF and IPBF fall into a "portion of the plan portfolio with respect to which," JPMC had fiduciary duties. (Ps' Reply Mem. 1-2.) Moreover, Plaintiffs point out that IBF and IPBF were each "actively-managed by JPMC as a distinct stable value fund, regardless of the fact that they were used as part of other portfolios." (*id*. at 2.) Additionally, Plaintiffs distinguish *Morgan Stanley* on the basis that, unlike here, the portfolio in that case did not involve a separately managed commingled fund that was a severable part of the portfolio. (*Id*. at 3 n.1.) I find that Plaintiffs have the better of the argument.

As an initial matter, the court in *Morgan Stanley* was evaluating and considering a motion to dismiss for failure to state a claim, not a class certification motion. *See* 712 F.3d at 717. Here, although Defendants initially filed a motion to dismiss, (Doc. 49), after Plaintiffs amended their complaint, Defendants answered, (Doc. 103). The question before me on Plaintiffs' motion for class certification is whether the putative class members share a common theory of liability. I find that Defendants have put forward a common theory of liability premised on an allegedly imprudent investment in IBF and IPBF by each of the 78 Stable Value Funds. (*See* Ds' Opp. 10 (acknowledging that each Stable Value Fund invested in IBF/IPBF); Ps' Reply Mem. 3 (emphasizing that the breach of fiduciary duty relates to "JPM's imprudence with respect to the IBF/IPBF standing alone").)

I am also not persuaded by Defendants' argument that the risk tolerances, investment

goals, and guidelines of the 78 Stable Value Funds preclude a finding of commonality and typicality. (*See* Ds' Opp. 16-18.) Defendants analogize this case to *Bd. of Trs. of S. Cal. IBEW-NECA v. Bank of N.Y. Mellon Corp.*, 287 F.R.D. 216 (S.D.N.Y. 2012) ("*IBEW-NECA*"), where the district court denied class certification. Defendants' reliance on *IBEW-NECA* is misplaced. In *IBEW-NECA*, Judge Berman denied class certification because the proposed class did not satisfy numerosity, classwide issues did not predominate over individual issues, and class action was not a superior method for adjudicating the claims. Judge Berman never reached the issue of whether "there [were] questions of law or fact common to the class" under Rule 23(a)(2) because plaintiff failed to establish numerosity. *Id.* at 225-26 ("Because Plaintiff has failed to establish the numerosity prerequisite under Rule 23(a)(1) (and because joinder is practicable), Plaintiff's motion for class certification is denied, and the Court need not address the remaining requirements of Rule 23(a) or (b)(3)." (internal citations omitted)). Judge Berman then went on to address—essentially in dicta—whether or not plaintiff could satisfy the requirements of Rule 23(b)(3) and stated he "would likely find that individual questions predominate over class-wide issues and that a representative (class) action is not superior to other available methods for adjudicating this controversy." *Id.* at 226. The plaintiff there had also conceded in arguments related to summary judgment that individual issues predominated, and Judge Berman noted that the challenged investments were ten separate Lehman notes, each of which carried different risks on account of their varied "announcement date, principal amount, maturity date, and tenor." *Id.* Moreover, the plaintiffs in *IBEW-NECA* conceded that these differences were "outcome determinative" of their claims. *Id.* Plaintiffs have made no such concessions.

The circumstances here more closely resemble the situation presented in *AFTRA*. The court in *AFTRA* certified a class comprised of separate ERISA retirement plans where plaintiffs

alleged that defendants violated their fiduciary duties. *AFTRA*, 269 F.R.D. at 351. Although the various ERISA plans had "some differences among the guidelines and risk-return profiles," the court held such differences were "irrelevant to the common thread that link[ed] the prudence claims" which was the investment in Sigma MTNs. *Id.* Likewise, here, investments in IBF and IPBF are the common thread linking the proposed class members.

Having undertaken a close examination of the parties' arguments and the evidence before me, I am persuaded that Plaintiffs have met their burden of demonstrating commonality and typicality by a preponderance of the evidence. (*See* Ps' Reply Mem. 5 (setting forth five categories of commonality).)

