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 (Q) 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.,

Defendants.

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT INCOME-PLUS INVESTMENT FUND'S MOTION FOR ATTORNEYS' FEES AND EXPENSES UNDER THE COMMON FUND DOCTRINE

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PRELIMINARY STATEMENT

On April 8, 2015, this Court issued an order allowing for the distribution of what will ultimately be well over $5.6 million in funds that would otherwise not have been paid to the vast majority of the investors in plaintiffs Beacon Associates LLC I and Beacon Associates LLC II (collectively "Beacon" or the "Beacon Funds"). The Order was the product of nearly two years of work and litigation in which the Income-Plus Investment Fund ("Income-Plus") sought a fair resolution with respect to the distribution of funds Beacon had received from the bankruptcy trustee appointed after the discovery of the fraudulent activities of Bernard L. Madoff (the "Madoff Trustee"). Income-Plus – a group trust whose investors are Taft-Hartley plans providing retirement and other benefits to union workers in various trades throughout New York state – incurred substantial legal fees with respect to the distribution issue, not only for the benefit of the investors in its fund, but for the benefit of the vast majority of Beacon's other investors, many of whom are also ERISA-governed plans. As a result, Income-Plus now seeks compensation under the "common fund" doctrine for its work in obtaining what has to date been an additional $5.6 million in funds available for distribution to Beacon's investors.

BACKGROUND

1. Income-Plus and Fastenberg

Income-Plus is a group trust formed on December 15, 1993, for the purpose of pooling investment assets of certain qualified pension plans and entities. (Compl. ¶ 17, Dkt. No. 2.) J.P. Jeanneret Associates, Inc. manages the Fund. (Compl. ¶ 41, Dkt. No. 2; Declaration of John P. Jeanneret, Ph.D., dated August 27, 2014 ("Jeanneret Dec.") ¶ 3, Dkt. No. 26.) Most of the investors in Income-Plus are Taft-Hartley[1] plans located in Upstate New York and are

[1] A Taft-Hartley plan is a multi-employer plan established pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), which permits employers and unions

governed by ERISA. (Jeanneret Dec. ¶ 3, Dkt. No. 26.) Beginning in 2000, Income-Plus invested in Beacon.

David Fastenberg ("Fastenberg") is the Trustee of the Long Island Vitreo-Retinal Consultants 401k FBO David Fastenberg. (Dkt. No. 79, p. 1 n.1.) Through the 401k plan, Fastenberg also invested in Beacon. In addition, Fastenberg's counsel represents approximately 170 other investors in Beacon. (*Id*.)

2. The Beacon Funds

The Beacon Funds are New York limited liability companies, which are comprised of numerous entities and individuals holding membership interests in the Funds. The governing documents regarding Beacon are the Fund's Amended and Restated Operating Agreement, dated April 1, 2004, as modified by a Confidential Offering Memorandum, dated August 9, 2004 (the "Operating Agreement"). (Compl. ¶ 14; Dkt. No. 2.) Defendant Beacon Associates Management Corp. is the managing member of the Beacon Funds. (Compl. ¶ 2; Dkt. No. 2.)

Because more than 25% of Beacon's membership interests are held by benefit plan investors (including ERISA Plans, Individual Retirement Accounts, and non-ERISA Plans), the Funds are subject to the ERISA Plan Asset Rule, 29 U.S.C. § 1002(42). (Compl. ¶ 5.)

3. Proceedings Concerning Beacon's Distribution of Monies

This case, commenced in April 2014, is related to a proceeding filed in 2009 by Beacon (the "Original Litigation"), which sought "a declaration that [Beacon] may distribute 'a significant portion of Beacon's remaining assets'" pursuant to what has been referred to as the valuation method (the "Valuation Method"). *Beacon Assocs. Mgmt. Corp. v. Beacon Assocs.*

(..continued)
to create trust funds for the benefit of employees, provided that the employers and employees are equally represented by the trustees of the funds. *National Labor Relations Bd. v. Amax Coal Co.*, 433 U.S. 322, 324 (1981).

LLC I, 725 F. Supp. 2d 451, 456-57 (S.D.N.Y. 2010). The Valuation Method was described by this Court in *Beacon Assocs.* as follows:

> The first such method, referred to as the "Valuation Method," treats the Madoff losses as though they occurred due to "market fluctuations," that is, the Madoff-related losses are reported as having occurred in December 2008 (the date of discovery) and, pursuant to Beacon's Operating Agreement, allocated to each member on a pro-rata basis. Thus, if a member's "capital balance represented 1% of the fund as of December 1, 2008…, that [member] would be allocated 1% of the losses attributable to Madoff."

