

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**BEACON ASSOCIATES LLC I, BEACON
ASSOCIATES LLC II, ANDOVER
ASSOCIATES, L.P., ANDOVER
ASSOCIATES LLC I, ANDOVER
ASSOCIATES (Q) LLC,**

Plaintiffs,

-vs.-

Civil Action No.
1:14-cv-02294 (AJP)

**BEACON ASSOCIATES MANAGEMENT
CORP.; ANDOVER ASSOCIATES
MANAGEMENT CORP.; INCOME PLUS
INVESTMENT FUND; DAVID
FASTENBERG, TRUSTEE, LONG ISLAND
VITREO-RETINAL CONSULTANTS 401K
FBO DAVID FASTENBERG, ET AL.,**

Defendants.

**MEMORANDUM OF LAW OF DEFENDANT INCOME-PLUS
INVESTMENT FUND RELATING TO CALCULATION OF NET EQUITY
FOR CERTAIN INVESTORS**

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Defendant Income-Plus Investment Fund (“Income-Plus”) submits this Memorandum of Law in support of its position that, pursuant to the Court’s Final Distribution Order dated October 31, 2014 (Dkt. No. 51) (the “Distribution Order” or “Order”), the investment accounts of AIJED International Ltd. (“AIJED LTD”) and the Special Asset Liquidating Trust/formerly named AIJED Associates LLC (“AIJED LLC”) should be combined for the purpose of applying the Net Equity Method set forth in the Order.

The issue before the Court is quite simple.

The Distribution Order provides that funds recovered (or to be recovered) by Beacon Associates LLC I and Beacon Associates LLC II (collectively “Beacon”) from the Madoff Trustee, as well as certain other funds relating to Beacon’s investment in Madoff, “should be distributed in accordance with [the] Net Equity Method, as defined below, until all investors are made whole (i.e., have received back all of their *principal* invested in Beacon)... .” (Order pp. 3-4 (emphasis added).) (The Order identifies the point at which investors have received back all of their principal as the “Beacon Net Equity Break Even Point.” (Order p. 4.)

The Distribution Order defines the Net Equity Method by reference to the calculations to be performed by Beacon¹ as follows:

in employing the Net Equity Method the following computation shall be used by each of Beacon and Andover: Each Fund shall compute each investor’s remaining unpaid investment in such Fund based upon each investor’s total cash contributions and subtract all cash distributions or withdrawals to that investor (inclusive of (i) the money investors received from the Ivy Class Action settlement before the Honorable Colleen McMahon distributed in accordance with the “Judge McMahon Ordered Plan of Allocation”), (ii) the monies distributed to Beacon Fund investors in 2010 in accordance with the July 27, 2010 Decision and Order of this Court (the “2010 Valuation Distribution Order”),

¹ The Distribution Order also references calculations to be made regarding certain funds defined collectively in the Order as “Andover.” Those funds are not at issue here.

and (iii) the 2013 distribution to Beacon Fund investors which included money distributed pursuant to the plan of allocation set forth in the 2010 Valuation Distribution Order and money distributed pursuant to the Judge McMahon Ordered Plan of Allocation), resulting in the investor's remaining "Net Equity."

(Order p. 5.) Beacon's calculations under the Net Equity Method identified two related investors with the name AIJED. One was AIJED LTD and the other was AIJED LLC.

Spreadsheets provided to Income-Plus by Beacon pursuant to this Court's Stipulation and Protective Order for the Production and Exchange of Confidential Information revealed a transfer of \$ REDACTED in REDACTED from AIJED LLC to AIJED LTD, as well as an additional transfer in REDACTED of \$REDACTED and a third transfer in REDACTED, this time of \$REDACTED. (See Declaration of John P. Jeanneret, Ph.D., dated March 13, 2015 ("Jeanneret Dec."), at ¶ 4.) Beacon's books and records indicate that the withdrawals from AIJED LLC to AIJED LTD were made *on the same day* and were referenced internally as "transfers." (Jeanneret Dec. ¶ 5.) Notwithstanding the fact that funds were transferred from one Beacon account to another, Beacon's net equity calculations for AIJED LTD treated the transfers as "new" cash contributions. (*Id.*)

Because the funds were simply transferred from one fund to another, however, the funds included significant appreciation based on Madoff's fraud and thus contained what has been referred to throughout the expansive, Madoff-spawned litigation as "false profits." In fact, the AIJED funds, with a few limited exceptions, had their Beacon investments tied 100 percent to Madoff (Jeanneret Dec. ¶ 6), which would mean any appreciation in their cash investments at the time of the transfers was based completely on Madoff's falsely reported profits.

After reviewing Beacon's net equity calculations, Income-Plus sought additional information regarding the transfers and ultimately objected to the calculations because treating funds transferred from AIJED LLC to AIJED LTD as initial "cash in" to AIJED LTD's Beacon

account grossly inflated the net equity balance calculated for AIJED LTD. (Jeanneret Dec. ¶ 7.) In fact, AIJED LTD was reported to have the largest net equity balance of any Beacon investor by a significant margin. (*Id.*) Other investors also objected to the calculations. As a result, the parties agreed to seek a ruling from this Court, which has expressly retained jurisdiction “over any issues that arise with respect to the distribution of funds pursuant to this Order... .” (Order p. 7.)

Treating funds transferred from AIJED LLC to AIJED LTD as initial “cash in” to AIJED LTD’s Beacon account is inconsistent with the net equity calculations approved in various contexts with respect to the Madoff fraud. For instance, as discussed below, the Judge McMahon Ordered Plan of Allocation (implemented with respect to the global settlement of the Ivy litigation referenced in the Distribution Order) approved a procedure whereby funds were tracked from the very first investment into a fund, as opposed to just when that fund was re-opened, or when there was a name change or merger associated with an investor.