3. Adequacy

The focus of the adequacy inquiry is on determining whether there are "conflicts of interest between named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S. at 625. In general, class representatives must not have interests that conflict with the interests of other class members, and class representatives and their attorneys must be sufficiently interested in prosecuting—and able to prosecute—the litigation. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). To preclude certification under Rule 23(a)(4), a conflict must be "fundamental." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). When a conflict exists, courts may divide a class into separate subclasses. *See Mazzei v. Money Store*, 288 F.R.D. 45, 56 (S.D.N.Y. 2012).

Defendants acknowledge that the named Plaintiffs each invested in a JPMC Stable Value Fund that was invested in the IBF or IPBF during the relevant time period, (Ds' Opp. 10), but argue that the named Plaintiffs are inadequate class representatives because intra-class conflicts exist regarding: (1) the periods that optimize the alleged damages; and (2) the fact that some

putative class members were "winners" and others were "losers." (Ds' Opp. 34-39.) Defendants also argue that certain named Plaintiffs are inadequate representatives because they are subject to unique defenses. (*Id.* at 33.)

Although certain class members may prefer different class periods, courts in this district have found that issues related to differing preferred damages periods do not preclude certification. *See AFTRA*, 269 F.R.D. at 354 (rejecting defendants' intraclass conflict argument as meritless where supposed conflict centered on "different dates" for calculating damages); *In re Alstom SA Sec. Litig.* 253 F.R.D. at 276 (same); *In re Livent, Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 516 (S.D.N.Y. 2002) (same); *see also Yost v. First Horizon Nat'l Corp.*, No. 08-2293-STA-CGC2011 WL 2182262, at *12 & n.69 (W.D. Tenn. June 3, 2011) ("Many courts have rejected identical arguments that a multitude of optimal imprudent dates is fatal to class treatment.") (collecting cases). Accordingly, I find that any such intra-class conflicts related to damages periods, to the extent any exist, would not be "fundamental," *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d at 35. Furthermore, any future intra-class conflict relating to damages could be mitigated by certifying subclasses if needed pursuant to Rule 23(c)(4). *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141(2d Cir. 2001) (noting that "creating subclasses" is one of a "number of management tools available to a district court to address any individualized damages issues), *overruled on other grounds by In re IPO*, 471 F.3d 24.

Next, Defendants claim that the proposed class cannot be certified because it will be comprised of "plan participants who outperform[ed] a damages benchmark (like the Hueler Index) and those who underperform[ed] the benchmark." (Ds' Opp. 37.) This argument is meritless because the proposed class definition expressly limits class members to those

participants whose investment "underperformed the Hueler Index or similar benchmark," (Ps' Mem. 3). Defendants argue that the facts in *In re Principal U.S. Property Account ERISA Litigation*, No. 4:10-cv-00198-VEG, 2013 WL 7218827, at *33 (S.D. Iowa Sept. 30, 2013), are analogous and support a finding that Plaintiffs do not satisfy the adequacy requirement of Rule 23(a)(4). (Ds' Opp. 38-39.) In *In re Principal*, however, the putative class, as defined, would have included members who suffered losses and also members who enjoyed gains following the challenged conduct of defendants. *In re Principal*, 2013 WL 7218827, at *33. Here, only those participants whose investment underperformed are included in the proposed class and subclasses.

Defendants also argue that class certification is inappropriate because Defendants have certain affirmative defenses, including statute of limitations and releases pursuant to a settlement agreement, as to certain named Plaintiffs. (Ds' Opp. 33-34.) Courts in this circuit have certified classes notwithstanding the purported defects Defendants identify. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 138 (holding that "fact that a defense 'may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones'"), *overruled on other grounds by In re IPO*, 471 F.3d 24; *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 116 (S.D.N.Y. 2010) (holding that defendants' affirmative defense that certain "class members . . . have either been fully compensated . . . or have released their claims . . . . is insufficient to deny class certification"); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 427-28 (S.D.N.Y. 1986) (emphasizing that existence of affirmative defenses regarding statute of limitations is "outside the scope of Rule 23"). Defendants cite *Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 226 F.R.D. 446, 454 (S.D.N.Y. 2005), and argue that the holding there precludes certification here, however, the court in *Weiss* did not hold that the existence of affirmative defenses precludes class certification.