725 F. Supp. 2d at 455 (citations omitted). In the Original Litigation, the Court considered other alternatives to the Valuation Method, including what was referred to as the restatement method, which would have treated Beacon's losses as having occurred in the same month that each of Beacon's investments in Madoff were made. (*Id*.)

After briefing and argument, on July 27, 2010, the Court ordered the distribution of Beacon's remaining assets pursuant to the Valuation Method proscribed by the Beacon Operating Agreement (the "July 2010 Order"). (Compl. ¶ 35; Dkt. No. 2.) In reaching its decision, as noted above, the Court considered arguments regarding the disbursement of Beacon's assets pursuant to the Valuation Method and other methodologies. One other methodology not directly considered by the Court in its 2010 order but relevant here is what has been referred to as the net equity method ("Net Equity Method"), described in the Complaint in this matter as follows:

> The Net Equity formula (sometimes called "cash in/cash out") determines each investor's interest in the Funds by calculating how much each investor contributed to Beacon or Andover and subtracting from that the amount withdrawn by the investor (i.e., cash in / cash out). To further amplify, an investor's "Net Equity," for the purpose of the distributions at issue here, has been calculated as the amount of the investor's investment of principal less any withdrawals or distributions received from the Funds, including the distributions made by the Funds in 2010. Any distribution to be made under the Net Equity Method would be calculated by taking the member's Net Equity percentage (calculated by comparing the net equity total investment to the total net equity

> investment of all Beacon investors) and multiplying it by the total amount of funds available for that distribution to Beacon investors.

(Compl. ¶ 40; Dkt. No. 2.)

The Court's 2010 ruling did not address the distribution of funds Beacon would later receive from the Madoff Trustee or from other litigation relating to the Madoff fraud. (Compl. ¶ 38; Dkt. No. 2.)

4. Proceedings Concerning Beacon's Distribution of Monies Received from The Madoff Trustee and Litigation Relating to the Madoff Fraud

In 2013, Beacon identified a dispute among investors regarding how funds received from the Madoff Trustee, as well as funds received from certain litigation, should be distributed. Income-Plus argued that the distribution should follow the Valuation Methodology – a method that would benefit Income-Plus and other investors – while Fastenberg advocated for use of the Net Equity Method – a method that would benefit Fastenberg and certain other investors. (Compl. ¶¶ 18, 42-44; Dkt. No. 2.)

Counsel for Income Plus spent considerable time and effort communicating with counsel for Beacon relating to the issues and reviewing relevant documents and materials. Ultimately, as a result of the uncertainty regarding the proper distribution methodology, Beacon, on April 2, 2014, commenced the above-captioned proceeding for a declaratory judgment, naming Income-Plus and Fastenberg as additional defendants so those parties could advance arguments in support of the conflicting distribution methodologies. (Compl. ¶ 45; Dkt. No. 2.)

As noted above, Income-Plus believed Beacon should distribute any funds pursuant to the governing documents, which mandated the use of the Valuation Methodology, while Fastenberg considered the Net Equity Method more appropriate because the funds to be distributed were related to the losses suffered by Beacon as a result of the Madoff's fraud. While they advocated different methodologies for the ultimate distribution, between the two, Income-Plus and

Fastenberg advocated on behalf of all investors in Beacon. In doing so, counsel for Income-Plus and Fastenberg, along with their clients, therefore spent considerable time and effort determining precisely what impact any distribution would have on Beacon's investors. It was this work that ultimately led to the common fund (discussed in more detail below) – a fund that has provided a substantial benefit to the vast majority of Beacon's investors and that would not have been created but for Income-Plus's willingness to advocate on behalf of the valuation methodology, seek discovery regarding Beacon's planned distribution, analyze that discovery, and then, as discussed in more detail, object to and convince the court to revise the planned distribution. In brief, by agreeing to participate actively in this litigation and incur legal fees, Income-Plus paved the way for a decision that has provided more than $5.6 million in additional funds for distribution to Beacon's investors. It is also expected that these additional benefits will continue for the foreseeable future, as the Madoff Trustee continues to distribute added money to Madoff investors, such as Beacon Associates.

