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VIA E-FILING AND FAX 212-805-7933

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

Dear Judge Peck:

We represent plaintiffs Beacon Associates (the "Beacon Fund") and Andover Associates (the "Andover Fund") (collectively "Plaintiffs") in connection with the captioned matter.

Your Honor may recall that the parties to this action, as well as counsel for AIJED International, Ltd. ("AIJED"), an investor which is concerned with the computation of its Net Equity for purposes of its distribution under the Final Distribution Order and Judgment [Doc. No. 51], participated in a January 14, 2015 Court Conference Call to discuss the investor Holdback issue now before the Court.[1]

The current issue before the Court generally concerns situations where an investor's Beacon account was either transferred from one investor to a related investor or where an investor closed out its Beacon account and subsequently opened a second Beacon account, and whether, for purposes of determining such investor's Net Equity under the Final Distribution Order and Judgment, the two purportedly related accounts should be combined and treated as one single account.

The Beacon Fund, as articulated during the January 14, 2015 Court Conference Call, is taking a neutral position on the merits of AIJED's claim (and the claim of the other Affected Beacon Investors) but unfortunately is now compelled to object to AIJED's broad discovery request to the Beacon Fund insofar as AIJED's counsel has articulate an intent to challenge the January 2015 $49 million distribution of funds made to investors in accordance with this Court's Final Distribution Order and Judgment.

[1] All capitalized terms shall have the meaning set forth in the January 23, 2015 Letter to the Court [Doc. No. 53].

AIJED, though its counsel, Mitch Hurley, has sought overly broad discovery from the Beacon Fund concerning the Net Equity detail of all Beacon investors. Specifically, AIJED has demanded production of "[a]ll investor information that the Beacon Fund previously produced to the Challenging Investors or their counsel." [Discovery Request Letter from AIJED dated Feb. 16, 2015]. AIJED's counsel has indicated that he wants to see all of the calculations that went into the determination of each investor's January 2015 distribution amount. Accordingly, AIJED's counsel is seeking the discovery that was produced in the summer and early fall of 2014 *prior to* the issuance of this Court's Final Distribution Order and Judgment. Such discovery related to the issue of whether the distribution should be made in accordance with Net Equity or Valuation and the amount of each investor's Net Equity and is therefore clearly unrelated to the specific narrow issue currently before the Court.

By way of relevant background and as the Court is aware, Plaintiffs filed this action nearly a year ago so that a proper distribution method could be expeditiously determined by the Court. Plaintiffs therefore sought a judicial ruling as to, among other things, the proper method of distribution to investors of tens of millions of dollars recovered from the Madoff Trustee and from other third parties and rightfully owed to those members of the Beacon Fund who are victims of Madoff's fraud. Shortly after commencement of this action the Beacon Fund gave notice to all of its investors of the action so that any investor wishing to participate could participate and raise any relevant objections *prior to* a Final Distribution Order and Judgment. As was explained to the Court at the time, notice was being given to all investors so that no investor could "challenge" a Court Ordered distribution after the fact.

AIJED first sought this information in mid-December 2014 (forty-five days *after* issuance of the Final Distribution Order and Judgment). At the time of AIJED's initial request, when I asked AIJED's counsel, Mr. Hurley, in an email why AIJED needed such information (since such information is clearly unrelated to AIJED's Net Equity issue), I was advised in writing, among other things, that he was seeking such information so that AIJED could "...evaluate whether there is any additional basis for ***challenging proposed distributions*** to those investors." (italics and bold font added).[2] At the time, I explained to AIJED's counsel that his request for such information was completely improper (and also untimely) because it sought information wholly irrelevant to the limited Holdback issue which affected AIJED (and several other investors).

Throughout this litigation, AIJED, notwithstanding the fact that it received notice of the action and its rights to participate, did absolutely nothing: AIJED did not seek to intervene

[2] The investors referred to in December were the clients represented by Messrs. Folkenflik and Whiteley. In other words, because AIJED's counsel felt that these two lawyers brought to light the issue of whether Net Equity of related accounts needed to be combined, AIJED was looking for reasons to attack the distribution Beacon allocated to such investors under the Final Distribution Order and Judgment.

in the action. AIJED did not file any submission for consideration of the Court. And, AIJED did not seek to be part of the information exchange that was coordinated through this Court during the summer and early fall of 2014 (the "2014 Discovery Period"). Rather, only *after* a Final Distribution Order and Judgment was entered by this Court on October 31, 2014 did AIJED decide to get involved and that was only *after* I reached out to AIJED's prior counsel in mid-November to seek information about AIJED's account history and inform him of the current issue which, depending upon the Court's ultimate ruling, could affect the amount of AIJED's personal distribution (and that of several other investors).

If AIJED wished to examine other investor accounts and potentially "*challenge*" other investor distributions, it could have done that in the months during discovery and briefing, after it received notice of this action by letter dated June 9, 2014. Further, AIJED had access to educate itself on all of the developments in this case because status updates and court documents were posted to a public website (www.herrick.com/beaconandover), as explained in the notice to investors of June 9, 2014. Furthermore, AIJED was aware of its personal Net Equity issue before the deadline to appeal the Final Distribution Order and Judgment ran and if it thought that in someway it was prejudiced by the Final Distribution Order and Judgment it could have filed an appeal or moved to stay the distribution. However, AIJED did not participate in the litigation process and thus should not now be allowed discovery that is wholly irrelevant to the very narrow issue presently before the Court which is the proper computation of Net Equity with respect to the 18 Affected Beacon Investors and the Holdback.[3] There is no excuse for AIJED's months of silence, only to agitate settled issues *after* the issuance of the Final Distribution Order and Judgment and *after* a distribution of over $49 million to investors.

