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September 8, 2014

VIA ECF
The Honorable Andrew J. Peck
United States Magistrate Judge
United States Courthouse, Courtroom 20D
500 Pearl Street
New York, NY 10007-1312

Re: Beacon Associates LLC I, et al. v. Beacon Associates Management Corp.
Civil Case No: 14-cv-2294 (AJP)

Dear Judge Peck:

I am writing to respond to a new matter raised in the Reply Memorandum of Law filed on Friday by the Income-Plus Investment Fund ("Income Plus"). I respectfully request that the Court accept this letter in lieu of a formal Sur-Reply.

Income Plus argues that this action should be considered to be a "legal," and not an "equitable," proceeding because the declaratory relief sought is addressed to a purely legal question of contract interpretation. See, Income Plus Reply Mem. at 2-4, *citing Simler v. Conner*, 372 U.S. 221 (U.S. 1963). Yet in its opening memorandum, Income Plus recognized that the underlying claim could be characterized as one seeking reformation (although it argued against that remedy on the merits). See, Income Plus Opening Mem. at 18-20. Reformation is an action in equity. *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 139 (2d Cir. 2010).

The underlying action could also be viewed as variously as one seeking specific performance, or an action for unjust enrichment, constructive trust, or restitution, all of which are equitable remedies. *Phlo Corp. v. Stevens*, 62 Fed. Appx. 377, 381 (2d Cir. 2003) (specific performance is equitable remedy); *Tasini v. AOL, Inc.*, 505 Fed. Appx. 45, 47 (2d Cir. 2012) (constructive trust is equitable remedy); *Bice v. Robb*, 511 Fed. Appx. 108, 110 (2d Cir. 2013) (unjust enrichment is equitable remedy); *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 662-663 (2d Cir. 2013) (claim seeking restitution of specifically identified funds is equitable remedy).

The existence of the contractual Operating Agreement is no bar to those remedies since to enforce the Operating Agreement in order to benefit later investors at the expense of earlier investors would violate public policy as the Second Circuit and others have held. See,

Fastenberg Reply Mem. at 7-8 and cases cited. *See, also, United States CFTC v. Efrosman*, 2009 U.S. Dist. LEXIS 84529, 26-27 (S.D.N.Y. Sept. 16, 2009). It is also true that the Operating Agreement does not provide any explicit provisions for distribution of money obtained as restitution of net cash invested. Even in the case of Ponzi schemes, had such a possibility been considered, investors would properly have assumed that any restitution would be paid by a trustee on the basis of the Valuation Method. *See, In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 238 (2d Cir. 2011).[1]

The Madoff Ponzi scheme together with distribution by the Trustee on a Net Investment basis means that Beacon is not receiving any "fictitious profits," and thus no fund-wide benefits, traceable to early investors, and that fact decisively shifts the equities in favor of the use of the Net Investment Method for distributions from the Beacon Funds to their investors.

Respectfully,

Max Folkenflik

MF/ag
Cc: Arthur Jakoby, Esq. (*via email*)
Brian Whitely, Esq. (*via email*)
Leah Kelman, Esq. (*via email*)

[1] As the Second Circuit held when approving the Net Investment Method of distribution by the Trustee in this case: "a customer's last account statement will likely be the most appropriate means of calculating 'net equity' in more conventional cases. We would expect that resort to the Net Investment Method would be rare because this method wipes out all events of a customer's investment history except for cash deposits and withdrawals." *Id.*