5. The Litigation

A. The October 31, 2014 Order

After Beacon filed the complaint on April 2, 2014, Income-Plus and Fastenberg reviewed documents provided by Beacon with respect to the impact the proposed distribution methodologies would have on the distribution of the funds Beacon had received (and would receive in the future) from the Madoff Trustee, as well as certain funds received as the result of litigation. (Declaration of John P. Jeanneret dated August 27, 2014, ¶¶ 12-15 ("Jeanneret Dec."); Dkt. No. 26.) That work included various communications with counsel for Beacon and the analysis of financial records provided by Beacon. (*Id.*)

On August 27, 2014, Income-Plus and Fastenberg submitted memoranda and supporting materials advocating respectively for use of the Valuation Method and the Net Equity Method,

and then submitted, on September 5, 2014, memoranda and supporting papers replying to each other's opening briefs. (Dkt. Nos. 25-30.)

On October 31, 2014, after a hearing, the Court ordered that money received by Beacon from the Madoff Trustee, and as otherwise identified in the Complaint, should be distributed according to the "Net Equity Method" until all investors were made whole (Dkt. No. 51) (the "Final Distribution Order" or the "October 31 Order"), at which point distributions would again follow the Valuation Method (Final Distribution Order p. 4; Dkt. No. 4).

B. Identification of Issues Regarding the Appropriate Net Equity Calculations

Prior to the entry of the October 31 Order, Beacon, pursuant to a stipulated confidentiality and protective order, provided data to Income-Plus and Fastenberg relating to the cash flows Beacon's management had prepared regarding Beacon's investors to enable Income-Plus and Fastenberg to identify any issues which might exist with respect to the calculation. In their initial reviews of that data, both Income-Plus and Fastenberg identified one of Beacon's investors which appeared to have an inflated net equity and questioned whether funds had been deposited independently by that investor into a new, separate and distinct Beacon account, or simply whether funds had been transferred from one related account to another. (*See* Memorandum of Defendant Income-Plus Investment Fund in Reply to Defendant Fastenberg's Memorandum of Law in Support of His Request for a Mandatory Injunction and Declaratory Judgment, Dkt. No. 33 at p. 5 fn. 4.)

Promptly after the entry of the Court's Final Distribution Order, Income-Plus and Fastenberg requested additional information relating to the issue they had identified during the initial briefing process. In particular, they sought additional information relating to investors identified on the materials provided by Beacon as Investor A and Investor B (collectively

"Investor A")[2], as well as any other Beacon investors that may have had transfers among related accounts. (Declaration of Brian E. Whiteley in Support of Income-Plus Investment Fund's Motion for Attorneys' Fees and Expenses Under the Common Fund Doctrine (hereafter "Whiteley Dec.") at ¶4.) After carefully reviewing those materials, Income-Plus and Fastenberg notified Beacon that they had identified certain accounts with related investors whose net equity calculations would require adjustments, and the legal reasoning supporting those adjustments. (*Id.* at ¶5.)

Beacon then notified the investors, including the Investor A entities, of the issue identified by Income-Plus and Fastenberg. 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 and Fastenberg to the Court for resolution. (Whiteley Dec. ¶6.)

C. The Dispute Concerning the Computation of Investor A's Net Equity under the Final Distribution Order and Expedited Briefing Schedule

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. (Whiteley Dec. ¶7.) On January 23, 2015, after difficult and extensive negotiations with all parties, Beacon submitted a letter to the Court with an agreed upon proposed schedule for

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

discovery and briefing with respect to the dispute. (*Id.*) The Court endorsed and "So Ordered" the letter on January 26, 2015.[3] (Dkt. No. 53.)

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. (*See, e.g.*, Dkt. Nos. 72, 76, 82, and 86.)

Spreadsheets provided by Beacon during discovery revealed a significant transfer of in 2005 from Investor A to Investor B, as well as additional transfers in 2006 and 2008 that were also significant. 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. (*See, e.g.*, Dkt. Nos. 72 and 82.)

D. The April 8, 2015 Order

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.) The Court rejected Investor A's argument that its accounts should not be combined for Net Equity purposes because investors in the two Investor A funds were different, finding that "Investor A and Investor B, and not their investors, were members of Beacon." (*Id*. at p. 3.) The Court went on to hold that "Investor A and Investor B are related and in equity and fairness should be treated as such for purposes of Beacon's Net Equity

[3] 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.)