As a result, treating funds transferred from AIJED LLC to AIJED LTD as initial “cash in” to AIJED LTD’s Beacon account would be inconsistent with the Judge McMahon Ordered Plan of Allocation. In particular, in support of the Judge McMahon Ordered Plan of Allocation, Lynda S. Borucki of The Brattle Group² provided an overview of the work performed and procedures that should have been followed with respect to the formulation of the Judge McMahon Ordered Plan of Allocation. (Borucki Aff. ¶ 4.) The Brattle Group stated that the data it reviewed in formulating the plan included investors that had closed but then re-opened

² The Brattle Group is an international economic consultancy active in finance and litigation retained by counsel in the litigation that lead to the Judge McMahon Ordered Plan of Allocation. (*See* Affidavit of Lynda S. Borucki of The Brattle Group (the “Borucki Affidavit” or “Aff.”), a copy of which is attached as Exhibit 1 to the Declaration of Brian E. Whiteley filed herewith.)

their accounts. (Borucki Aff. ¶ 16.) The Brattle Group stated that those investors should be treated “as if their account was never closed. *Thus, contributions and withdrawals were tracked from the very first investment into a fund, as opposed to just when it was re-opened.*” (*Id.* (emphasis added).)

The Brattle Group treated accounts involving mergers and name changes in the same way. (Borucki Aff. ¶ 13.) In reviewing materials provided by Beacon with respect to the net equity calculations, J.P. Jeanneret Associates, Inc. (“JPJA”), the investment manager of Income-Plus, has confirmed that the merged accounts of certain ERISA funds previously advised by JPJA were treated as a single entity for the purpose of determining their net equity. (Jeanneret Dec. ¶ 8.)

The reason for tracking from the initial investment rather than just when an account was re-opened was straight forward and is best explained by example. Assume for the purpose of this example Fund A made an initial investment in Beacon of \$1 million and that the investment grew over time to \$2 million, without any withdrawals. If that assumption were true, Fund A would have had a “net equity” investment of \$1 million but an account value of \$2 million. If Fund A then merged into Fund B and Beacon opened a new account to reflect the name change from Fund A to B, Beacon’s books and records would reflect an initial cash-in investment for Fund B of \$2 million when Fund B had, in reality, only \$1 million in “net equity” at the time of the initial investment of its predecessor, Fund A. As a result, the only way to understand Fund B’s true “net equity” would be to trace Fund B’s investment back to Fund A’s initial investment of \$1 million, as The Brattle Group did with other, similarly-situated investors. (Borucki Aff. ¶ 16.) Without that tracing, Fund B would have an inflated “net equity” investment of \$2 million, instead of only the original \$1 million actually invested.

The Brattle Group analysis (which formed the basis of the Judge McMahon Ordered Plan of Allocation) protected against inflated net equity calculations by treating opened and re-opened and merged accounts as a single entity. In particular, The Brattle Group defined the analysis as follows:

The data we received included investors who closed their accounts prior to December 2008. Any closed accounts that did not re-open prior to December 2008, were excluded from receiving any share of the settlement. Investors who closed their account, and then re-opened it prior to December 2008, were treated as if their account was never closed. Thus, contributions and withdrawals were tracked from the very first investment into a fund, as opposed to just when it was re-opened.

(Borucki Aff. ¶ 16.) That same analysis should have been applied to the AIJED accounts now at issue. Although it is unclear why the two AIJED accounts here were not merged under the Judge McMahon Ordered Plan of Allocation, the result was a significant windfall to AIJED LTD. In particular, AIJED LTD was identified as having a positive net equity of over \$ REDACTED after the discovery of Madoff's fraud when, in fact, the combined net equity of the two AIJED funds was approximately \$ REDACTED . (Jeanneret Dec. ¶ 9.) The inflated net equity amount resulted in a payment of over \$REDACTED – or \$ REDACTED more than what AIJED should have received if The Brattle Group's methodology had been applied appropriately. (*Id.*) AIJED LTD should return that windfall to Beacon.

In any event, when the \$REDACTED AIJED LTD received as a result of the settlement of the Beacon litigation is subtracted from its true net equity of \$ REDACTED , AIJED LTD is revealed to be a significant net winner. (Jeanneret Dec. ¶ 10.) In fact, when the AIJED LLC and AIJED LTD accounts are consolidated – as they should be here under the terms of the Distribution Order – and when the distributions received to date by AIJED LTD are factored in

as required by the Distribution Order, AIJED LTD is a net winner in the amount of approximately \$ REDACTED . (*Id.* at ¶ 11.)

In light of the above, when the AIJED LLC and AIJED LTD accounts are consolidated, AIJED is entitled to no distribution at this point and would not be entitled to any distribution until all investors reach the “Net Equity Break Even Point” (as defined in the Order). (Jeanneret Dec. ¶ 12.) Further, AIJED’s percentage share of the overall net equity would be reduced to zero, thus increasing the net equity percentages of all of the remaining investors that still have positive net equity. (*Id.*)

For the foregoing reasons, Income-Plus respectfully requests that the Court Order Beacon Associates LLC I and Beacon Associates LLC II to treat AIJED LLC and AIJED LTD as a single account for the purpose of calculating their net equity under the Distribution Order.

DATED: March 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, I electronically filed the foregoing Memorandum of Law of Defendant Income-Plus Investment Fund Relating to Calculation of Net Equity for Certain Investors using the CM/ECF system, which sent electronic or other notification of such filing to all counsel of record in this case.

/s/ Brian E. Whiteley
BRIAN E. WHITELEY