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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 (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,

Defendants.

14-CIV-2294

REPLY DECLARATION OF MAX FOLKENFLIK IN FURTHER SUPPORT OF ADJUSTMENTS TO NET EQUITY

I, Max Folkenflik, hereby declare:

1. I am a member in good standing of the Bar of New York and of this Court, and a Partner at the law firm of Folkenflik & McGerity LLP, counsel for Defendant David

Fastenberg.[1] I make this Reply Declaration in further support of certain adjustments to the calculation of the "Net Equity" (as defined in this Court's Order October 31, 2014) of certain Beacon Fund investors. Without those adjustments, those investors will be receiving distributions of profits, in the case of the AIJED Funds[2], entirely fictitious Madoff Profits[3] while other investors have still not received a full return of their cash invested.

2. AIDJED argues that somehow some of the preliminary computations made by the Beacon Funds,[4] or computations made by the Brattle Group in the Class action, or the negotiations regarding this Court's order of October 31, 2014 (the "Distribution Order") somehow limit this Court's ability to review and rule upon the computation of Net Equity with respect to accounts where there had been inter-account transfers. AIJED cites no law which supports its suggestion that prior exploration of facts or computations should somehow be preclusive of the issues presented here, and we are aware of no law and no theory which would bar this Court from doing equity in this case. Notably, AIJED does not provide any sworn statement by any person with knowledge but bases its argument on "assumptions." I personally participated in those negotiations and the drafting of Distribution Order, and the factual history proves conclusively that AIJED's assertions and conclusions are incorrect.

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[1] Defendant David Fastenberg, appears as Trustee of the Long Island Vitreo-Retinal Consultants 401k FBO David Fastenberg. While not formally parties to the action, as they were the last time, Fastenberg's counsel also represent approximately 170 other investors in the Plaintiff Beacon Funds.

[2] The AIJED Funds are AIJED Associates LLC ("AIJED I") and AIJED International Ltd. ("AIJED II") and are referred to collectively as "AIJED" or the "AIJED Funds."

[3] As AIJED points out in its supporting papers, in 2004 AIJED directed the Beacon Funds to divide its investments into two buckets, Madoff and non-Madoff, and in 2007 AIJED withdrew all of the non-Madoff investments leaving only Madoff investments and Madoff profits in its account. See, Declaration of Arthur S. Gordon, 3/12/15, ¶¶ 21-23.

[4] The Plaintiffs, Beacon Associates LLC I, Beacon Associates LLC II, Andover Associates L.P., Andover Associates LLC I, and Andover Associates LLC (QP) are hereinafter referred to collectively as the "Beacon Funds" or the "Funds".

3. To take the Distribution Order first, AIJED is correct in stating that "the Challanging Investors [presumably meaning Mr. Whiteley and myself] were involved in" drafting the Distribution Order. AIJED Mem. at 16. Where their argument fails is the on the conclusory assertion, without any analysis or citation, that "the proposed reallocation is not consistent with the terms of the Order." *See, id.* To the contrary, such re-allocations are expressly contemplated by the Distribution Order which clearly states in its penultimate decretal paragraph:

> IT IS FURTHER ORDERED THAT this Court shall retain jurisdiction over any issues that arises with respect to the distribution of funds pursuant to this Order, the final liquidation of the Funds and any potential adjustments made to any individual investor with such investor having the right to challenge any such adjustment after being advised of the proposed adjustment by the Funds or the Fund seeking a further Order from the Court's with respect to any such proposed adjustment upon notice to the investor

Distribution Order, Folkenflik Decl. 1/13/15, Exhibit B at 7-8.

4. That paragraph was intended to preserve, and did expressly preserve, the right to seek individualized adjustments to investor accounts to properly apply the computation of cash basis and Net Equity in accordance with the Court's Order. Mr. Whiteley, Mr. Jakoby and I had been discussing that there were potential adjustments for some time. To the best of my recollection, I had made some preliminary inquiries into the existence of inter-account transfers which might have caused "Madoff profits" to be credited to transferee accounts, which would need to be adjusted if the Net Equity method of distribution was adopted by the Court rather than the Valuation Method. However, since the Court had not ruled on the method of distribution, that issue had not yet been fully analyzed for any of the accounts.

