

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

*Plaintiffs,*

-vs-

**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.,**

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

*Defendants.*

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**DECLARATION OF BRIAN E. WHITELEY SUBMITTED IN SUPPORT OF  
INCOME-PLUS INVESTMENT FUND'S  
MOTION FOR ATTORNEYS' FEES AND EXPENSES  
UNDER THE COMMON FUND DOCTRINE**

I, Brian E. Whiteley, hereby declare on oath and state as follows:

1. I am a partner with the law firm of Barclay Damon LLP, counsel for Income-Plus Investment Fund in the above-captioned matter. I am a member in good standing of the Massachusetts and New York bars and have been admitted pro hac vice to practice law before the Court in this matter.

2. This declaration is submitted in connection with the Memorandum of Law in Support of Defendant Income-Plus Investment Fund's Motion for Attorneys' Fees and Expenses Pursuant to the Common Fund Doctrine.

3. On October 31, 2014, after a hearing, the Court in the above-captioned matter ordered that money received by Beacon Associates LLC I and related entities from the Madoff

Trustee should be distributed in accordance with a particular valuation methodology. (Dkt. No. 51) (the “Final Distribution Order”).

4. Promptly after the entry of the Court’s Final Distribution Order, Income-Plus requested additional information relating to an issue identified during the briefing process that had led to the Final Distribution Order. In particular, Income-Plus sought additional information relating to investors identified on the materials provided by Beacon as Investor A and Investor B (collectively “Investor A”)<sup>1</sup>, as well as any other Beacon investors that may have had transfers among related accounts.

5. After carefully reviewing those materials, Income-Plus notified Beacon that it had identified certain accounts with related investors whose net equity calculations would require adjustments, and the legal reasoning supporting those adjustments.

6. Beacon then notified its investors, including the Investor A entities, of the issue identified by Income-Plus. Counsel for Investor A, in response, made clear to Beacon that Investor A would object to any modification of Beacon’s initial net equity calculations. After conferring on various occasions in December 2014, all counsel agreed to submit the issues raised by Income-Plus to the Court for resolution.

7. On January 14, 2015, counsel for Beacon, Income-Plus, one other group Beacon investors referred to as Fastenberg, and Investor A participated in a conference call with the Court for the purpose of identifying the dispute that had arisen concerning the computation of Investor A’s net equity under the Final Distribution Order.

8. On January 23, 2015, after extensive negotiations with all parties, Beacon submitted a letter to the Court with an agreed upon proposed schedule for discovery and briefing with respect to the dispute. The Court endorsed and “So Ordered” the letter on January 26,

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<sup>1</sup> The names of Investor A and Investor B are known to Beacon but have been withheld for confidentiality reasons.

2015.2 (Dkt. No. 53.)

9. The parties then spent the next several months engaged in significant discovery and briefing on an expedited schedule. Briefing was completed on March 31, 2015.

10. Spreadsheets provided by Beacon during discovery revealed a transfer of \$6,979,000 in 2005 from Investor A to Investor B, as well as an additional transfer in 2006 of \$500,000 and a third transfer in 2008, this time of \$2,500,000. Beacon's books and records indicated that the withdrawals from Investor A and transfers to Investor B were made contemporaneously and were referenced internally as "transfers." As a result, Income-Plus and Fastenberg argued in their briefing that funds transferred from one Beacon account to another, related account, should not be treated as "new" cash contributions for the purposes of calculating "Net Equity" under the Final Distribution Order.

11. On April 8, 2015, the Court issued an Order holding that, "in equity and fairness, each related account should be treated as a single entity for purposes of determining Net Equity." (April 8, 2015 Order p. 1; Dkt. No. 91.)

12. Investor A filed an appeal and sought and received (after further briefing) a stay of distribution of the amount attributable to the holdback of its funds. (Dkt. No. 114.)

13. Income-Plus and Fastenberg negotiated with Investor A and Beacon over distribution issues in light of the stay. Investor A ultimately withdrew its appeal.

14. With respect to Income-Plus' actual fees and expenses in this matter, in August 2013, Income-Plus and counsel entered into a written agreement for legal services relating to Beacon.

15. From the inception of the engagement in August 2013 until the filing of the

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<sup>2</sup> Based on Beacon's calculations, approximately \$4.1 million was held back from distribution to several Beacon investors pending determination of the issue discussed here. Of that amount, \$3,538,228 million represented the Investor A Holdback amount. (*See* Dkt. Nos. 53 and 114.)

Complaint in this action, counsel for Income-Plus worked with counsel for Beacon and Income-Plus personnel in an attempt to resolve all open issues regarding the distribution of funds received from the Madoff Trustee and any other sources.

16. After the filing of the litigation until the Court's endorsement of Beacon's right to distribute the funds held back, counsel and Income-Plus continued to work on identifying the appropriate methodology for distributing the funds. During the course of that work, as discussed above, Income-Plus and Fastenberg discovered the issues regarding Investor A and a few other investors, leading to a benefit of more than \$5.6 million to all other Beacon investors.

17. The actual fees and expenses incurred by Income-Plus during the time period August 2013 through July 2015 totaled over \$175,000.

18. Income-Plus' counsel worked a total of 525.9 hours from the time the net equity method issue was discussed in August 2013 through July 2015, which includes the time period Investor A ultimately withdrew its appeal, and the further negotiations to clarify Beacon's right to distribute the held back funds.

19. This time includes: 1) analyzing Beacon's proposed distributions and the net equity method; 2) reviewing Beacon's proposed procedure for resolution of Beacon distribution of funds from the Madoff trustee; 3) moving for distribution of Beacon funds from the Madoff Trustee pursuant to the "net equity method"; 4) analyzing data provided to Income-Plus by Beacon relating to the cash flows Beacon's management had prepared regarding Beacon's investor to identify issues with respect to the calculations; 5) identifying certain issues regarding the calculation of distribution amounts and working with counsel for Beacon to clarify all of those issues; 6) reviewing additional information relating to Investor A and Investor B and any other Beacon investors that may have had transfers among related accounts, identifying certain