Weiss merely recognized that "affirmative defenses may be considered as a factor in the class certification calculus." *Id.*

Based on the parties' arguments and the evidence before me, I find that any conflict arising from the purported affirmative defenses is not "fundamental," *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d at 35, and, in any event if necessary, can be addressed through subclasses. *See Mazzei v. Money Store*, 288 F.R.D. at 56 (noting that courts have discretion to create additional classes or split a class into subclasses so long as each subclass satisfies the prerequisites of Rule 23(a) and 23(b)).

With regard to Defendants' argument that certain Plaintiffs will be subject to an argument that they released Defendants pursuant to a settlement agreement, I find that those Plaintiffs can be placed into a subclass. Accordingly, named Plaintiffs Duran and Koch can be representatives of the Caterpillar Subclass[14] which will have the following definition:

> All participants of the Caterpillar Plan, as well as beneficiaries of those plans, who were invested directly or indirectly in JPM's Caterpillar Stable Principal Fund or any other JPM Stable Value Fund that invested in the JPM Intermediate Bond Fund and/or the Intermediate Public Bond Fund between January 1, 2009 and December 31, 2010 and whose stable value fund investment performance underperformed the Hueler index or similar objective benchmark. Excluded from the Class are the jurists to whom this case is assigned, as well as their respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter, as well as their officers and directors; any person, firm, trust, corporation, officer, director, or other individual or entity in which a Defendant has a controlling interest or that is related to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party.

Likewise, Defendants' purported statute of limitations defense as to named Plaintiffs Knee,

[14] For the reasons already stated, I find that the Caterpillar Subclass satisfies the commonality and typicality requirements of Rule 23(a). In light of the fact that the Caterpillar Plan had tens of thousands of participants, (Ds' Opp. Ex. F § 6.4), I find that numerosity is satisfied. Finally, the subclass treatment of the Caterpillar Plan resolves any defect with respect to Rule 23(a) adequacy. Accordingly, based on the evidence before me, I find that the Caterpillar Subclass meets each requirement of Rule 23(a).

Murphy, and Hedges and other subclass members of the ACSAF/JPMorgan Stable Value Fund Subclass, as presently structured, can be decided in "one stroke," *Wal-Mart*, 564 U.S. at 350, on the subclass level. *See In re Baldwin-United Corp. Litig.*, 122 F.R.D. at 427-28 (emphasizing that existence of affirmative defenses regarding statute of limitations is "outside the scope of Rule 23"); *Dubin v. E.F. Hutton Grp., Inc.*, No. 88 CIV. 876 (PKL), 1990 WL 105757, at *3 & n.3 (S.D.N.Y. July 20, 1990) (certifying class and declining to rule on statute of limitations issue pending further developments in the litigation); *Mersay v. First Republic Corp. of Am.*, 43 F.R.D. 465, 471 (S.D.N.Y. 1968) (class certified notwithstanding individual questions as to statute of limitations); *see also In re Cmty. Bank of N. Va.*, 622 F.3d 275, 292-93 & n.13 (3d Cir. 2010) (noting that "many courts have refused to consider statute-of-limitations issues at the class certification stage, reasoning that such an inquiry veers impermissibly into whether the named plaintiffs and the class can prevail on their claims") (collecting cases).

Having closely reviewed the parties' arguments and the evidence before me, and with the addition of the Caterpillar Subclass relating to the Caterpillar Plan, I find that Plaintiffs have demonstrated adequacy by a preponderance of the evidence.

4. Ascertainability

The implicit requirement that a class or subclass be ascertainable requires that the class description must be sufficiently definite such that it is administratively feasible for a court to determine, by reference to objective criteria, whether a particular individual is a member of the class. *See AFTRA*, 269 F.R.D. at 345-46, quoting *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008).