Distribution." (*Id.*) The Court further held that the other "Holdback Investors" identified by Beacon should be treated as single entities for the purposes of the Net Equity calculations. (*Id.*)

Investor A was the only Holdback Investor that filed an appeal, and Investor A sought and received (after further briefing) a stay of distribution of the amount attributable to the holdback of its funds. (Dkt. No. 114.) Income-Plus and Fastenberg negotiated with Investor A and Beacon over distribution issues in light of the stay. (Whiteley Dec. ¶13.) Investor A ultimately withdrew its appeal on July 1, 2015, and this Court notified the parties, on July 13, 2015, that Beacon was free to distribute the funds that had been held back. (Dkt. Nos. 116 and 117.)

6. The Substantial Benefit Conferred on Beacon and the Majority of its Investors

As noted above and as further explained below, Beacon has distributed over $5.6 million more to a majority of its investors (the "Benefitted Class") than originally projected and will continue to make distributions to the investors that exceed what they would have received in the absence of the work performed by Income-Plus. The over $5.6 million common fund realized to date is based on the fact that, according to records produced by Beacon pursuant to this Court's June 20, 2019 Scheduling Order (Dkt. #121), Beacon has to date distributed $84,904,984 in funds received from the Madoff Trustee. (Declaration of John P. Jeanneret, Ph.D In Support of Income-Plus Investment Fund's Motion for Attorneys' Fees and Expenses Under the Common Fund Doctrine ("Jeanneret September 20 Dec.") ¶4.) Beacon's historical records indicate that Investor A – before the litigation giving rise to this claim for a common fund award – would have received approximately 6.6% of the $84,904,984 distributed to date because that had been Investor A's percentage interest in Beacon prior to the litigation. (Jeanneret September 20 Dec. ¶5.) Investor A's 6.6% of $84,904,984 was equal to $5,603,729 that was instead available for

distribution to the balance of the investors in Beacon. In brief, a common fund of over $5.6 million – a fund that will continue to increase as future distributions are made – would not have been available to Beacon's investors if Income-Plus and Fastenberg had not, as an initial matter, advocated for the respective Valuation and Net Equity Methods, or if they had not identified, objected to, and litigated the issues raised in the briefing related to Investor A that resulted in the Court's April 8 Order.

7. To Obtain This Recovery, Income-Plus has Incurred Legal Fees and Expenses

Over the course of the litigation, Income-Plus incurred legal fees and expenses, which it paid along the way, recognizing that the litigation would result in benefits not only to Income-Plus, but also to all other similarly-situated Beacon investors. This motion would reimburse Income-Plus for its actual attorneys' fees and costs, as well as for the considerable time spent by its employees on the matter, and it will further reward Income-Plus for the risks taken in pursuing the litigation. As noted above, Income-Plus' willingness to litigate these matters on behalf of the investors in Beacon has to date resulted in an additional $5.6 million available for distribution to the investors and will continue to provide additional funds in the years to come.

With respect to Income-Plus' actual fees and expenses, in August 2013, the fund and counsel entered into a written agreement for legal services relating to Beacon. (*See* Whiteley Dec. ¶14.) From the inception of the engagement in August 2013 until the filing of the Complaint in this action, counsel for Income-Plus worked with counsel for Beacon, Fastenberg, 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. (Whiteley Dec. ¶15.)

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. The actual fees and expenses incurred by Income-Plus during the time period August 2013 through July 2015 totaled over $175,000. (Whiteley Dec. ¶17.) Income-Plus now seeks a common fund award of $700,000. That amount is approximately 12.5% of the amount recovered for Beacon's investors to date, and that percentage will only decrease as distributions from the Madoff Trustee continue.[4] By way of example, if the Trustee distributes an additional $15 million to Beacon in the years ahead, the additional funds available to Beacon's other investors will be close to another $1 million.

ARGUMENT

I. LEGAL STANDARDS

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine reflects the traditional practice in courts of equity, which recognize "that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *In Re Zyprexa Prods. Liability Litig.*, 594 F.3d 113, 128-29 (2d Cir. 2010) (citations omitted). The litigants or attorneys whose efforts created the fund are entitled to a reasonable fee – set by the court – to be taken from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citing cases).

[4] Income-Plus requests 12.5% of the current common fund because it understands Fastenberg also intends to seek an award. Counsel for Fastenberg and Income-Plus worked together on the issues leading to the common fund and believe that an award of 25% of the current fund is appropriate.

