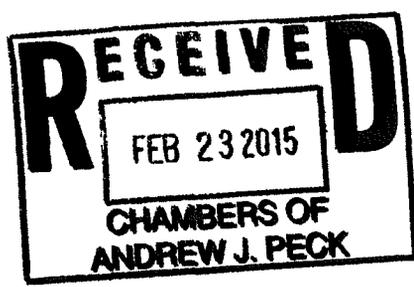


UNITED STATES  
DOCUMENT  
ELECTRONICALLY FILED  
DOC#  
DATE FILED: 2/23/15



**Akin Gump**  
STRAUSS HAUER & FELD LLP

**BY ECF** MITCHELL P. HURLEY  
+1 212.872.1011/fax: +1 212.872.1002  
mhurley@akingump.com

February 20, 2015 **MEMO ENDORSED** 2/23/15

*The Court will hold a conference on 2/25 at 10 AM to resolve the discovery issues raised in the recent letter.*

Delivered by Facsimile Only  
Pursuant to Individual Practice 1(A)

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

SO ORDERED:  
  
Hon. Andrew J. Peck  
United States Magistrate Judge

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

*copy ECF: Peck's memo*

Dear Judge Peck:

We represent AIJED International, Ltd. ("AIJED"), an investor in the Beacon fund ("Beacon" or the "Beacon Fund"). We write pursuant to paragraph 4 of the Scheduling Letter that was "so ordered" by the Court on January 26, 2015 (the "Scheduling Letter," ECF No. 53) to address certain discovery issues that have arisen in the above-referenced matter. Specifically, AIJED respectfully requests that the Court:

- Require counsel to provide a list to AIJED of the Challenging Investors they represent in connection with this matter, as expressly agreed in paragraph 2 of the Scheduling Letter<sup>1</sup>; and
- Order Beacon or the Challenging Investors to produce copies of documents that Beacon previously produced to the Challenging Investors, which detail the withdrawal and contribution activities of AIJED and the other investors in Beacon (the "Discovery Documents").<sup>2</sup>

Some background concerning the pending dispute is necessary to frame the parties' disagreement concerning discovery. On or around November 6, 2014, Beacon advised AIJED that Beacon had calculated AIJED's Net Equity pursuant to the Court's October 31, 2014 order

<sup>1</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Scheduling Letter.

<sup>2</sup> AIJED's informal request for documents is attached hereto as Exhibit A.



The Honorable Judge Andrew J. Peck  
United States Courthouse, Courtroom 20D  
February 20, 2015  
Page 2

(the "Order"), and concluded that AEJID had substantial positive Net Equity. As a result, Beacon advised AEJID that it was entitled to well over \$3 million in additional distributions from Beacon. Subsequently, however – and allegedly based on information contained in the Discovery Documents – the Challenging Investors convinced Beacon to recalculate AIJED's Net Equity by subtracting net distributions made to a different AIJED investment fund called AIJED Associates LLC (together with its successor liquidating trust, "Associates").

Beacon's recalculation of Net Equity was wrong. Under the Order, Beacon was required to "compute *each investor's*" net equity "based upon *each investor's* total cash contributions and subtract all cash distributions or withdrawals to *that investor.*" Order at 5 (emphasis added). Beacon's initial determination that AIJED was entitled to a distribution was based on precisely this calculation. Beacon's subsequent conflation of AIJED and Associates for purposes of calculating Net Equity not only contradicts the literal terms of the Order, it is also manifestly unfair. While some investors in AIJED were investors in Associates before AIJED was formed in June, 2005, Beacon debited the entirety of the withdrawals made by those investors against Associates in calculating Associates' Net Equity.

Thereafter, from August, 2005 through December, 2008 (when the Madoff fraud was discovered), there were no investors in AIJED who were also material investors in Associates. During that period, Associates' made *net withdrawals* from Beacon of some \$5.9 million for the benefit of Associates' investors, while AIJED (and its different investor base) made *net contributions* to Beacon of some \$3.1 million. Based on the foregoing contributions and withdrawals, Beacon correctly determined that AIJED was left with \$4,719,081 in positive Net Equity, while Associates was left with \$7,696,646 in negative Net Equity. Inexplicably, however, Beacon proceeded to net the two funds positions against one another, and concluded that neither was entitled to a further distribution because on a "combined" basis, they had negative Net Equity. Beacon's "combination" of AIJED and Associates for Net Equity purposes has no support in the Order, and is entirely unfair since, among other things, the two funds have materially different investors.

#### **Refusal by Beacon and the Challenging Investors to Produce Documents**

When confronted with these facts, Beacon claimed that it had treated AIJED no differently than any other Beacon investors. Max Folkenflik, counsel for a group of Challenging Investors, made a similar claim with respect to the clients he represents (although, as discussed below, he has not yet provided AIJED with the identities of his clients). To test these assertions, AIJED has repeatedly asked both Beacon and the Challenging Investors to produce copies of the

The Honorable Judge Andrew J. Peck  
United States Courthouse, Courtroom 20D  
February 20, 2015  
Page 3

Discovery Documents so that AIJED can evaluate for itself whether there are other Beacon investors situated similarly to AIJED, and, if so, whether those investors were accorded the same treatment Beacon now seeks to impose upon AIJED. Beacon and the Challenging Investors have refused to share these materials with AIJED, even though AIJED has agreed to maintain their confidentiality, and despite the lack of any material burden associated with their production.