First, Defendants argue that the current flexibility regarding the objective benchmark that will serve as the measure of damages precludes certification because, until the benchmark is

ultimately decided, the class members are neither ascertainable nor manageable. (Ds' Opp. 39-40.) Plaintiffs calculate damages as the deviation from the objective benchmark index known as the Hueler Index. (*See* Ps' Mem. 31 n.55.) As Plaintiffs acknowledge, however, another benchmark could be substituted in place of the Hueler Index without changing any underlying methodology. (*Id.*; Pomerantz Reb. ¶¶ 30-31.) Second, Defendants argue that if a different objective benchmark replaces the Hueler Index, "the members of the class will change significantly," which will raise issues regarding due process and res judicata. (Ds' Opp. 39-40.)

Defendants' arguments are unpersuasive. First, whether the Hueler Index or another objective benchmark is ultimately used as the basis upon which to calculate damages, the class members will be readily identifiable as having underperformed the objective benchmark or not. Second, "[i]ndividual class members need not be identified prior to certification, but class membership must be ascertainable prior to the end of the action." *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. at 395-96. Third, the fact that the individuals comprising the class may change as a result of using a different benchmark does not inform the objective ascertainability of the class. Based on the evidence before me, I find that the class and subclass definitions are sufficiently definite and will enable me to determine, by reference to objective criteria, whether a particular individual is a member of the class or a subclass. *See AFTRA*, 269 F.R.D. at 345-46; *see also Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 814 (holding that "reference to the Hueler Index is one reasonable way to exclude from the class any persons who did not experience injury").

Accordingly, Plaintiffs have demonstrated by a preponderance of the evidence that the members of the class and subclasses are ascertainable.

B. *Rule 23(b)*

Because I find that each of the Rule 23(a) requirements is met, I proceed to determining whether the proposed class and subclasses are appropriate for certification under Rule 23(b). Plaintiffs seek certification under Rule 23(b)(1)(B) or in the alternative under Rule 23(b)(3).

1. Certification Under Rule 23(b)(1)(B)

Rule 23(b)(1) has two prongs. Plaintiffs seek certification pursuant to the second prong, under which a class action can be maintained if "prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). (*See* Ps' Mem. 24-26.) This rule frequently applies to protect putative class members in so-called "limited fund cases"—cases in which "numerous persons make claims against a fund insufficient to satisfy all claims." *Amchem Prods.*, 521 U.S. at 614. Courts also consider certification under Rule 23(b)(1)(B) appropriate in certain ERISA fiduciary duty cases where the named plaintiffs bring the claim "in a representative capacity" and are seeking recovery on behalf of the plan as an entity. *See, e.g.*, *In re Beacon Assocs. Litig.*, 282 F.R.D. at 341-42.

Plaintiffs seek certification under Rule 23(b)(1)(B) based on Defendants' breaches of fiduciary duty, which Plaintiffs argue affected all proposed class members similarly. Excluded from the proposed class (and subclasses) are any 401(k) plan participants that invested in the Stable Value Funds but met or exceeded the Hueler Index. (Ps' Mem. 2, 31 n.55.) Defendants argue that Plaintiffs have not shown compliance with Rule 23(b)(1)(B) for three reasons. First, Defendants argue that because breach, causation, and damages depend on individualized proof,

adjudication with respect to one potential class member would not be dispositive of the interests of other members. (*See* Ds' Opp. 29.) Second, Defendants argue that *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), confirmed that plan participants can sue for individual losses, and because Plaintiffs here do just that, as opposed to seeking recovery "on behalf of the plan as an entity," *In re Beacon Assocs. Litig.*, 282 F.R.D. at 341-42, their interests would not be impaired by an adjudication with respect to a different plaintiff's claims. (*See* Ds' Opp. 30-32.) Third, Defendants argue that the Supreme Court's decision in *Wal-Mart* unequivocally concludes that "individualized monetary claims belong in a Rule 23(b)(3)." (Ds' Opp. 31-32, quoting *Wal-Mart*, 564 U.S. at 362.)

I agree; certification of the proposed class and subclasses under Rule 23(b)(1)(B) would not be appropriate in light of the fact that Plaintiffs seek individual monetary damages.