In this Circuit, common fund fee awards are evaluated based on the six-factor standard set forth in *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F.Supp.2d 437, 440 (E.D.N.Y. 2014). Accordingly, a court must weigh "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 290 F.3d at 50.

District courts "may award attorneys' fees using either a percentage of the fund or a lodestar calculation." *Id.* ("no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee"). "The lodestar method multiplies hours reasonably expended against a reasonable hourly rate." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). However, "[t]he trend in this Circuit" is to award attorney's fees based on "the percentage method." *Id.*[5] Under either method, "a fee award should be assessed based on scrutiny of the unique circumstances of each case." *Goldberger*, 209 F.3d at 53.

[5] *See also, e.g., In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 U.S. Dist. LEXIS 177175, *31 (S.D.N.Y. Dec. 19, 204) ("[t]he trend among district courts in the Second Circuit is to award fees using the percentage method") (citation omitted); *Spicer v. Pier Sixty LLC*, No. 08 Civ. 10240 (PAE), 2012 U.S. Dist. LEXIS 137409, at *12 (S.D.N.Y. Sept. 14, 2012) (applying the percentage of the fund method as "consistent with the trend in the Second Circuit"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 171 (S.D.N.Y. 2007) (same); *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96 CIV. 0583 (DAB), 2002 U.S. Dist. LEXIS , at *3 (S.D.N.Y. June 17, 2002) (same) (citation omitted). *See also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. Apr. 10, 1993) ("The Eleventh Circuit has, after reviewing criticisms of the lodestar method and the findings of the Third Circuit task force specifically established the percentage-of-the-fund, not the lodestar, approach as applicable in all common fund cases in that circuit."); *Levine v. Am. Psychological Ass'n (In re APA Assessment Fee Litig.)*, 311 F.R.D. 8, *35 (D.D.C. Oct. 14, 2015) ("In a common fund case like this, a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fee award.") (citation omitted).

As for reimbursement of litigation costs, "'[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.'" *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 U.S. Dist. LEXIS 152275, at *33 (E.D.N.Y. Oct. 23, 2012) (quoting *In re Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3421 (AAR), 2001 U.S. Dist. LEXIS 19868, at *17 n.12 (E.D.N.Y. Oct. 31, 2001)). *See also, e.g.*, *Interchange*, 991 F. Supp. 2d at 448 ("As a general rule, counsel are entitled to reimbursement for reasonable out-of-pocket expenses incurred over the course of litigating the case."); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (same).

II. THE REQUESTED AWARD IS REASONABLE AS A PERCENTAGE OF THE SETTLEMENT FUND

All of the Goldberger factors support the requested attorney fee award in this case.

A. The Fee Request is Consistent with the Size and Scope of the Common Fund

The requested award of $700,000 is approximately 12.5% of the current common fund obtained as the result of Income-Plus' willingness to litigate the issues discussed above and its ultimate success. As noted above, Income-Plus understands that Fastenberg will also request an award of $700,000 such that the total award will be $1.4 million (25% of the common fund). Courts in the Second Circuit have frequently approved attorney fee requests, exclusive of expenses, that are significantly above the approximately 25% sought here. *See, e.g.*, *Vitamin C*, 2012 U.S. Dist. LEXIS 152275 at *33 (noting that "'[i]n this district alone, there are scores of common fund cases where fees alone … were awarded in the range of 33-1/3% of the settlement fund'") (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *33 (S.D.N.Y. Nov. 26, 2002)).[6]

[6] *See also, e.g.*, *Spicer*, 2012 U.S. Dist. LEXIS 137409, at *12 ("Class counsel's request for one-third of the settlement fund is also consistent with the trend in this Circuit."); *Giant*, 279 F.R.D. at 163 n.6 (same); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y.

B. The Time and Labor Expended by Income-Plus' Counsel Support the Requested Fee

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. (Whiteley Dec. ¶18.)[7] 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 accounts with related investors whose net equity calculations would require adjustments and the legal reasoning supporting those adjustments; 7) engaging in significant discovery and briefing on an expedited schedule during the January 2015 through March 2015 time period focused on the issue concerning the computation of Investor A's net

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2009) (awarding one-third of a settlement fund); *In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund ...."); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, at *43 (E.D. Pa. June 2, 2004) (citing a "Judicial Center study that found that in federal class actions generally [the] median attorney fee awards were in the range of 27 to 30 percent."); 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 14.6 n.9, at 768 (4th ed. 2002) ("In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range.").