As noted above, Mr. Folkenflik has not identified the Challenging Investors that he represents in connection with this dispute, despite paragraph 2 of the Scheduling Letter, which provides that "Messrs. Folkenflik and Whitely shall, on or before January 29, 2015, provide to counsel for the Beacon Fund and AIJED a list of each of the Challenging Investors they represent in connection with this dispute." While Mr. Folkenflik has indicated that the Challenging Investors include all 165 "intervenor" in a prior phase of this case, the identities of those intervenors are not publicly available. AIJED respectfully asks the Court to instruct Mr. Folkenflik to identify the Challenging Investors he represents, and to order Beacon and/or the Challenging Investors to produce the Discovery Documents.

Finally, AIJED asked for copies of communications between the Challenging Investors and Beacon concerning the calculation of Net Equity for investors in Beacon, including any such communications concerning AIJED's Net Equity. The Challenging Investors refused to produce these communications because they supposedly are subject to a claim of "confidentiality" by Beacon. AIJED pointed out that it has agreed to be bound by the terms of the confidentiality order, but the Challenging Investors were unmoved. For its part, Beacon indicated it was still considering AIJED's request and would not commit to producing these documents at the time of this filing. AIJED respectfully asks the Court to order production of these materials as well.

#### **AIJED'S Document Production**

In his informal request for documents, Mr. Folkenflik asked AIJED to produce documents sufficient to identify AIJED's investors and Associates' investors, and the amounts and timing of such investors' withdrawals and redemptions from the two funds. AIJED has agreed to produce the requested information from the time AIJED was formed in or around June, 2005 through December, 2008, when the Madoff fraud was discovered. In addition, Mr. Folkenflik asked AIJED to produce documents sufficient to determine "whether the two funds, or any investors that appear to be different in the two funds should be treated as 'one' for the purpose of the Net Equity calculation." AIJED believes no such documents exist, but has advised Mr. Folkenflik that it will consider in good faith any follow up requests Mr. Folkenflik may have after reviewing AIJED's document production.

**Akin Gump**  
STRAUSS HAUER & FELD LLP

The Honorable Judge Andrew J. Peck  
United States Courthouse, Courtroom 20D  
February 20, 2015  
Page 4

Thank you for your time and attention to this matter.

Respectfully submitted,



Mitchell P. Hurley

Cc: Counsel to Beacon (via email)  
Counsel to Challenging Investors (via email)

EXHIBIT A

# Akin Gump

STRAUSS HAUER & FELD LLP

MITCHELL P. HURLEY  
+1 212.872.1011/fax: +1 212.872.1002  
mhurley@akingump.com

February 16, 2015

Max Folkenflik, Esq.  
Folkenflik & McGerity LLP  
1500 Broadway, 21st Floor  
New York, NY 10036

Brian E. Whiteley, Esq.  
Hiscock & Barclay LLP  
One International Place, 14th Floor  
Boston, MA 02110

Arthur G. Jakoby, Esq.  
Herrick, Feinstein LLP  
2 Park Avenue, #21  
New York, NY 10016

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

Dear Max, Brian and Arthur:

As you know, we represent AIJED International, Ltd. ("AIJED") in the above-captioned action. We write, pursuant to the joint letter submitted to the court on January 23, 2015 in this matter (the "Joint Letter"), to request documents in connection with the instant dispute.

In connection with this dispute, AIJED requests the following documents:

- All investor information that the Beacon Fund<sup>1</sup> previously produced to the Challenging Investors or their counsel; and
- All post-October 31, 2014 communications between the Beacon Fund, Mr. Folkenflik, Mr. Whiteley, or their respective law firms, on the one hand, and any Affected Beacon Investor, on the other, purporting to notify a Affected Beacon Investor of any calculation regarding the Affected Beacon Investor's respective alleged net equity position or otherwise discussing an Affected Beacon Investor's position in the Beacon Fund.

---

<sup>1</sup> Defined terms used and not defined herein should be given the definition provided in the Joint Letter.

**Akin Gump**  
STRAUSS HAUER & FELD LLP

Max Folkenflik, Esq.  
Folkenflik & McGerity LLP  
Brian E. Whiteley, Esq.  
Hiscock & Barclay LLP  
Arthur G. Jakoby, Esq.  
Herrick, Feinstein LLP

February 16, 2015  
Page 2

AIJED reserves all rights with respect to these document requests, which are being exchanged informally per the Court's request and by agreement among counsel.

Very truly yours,

Mitchell P. Hurley

# Akin Gump

STRAUSS HAUER & FELD LLP

## FAX TRANSMISSION

February 20, 2015

To	Fax Number	Telephone
Magistrate Judge Andrew J. Peck	(212) 805-7933	(212) 805-0036

**From:** Mitchell P. Hurley

**Direct Dial:** +1 212.872.1011

**Re:** *Beacon Associates LLC I et al v. Beacon Associates Management Corp. et al*  
*1:14-cv-02294-AJP*

**Message:**

Letter re: Beacon Associates LLC I et al v. Beacon Associates Management Corp. et al, Case No. 1:14-cv-02294-AJP.

Sender's email: mhurley@akingump.com

Sender's fax: +1 212.872.1002

Floor: 41st

Secretary:

Ext:

Fax Operation Verification: \_\_\_\_\_

The information contained in this facsimile message is attorney-client privileged and confidential, and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us by mail at the address below.