2. Certification Under Rule 23(b)(3)

Certification pursuant to Rule 23(b)(3) requires "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). I analyze each element in turn.

i. <u>Predominance</u>

The Rule 23(b)(3) predominance requirement is more demanding than the commonality requirement under Rule 23(a). *See Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). "The predominance requirement is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108,

118 (2d Cir. 2013) (quoting *IUFCW Local 1776 v. Eli Lily & Co.*, 620 F.3d 121, 131 (2d Cir. 2010)).

To determine whether Plaintiffs have met this burden, I turn to the elements of Plaintiffs' claims. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809-10 (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."). To succeed on their claims, Plaintiffs will have to establish: (1) that JPMC was an ERISA fiduciary who (2) was acting in its capacity as a fiduciary, and (3) breached its fiduciary duty. *See In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d at 353. Additionally, Plaintiffs must prove "some causal link between the alleged breach of [fiduciary] duties and the loss plaintiff seeks to recover." *Silverman*, 138 F.3d at 104. Defendants have conceded the first and second elements with respect to certain accounts, and common proof will either prove or disprove Defendants' role with respect to the Stable Value Funds and the IBF and IPBF. (Ps' Mem. 18.)

With respect to the breach element of Plaintiffs' fiduciary duty claims, Defendants argue that the same defects precluding a finding of commonality and typicality pursuant to Rule 23(a)(2) and (a)(3) also preclude a finding of predominance under the "more rigorous requirements of Rule 23(b)(3)." (Ds' Opp. 9-18.) As set forth above in detail, (*see supra* Section IV.A.2), I find Plaintiffs have put forward a theory of liability premised on allegedly imprudent investment in IBF and IPBF, and that the investments in IBF and IPBF are common to all putative class members, (P's Reply Mem. 9-10). *See AFTRA*, 269 F.R.D. at 349 (holding predominance requirement satisfied where prudence claim dominated by common issues of law and fact including identity of fiduciary and whether it was imprudent to invest in security common to all class members).

Next, Defendants argue Plaintiffs have failed to demonstrate that causation can be proved on a classwide basis because Plaintiffs can only specify what quantum of underperformance is attributable to Defendants' alleged breaches through a fund-by-fund analysis. (Ds' Opp. 19-21.) The court in *State Street* rejected this argument and stated that this issue is more appropriately considered in the context of calculating damages. *See In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 842 F. Supp. 2d 614, 654 n.29 (S.D.N.Y. 2012) (rejecting defendant's argument that plaintiff had "not shown causation because it ha[d] not shown what *portion* of the Plans' losses is attributable to [defendant's] imprudent investment decisions" (emphasis in original) (citing *Silverman*, 138 F.3d at 106 n.1 (Jacobs, *J*., concurring))). I agree and analyze Defendants' argument below with regard to calculating damages.

Defendants also argue that Plaintiffs cannot demonstrate predominance with respect to causation because there are "numerous" other factors—cash inflows and outflows, changes in wrap contracts, varying levels of investment in cash and cash equivalents—that affected the performance of the Stable Value Funds yet had no role in Defendants' alleged breaches. (Ds' Opp. 23.) Plaintiffs concede that factors other than Defendants' breaches influenced the underperformance of the Stable Value Funds as measured against the Hueler Index. (Ps' Reply Mem. 10; Pomerantz Reb. ¶ 34.) Nevertheless, Plaintiffs emphasize that they are only required to show "some causal link," *Silverman*, 138 F.3d at 104, between the underperformance and JPMC's alleged imprudence. (Ps' Reply Mem. 10.) Plaintiffs are correct.

