

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, ET AL.,**

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

Defendants.

**DECLARATION OF MAX FOLKENFLIK SUBMITTED IN SUPPORT OF THE
MOTION FOR ATTORNEYS' FEES AND EXPENSES
UNDER THE COMMON FUND DOCTRINE**

I, Max Folkenflik, hereby declare on oath and state as follows:

1. I am a partner in Folkenflik & McGerity, counsel for Defendant David Fastenberg ("Fastenberg") the Trustee of the Long Island Vitreo-Retinal Consultants 401k FBO David Fastenberg. Mr. Fastenberg, as Trustee, invested in Plaintiffs, (collectively the "Beacon Funds," and successfully sought to have the distributions increased to virtually all of the Beacon Fund investors. Mr. Fastenberg's efforts were funded by Family Management Corporation ("Family Management"), Mr. Fastenberg's investment advisor.

2. Mr. Fastenberg joins in the motion and adopts the argument made in 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, and the Declarations and

exhibits and factual information submitted therewith. Beacon Fund investors have received over \$5.6 because of the work of Mr. Whiteley and I and our firms. That work was funded by Income Plus and Family Management. We have filed this motion under the common fund doctrine to obtain compensation for Income Plus and Family Management for the benefit they have conferred on those investors through the funding of lengthy, complex and risky litigation.

3. I was engaged by Family Management in December 2008, shortly after the Madoff frauds were discovered, to protect the interests of their clients in connection with investments the clients had made in various Madoff investments. Those interests were strongly aligned, but to address any possible conflicts, I entered into individual retainer agreements with each of the clients effected by the Madoff fraud which provided that my fee would be paid by Family Management, not the individual clients, and that each client waived any conflict that might exist among the clients of with Family Management.

4. From the outset, I was deeply involved in Madoff related matters in general and in matters related to the Beacon Funds, in particular. Because Madoff ran a Ponzi Scheme, with “fictitious profits” and old investors being paid using new investor money, some of Madoff investors had withdrawn their “fictitious profits” and had taken more from Madoff than they originally invested. The Madoff Trustee determined that the distributions he made would be made by valuing each investor’s “share” on a cash in, cash out basis, so that no investor would be paid a distribution until everyone had first received the full amount of their remaining loss. The Beacon Funds were “net losers” using that computation, but the Beacon Fund Operating agreement had a different formula which could result in further profiting those who already profited in those funds (by withdrawing more from the Beacon Funds than they originally put in) while other investors still had net losses.

5. I succeeded in convincing Judge Peck to defer application of the distribution formula contained in the Beacon Operating Agreement until all investors had first received full repayment of their investment in Madoff's fraudulent investment company. Only then would those who had profited from their Madoff investments continue to receive distributions from the Beacon Funds. *See*, (Dkt. No. 51) (the "Final Distribution Order").

6. Mr. Whiteley and I continued to review distribution information and in that process noted that some investors in Beacon had moved money between different accounts controlled by them. In particular, we noticed that two related accounts controlled by the same fund had moved millions of dollars from one account to the other, and effectively "created" a large loss in one of those accounts. Those two accounts are identified on the materials provided by Beacon as Investor A and Investor B (collectively "Investor A")¹. We also reviewed other Beacon investors that may have had transfers among related accounts to identify similar distortions.

7. The Investor A distortion was particularly acute because one of its two accounts had a contract that would effectively deny it any distribution based on amounts distributed to Beacon by the Madoff Trustee, or recovered by the Beacon Funds in suits then pending. In effect, the transfers between the two accounts created fictitious losses in the account that was entitled to distributions, and gave profits to the account that was contractually not entitled to any distributions.

8. Mr. Whiteley and I conferred on these issues and raised them with counsel for the Beacon Funds, Arthur Jakoby. Counsel for Investor A 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 to the Court

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

for resolution.

9. On January 14, 2015, counsel for Beacon, Income-Plus, 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 and it was agreed that the parties would litigate the issue before Judge Peck. As Mr. Whiteley points out in his Declaration, the parties then spent the next several months engaged in significant discovery and briefing on an expedited schedule. Approximately \$10 Million in transfers between Investor A and Investor B were identified.

10. Briefing was completed on March 31, 2015. 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.) As a result, Investor A received over \$5.6 million less and all other investors received over \$5.6 million more, than would have been the case absent the efforts of Income Plus and Fastenberg.

11. 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.) Following further negotiations, Investor A withdrew its appeal.

12. I have worked on matters specifically related to the distributions by the Beacon Fund at issue on this motion since June 2013. The billable time incurred was 440.6 hours through September 2016. After Investor A withdrew its appeal, there was some limited time spent on reviewing distribution calculations and Beacon Fund's determinations on the amount of distributions to be "held back" as a reserve for future expenses. Most of the work done was billed by me and at my then effective billing rate of \$625/hr. The actual fees incurred total \$226,558. That computation includes some preliminary discussions about the potential for a

common fund recovery.

13. I believe that the common fund fee requested is reasonable and justified by the significant expense incurred, the risk that neither Family Management nor its clients would receive any benefit from that expense, and the excellent results obtained for Beacon Investors.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 20, 2019

/s/ Max Folkenflik

Max Folkenflik

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing Declaration of Brian E. Whiteley using the CM/ECF system, which sent electronic or other notification of such filing to all counsel of record in this case.

/s/ Brian E. Whiteley

Brian E. Whiteley