Both before and during the Court Conference Call, AIJED's counsel, Mr. Hurley, indicated that AIJED would likely seek discovery of the information produced during the 2014 Discovery Period. Very much aware of AIJED's intent to try to ***challenge*** the then upcoming distribution, I objected to any request beyond discovery requests applicable to Affected Beacon Investors and the Holdback. At that time, in response to Mr. Hurley's indication that he wanted to reexamine the then pending distribution of the $49 million, Your Honor noted as follows:

> but so you know where I'm coming from. I am not inclined, once the money has been distributed to try to claw money back from people, because that will well outweigh any likely benefit to anybody.

[3] Beacon has and will continue to comply with the January 23, 2015 Letter which sets forth a briefing schedule and limited discovery on the Holdback issue. Beacon does not object to confidentially producing any materials sought by AIJED relevant to the Holdback issue and the 18 Affected Beacon Investors and in fact produced such information earlier today.

> Once this distribution goes, other than this issue of treating related funds who are members of Beacon, and for that there is the reserve so the money will be there, other than that, I'm not going to look kindly and will probably rule against any attempt to recalculate somebody else's piece of the pie and say that therefore you are entitled to your 1/1000 of that money or whatever it is it would be. That's just fair warning.

[Tr. of Court Conference Call, 7:17-8:4].

Despite the "fair warning", and after sitting on its hands during the entire course of this litigation, AIJED's counsel ignored the Court's warning and has proceeded as if AIJED is now entitled to unfettered access to information and discovery to ***challenge*** the $49 million Net Equity distribution, which has already been paid to investors. AIJED is entitled to no such accommodation or courtesy only to upend a litigation in which it chose not to participate.

Having stated in writing in December 2014 that is was requesting the information in order to ***challenge*** the distribution amounts to other investors and having heard the Court's "fair warning" about engaging in such an attack, AIJED's counsel has now changed the "reason" for his request and in an email dated February 18, 2015 stated that now he needs this same information, not to "***challenge***" the distribution but rather in order to:

> ...determine whether other investors in Beacon are situated similarly to AIJED (or arguably so) and, if there are such investors, whether Beacon's methodology for calculating "net equity" for those investors is consistent with the methodology and treatment Beacon now seeks to impose on AIJED.

[Email from AIJED's counsel to Arthur Jakoby dated Feb. 18, 2015].

Thus, AIJED's counsel has now abandoned the reason he gave in December 2014 for needing this information (i.e., to ***challenge*** the distribution amounts calculated by Beacon) and now, having heard the Court's "fair warning" states that he needs this same exact information in order to make sure that other investors "situated similarly to AIJED" (i.e., investors with related accounts) are being treated the same. This newfound reason is clearly contrived. Pursuant to the January 23, 2015 Letter to the Court, there are only 18 such investors and thus discovery related to <u>all</u> Beacon investors is wholly irrelevant. The Beacon Fund has no issue providing any discovery related to the calculation of the Net Equity for the 18 Affected Beacon Investors and in fact has provided such information. Finally, the discovery produced during the 2014 Discovery Period does not in any way provide data on investors with "related Beacon accounts" and therefore even if produced would not help AIJED identify investors who

are "situated similar to AIJED." Rather the information produced during the 2014 Discovery Period can only be used to evaluate and ***challenge*** the distribution amounts to specific investors.[4]

Accordingly, we respectfully request that the Court quash AIJED's improper and overly broad request for all investor information previously produced in this action, which is irrelevant to the pending narrow issue before the Court.

We thank the Court for its attention to this matter.

Respectfully submitted,

Arthur G. Jakoby

cc: All Parties (via e-mail)

[4] Even worse than ignoring this Court's "fair warning" is the fact that AIJED's counsel, having been told in advance by me that the Beacon Fund would formally object to any request for production of the information produced during the 2014 Discovery Period and not produce such information absent a Court Order, attempted an end run around the Beacon Fund's objection and sought from Messrs. Folkenflik and Whitely the same documents (i.e., the documents that the Beacon Fund produced to Messrs. Folkenflik and Whitely during the 2014 Discovery Period). When Mr. Folkenflik advised Mr. Hurley that any request for the Beacon Fund documents needs to be made to the Beacon Fund and not to him (because they were received by him pursuant to the Court's Confidentiality Order), Mr. Hurley responded (with a February 18, 2015 3:00 p.m. email) and attempted to convince Mr. Folkenflik to produce such information anyway ***but he deleted me as a cc on the email chain clearly so that I would not be aware of his efforts***. Accordingly, by email dated February 19, 2015, after Mr. Folkenflik made me aware that I had been deleted as a cc on the email chain, I asked Mr. Hurley to copy me on all future emails concerning his efforts to get the 2014 discovery and I further asked Messrs. Folkenflik and Whiteley to hold off on producing such documents until the Beacon Fund's objection could be heard and ruled upon by the Court.