After carefully reviewing the evidence and the parties' arguments, I find that the evidence before me demonstrates a causal link between the alleged breaches of fiduciary duties and the underperformance of the Stable Value Funds relative to the objective benchmark. As a starting point, the "common denominator" among all 78 Stable Value Funds is the fact that each was

invested in IBF. (Kim Decl. Exs. D, S.) According to the head of JPMC's Stable Value Fund Group, in the aggregate, approximately [redacted] of all the assets of all 78 Stable Value Funds were invested in IBF. (Kim Decl. Ex. S.) I also find evidence of a causal link in the fact that IBF primarily owned sub funds which were heavily invested in various types of mortgage backed securities, (Kim Decl. Ex. R; Pomerantz Rpt. ¶¶ 56-57), resulted in IBF losing [redacted] in market value compared to its benchmark, (Pomerantz Rpt. ¶ 78), during the sub-prime mortgage crisis, i.e., between October 2007 and September 2009. Plaintiffs' expert estimates that "[redacted]

[redacted]

[redacted]

(*id.* ¶ 83).

With respect to damages, Defendants argue that Plaintiffs' damages model fails because the model does not account for those factors that are unrelated to Defendants' alleged breaches but caused underperformance. (Ds' Opp. 25-27.) Defendants also argue that Plaintiffs' theory of liability does not comport with their theory of damages because the damages and class periods are not identical. (*Id.* at 27-28.)

The measure of damages in an ERISA case is the difference between what the investment returned and what the investment would have returned had it been managed prudently. *See Donovan v. Bierwith*, 754 F.2d 1049, 1056 (2d Cir. 1985). Individualized issues relating to damages, while relevant to the predominance analysis, are insufficient to defeat class certification where other common issues predominate and provided "the evidence necessary to make out such damages claims, while individual, is easily accessible." *Sykes*, 780 F.3d at 88; *see Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 302 (S.D.N.Y. 2003) ("When liability can be determined on a class-wide basis,

individualized damage issues are not ordinarily a bar to class certification.”).

Both Plaintiffs’ and Defendants’ expert agree that they can calculate damages on the participant level. (*See* Stangle Rpt. ¶¶ 105-06; Pomerantz Rpt. ¶¶ 103-09.) Additionally, the experts can isolate the factors unrelated to Defendants’ alleged breach when calculating damages. (*See* Pomerantz Rbt. ¶ 34 (noting that the “analysis can easily distinguish between crediting rate losses due to each fund’s investment in the IBF/IPBF as compared to losses due to the other factors Dr. Stangle identifies”).) As set forth above, (*see supra* Section IV.A.2), the timing mismatch between when an investment decision was made and when investors experienced damages is inherent in the structure of the Stable Value Funds. (*See* Kim Decl. Ex. D, at 2 (noting that “the [Stable Value F]und’s rate of return can lag changes in market interest rates due to the smoothing mechanisms of the wrap contract”).) Accordingly, I find that Plaintiffs’ damages calculations do not preclude certification. *See Sykes*, 780 F.3d at 88.

Accordingly, I find that Plaintiffs have demonstrated by a preponderance of the evidence that common issues predominate and are capable of classwide resolution.

ii. Superiority

The superiority element of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication. In analyzing that question, the court must consider, among other things: (1) “the interest of the members of the class in individually controlling the prosecution or defense of separate actions;” (2) “the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;” (3) “the desirability or undesirability of concentrating the litigation of the claims in the particular forum;” and (4) “the difficulties likely to be encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3)(A)-(D).

Defendants argue that classwide adjudication would not be superior because of "the highly individualized nature of the proof necessary to establish Plaintiffs' claims," and because the 300 plan fiduciaries are better suited to bring these claims. (Ds' Opp. 32-33.) However, and as set forth in detail above, (*see supra* Section IV.A.2), I find that the evidence before me demonstrates that Plaintiffs' claims can be proven (or disproven) in "one stroke." *Wal-Mart*, 564 U.S. at 350. Here, substituting a single class action for potentially hundreds of thousands of trials in a matter involving substantial common legal and factual issues susceptible to generalized proof will achieve significant economies of "time, effort and expense, and promote uniformity of decision." Fed. R. Civ. P. 23 advisory committee's notes to 1996 amendment. Rule 23(b)(3) class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. *See Amchem Prods.*, 521 U.S. at 617.