5. Mr. Whiteley, Mr. Jakoby and I had also discussed that any proposed adjustment would have to be the subject of a Court order, and the persons directly affected by the proposed adjustment would have to have been given notice and an opportunity to be heard before any such

order could be entered. As a result, we concluded that any such proposed adjustment would have to be the subject of a subsequent proceeding, and we did not even attempt to finally analyze, or quantify, let alone propose, any individual adjustments in the proceedings leading up to the Distribution Order.

6. In November, 2014, after the Court signed the Distribution Order, Mr. Whitely and I enquired about related accounts and started to get information and preliminary calculations from the Beacon Funds concerning the distributions ordered by the Court. It was always understood and agreed that the Beacon Funds would give Mr. Whitely and I a chance to comment on any proposed distributions and to bring any questions or issues regarding proposed distributions to the Court for resolution.

7. Mr. Jakoby informed Mr. Whitely and I, as he has repeatedly informed the Court, that the Beacon Funds intended to "remain neutral," and would not take any position on whether any disputed method of allocation was the "proper one." Nor would any other approach be appropriate, in light of the fact that the method of calculating "Net Equity" was a Court-ordered computation, and not a matter of the Beacon Funds regular business practice. Therefore it is factually wrong for AIJED to argue that "Beacon's calculation" of the Net Equity "should not be disturbed." *See*, AIJED Mem. in Opp. at 14-15. The Beacon internal employee who made illustrative computations using various and sometimes contradictory assumptions had no authority to make, nor did she or anyone else at Beacon make, any determination that any "calculation" was the correct one.

8. AIJED attempts to paint the arguments made here as a somehow improper "last minute accounting gerrymander." *See*, AIJED Mem. in Opp. at 3. While it should not matter at all whether I have changed my position regarding the AIJED accounts, the fact is I have not. My

position always has been as was stated in the hearing on February 25, that I just wanted to ascertain the proper way to apply this Court's Distribution Order. As I stated to the Court on February 25, I had not yet determined what I believed the proper application of this Court's Order required under these facts, but I believed it might require either merging accounts, adjusting the computation of cash basis, or possibly other approaches. *See*, Tr. 2/25/15, at 11:8-12:24. True copy of the transcript of that hearing is annexed hereto as Exhibit J, the next exhibit in sequence from the exhibits annexed to my prior declaration.

9. Neither AIJED or its counsel had any involvement in the class action settlement, so its factual comments with regard to that process are without any foundation. I did not "meet with" the Brattle Group, as AIJED claims. *See* Mem. in Opp. at 11. I did have several telephone calls with Lynda Borucki of the Brattle Group, to understand certain issues that arose in her calculations, primarily, to the best of my recollection, issues regarding distributions to Income Plus investors and the computation of the amount of the settlement to Beacon Funds' Investors, as a group. I did negotiate with other participants in the settlement, but I did not in any respect control or supervise the Brattle Group who were retained by and reported to the class action attorneys.

10. I do not recall in particular any a discussion concerning AIJED Funds and I was not aware of the factual details concerning those accounts. Those details, to the extent that the Brattle Group sought them, were supplied by the Beacon Funds directly to Ms. Borucki, who had conversations with the Beacon Funds which I was not a party to nor aware of other than to know those conversations occurred.

11. Nor would the issues raised here have been meaningful in any way to the class action settlement. At the time of the class action settlement, the Beacon Fund records showed that

AIJED II had in excess of $10 Million in Net Equity. The allocation of cash basis which we believe is proper under this Court's Distribution Order shows that as a result of the class action settlement and other distributions, AIJED II, has received approximately $[redacted] more than its Net Equity. That amount is less than one one-thousandth of one percent, 0.0003%, of the value of that $[redacted] million class action settlement. There is no reason why this Court should relinquish its right an obligation to do equity in this case because of adjustments made, or not made, by the Brattle Group in the class action case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 23, 2015
New York City, New York

Max Folkenflik