Next, Defendants argue that classwide adjudication is not superior because certain named Plaintiffs, including Plaintiff Whitley, are sophisticated parties capable of proceeding in individual actions. (Ds' Opp. 33 n.30.) This argument is unpersuasive and is particularly so here in light of the fact that Defendants stipulated and agreed to consolidation of several separate actions including Plaintiff Whitley's action. In any event, courts have rejected the argument that the presence of more sophisticated class members precludes certification. *See AFTRA*, 269 F.R.D. at 355 (rejecting defendants' argument that sophisticated parties should proceed individually and noting that inclusion of sophisticated plaintiffs could equalize the bargaining power and effectuate a more equitable settlement); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 9 MD 2017 (LAK), 2013 WL 440622, at *5 (S.D.N.Y. Jan. 23, 2013) (holding that plaintiffs' adequately demonstrated superiority where some class members invested "large sums of money"

and others did not).

Additionally, Defendants argue that the class and subclasses will become unmanageable in the event that Plaintiffs switch from the Hueler Index to another objective measure as the basis for calculating damages after the notice and opt-in period. (Ds' Opp. 40.) Defendants' hypothetical scenario in which the due process rights of putative class members are at risk can easily be avoided with foresight. Moreover, the decision as to which objective measure of damages is most appropriate is not a merits issue, and thus Defendants' reliance on *Bolden v. Walsh Construction Co.*, 688 F.3d 893, 895 (7th Cir. 2012) (denying class certification where class definition included embedded reference to issue to be decided at trial), is misplaced.

Accordingly, I find that Plaintiffs have demonstrated by a preponderance of the evidence that proceeding as a class action is superior to other methods of adjudication.

C. *Appointment of Class Counsel Under Rule 23(g)*

Appointment of class counsel is governed by Rule 23(g), which requires me to consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A); *see, e.g.*, *Gatto v. Sentry Servs., Inc.*, No. 13 Civ. 5721 (RMB) (GWG), 2014 WL 7338721, *3 (S.D.N.Y. Dec. 19, 2014); *Laurent v. PricewaterhouseCoopers, LLP*, No. 06-CV-2280 (JPO), 2014 WL 2893303, *5 (S.D.N.Y. June 26, 2014); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 165 (S.D.N.Y. 2008). I may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs request that I appoint interim lead counsel as co-lead class counsel. (Ps' Mem.

32.) In support of their request, Plaintiffs' attorneys have submitted ample documentation of their capacity to "fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(1)(B). Further, they have demonstrated that they have competently litigated numerous class-action lawsuits, including comparable ERISA actions, and bring sufficient resources to this matter. (*See* Decl. Michael M. Mulder, Esq. (Doc. 202).) Defendants do not raise any argument with respect to the appointment of interim lead counsel as co-class counsel.

After consideration of the requirements of Rule 23(g), given their experience and demonstrated knowledge in this area of the law, and in absence of an objection by Defendants, The Law Offices of Michael M. Mulder and Schneider Wallace Cottrell Konecky & Wotkyns LLP will be appointed as co-class counsel.

D. *Class Definition and Class Period*

The class and subclass definitions and class periods set forth above, (*see supra* Section II.E), are hereby adopted.

V. Conclusion

For the foregoing reasons, Plaintiffs' motion for class certification, (Doc. 201), is GRANTED. Richard Whitley, Terry J. Koch, Caroleta M. Duran, Mark D. Grandy, John M. Gates, Scott Newell, Nancy Dye, Rosemary Dotson, John Stolwyk, Michael Knee, Eric M. Murphy, and Clay Hedges are appointed class representatives, and The Law Offices of Michael M. Mulder and Schneider Wallace Cottrell Konecky & Wotkyns LLP are appointed co-class counsel. The Clerk of the Court is directed to close the motion, (Doc. 201).

In light of the parties' representation that class certification pursuant to Rule 23(b)(3) would affect the date by which they are ready for trial, (Doc. 366), the parties are instructed to submit a joint letter by April 21, 2017, setting forth proposed trial dates in October and

November 2017. In addition, I note that I will issue my ruling on the parties' motions for summary judgment by June 30, 2017.

SO ORDERED.

Dated: March 31, 2017
New York, New York

Vernon S. Broderick
United States District Judge