[7] Income-Plus has not sought reimbursement for fees and expenses relating to its request for fees under the common fund doctrine.

equity under the Final Distribution Order; 8) arguing that funds transferred from one Beacon account to another, related account should not be treated as "new" cash contributions for purposes of calculating "Net Equity" under the Final Distribution Order; 9) obtaining the April 8, 2015 Order; and 10) participating in negotiations to resolve these issues. (Whiteley Dec. ¶19.)

C. The Magnitude and Complexity of the Litigation Support the Requested Fee

The issues in this case with respect to the methodologies for the distribution of the funds held by Beacon, and then determining and calculating Beacon investor interests, were complex and bitterly fought. The issues litigated were novel. They concerned the appropriate method to distribute monies which Beacon recovered and continues to recover from the Madoff Trustee as well as from other sources in the context of an historic and unique fraud perpetrated by Madoff. The issues with respect to Investor A were particularly unique given the nuances of the transfers at issue, the cryptic notes on Beacon's spreadsheets that lead to the initial questions from Income-Plus, the need to tease out from Beacon the precise nature of the relevant transfers to Investor A (and a variety of other investors), and then the hard-fought litigation with Investor A regarding those issues.

D. The Risks Entailed in the Litigation Support the Requested Fee

There can be no serious question that litigating the issues concerning distribution pursuant to the "Net Equity Method" and the distribution issues concerning Investor A involved risks, and that the results achieved by Income-Plus were far from guaranteed. Nevertheless, Income-Plus knew that there would be significant benefits to not only Income-Plus but also to a myriad of other Beacon investors if Income-Plus was successful in its litigation efforts. Investor A, represented by very able counsel, aggressively defended its position that the two Investor A Funds were different and that there was no material overlap in the identity of the investors in

Investor A and Investor B. As a result, while other investors may have been content to remain silent and allow the distribution to go as Beacon had planned without a fair resolution of the Investor A issue, Income-Plus elected to pursue the issue, incurring the legal fees for which it now seeks reimbursement from the common fund.

E. The Quality of Income-Plus' Representation Supports the Requested Fee

Income-Plus' counsel drew extensively on its knowledge of Income-Plus, its investors and the investments in Beacon gained over the course of representing Income-Plus since 2009 in connection with various Madoff-related issues. Income-Plus' counsel successfully opposed Investor A's efforts to treat Investor A and Investor B as separate entities instead of as related and therefore a single entity for purposes of determining Net Equity. Further, Income-Plus' counsel developed a record for the Court to conclude that, "in fairness, the Investor A Funds should not receive the benefit of [] fictitious profits until all other Beacon members receive back the principal they invested in Beacon." (April 8 Order p. 2.) Notably, in making this ruling, the Court quoted directly from Income-Plus' brief on the issue.

> After reviewing all of the parties' submissions on this issue (Dkt. Nos. 65, 69-77, 79-90), the Court holds that, in equity and fairness, each related account should be treated as a single entity for purposes of determining Net Equity.
>
> As Beacon member Income-Plus Investment Fund explained:
>
> The reason for tracking from the initial investment rather than just when an account was re-opened was straight forward and is best explained by example. Assume for the purpose of this example Fund A made an initial investment in Beacon of $1 million and that the investment grew over time to $2 million, without any withdrawals. If that assumption were true, Fund A would have had a "net equity" investment of $1 million but an account value of $2 million. If Fund A then merged into Fund B and Beacon opened a new account to reflect the name change from Fund A to B, Beacon's books and records would reflect an initial cash-in investment for Fund B of $2 million when Fund B had, in reality, only $1 million in "net equity" at the time of the initial investment of its predecessor, Fund A. As a result, the only way to understand Fund B's true "net equity" would be to trace Fund B's investment back to Fund A's initial investment of $1 million

> . . . . Without that tracing, Fund B would have an inflated "net equity" investment of $2 million, instead of only the original $1 million actually invested.

(April 8 Order pp. 1-2.)

F. Public Policy Considerations Support the Requested Fee

Public policy favors the requested award here.

It is well-recognized that courts should reward those who are willing to take on the risk of prosecuting difficult and complex cases. *See, e.g.*, *Interchange*, 991 F. Supp. 2d at 441 ("Counsel should be rewarded for undertaking [the risks in the litigation] and for achieving substantial value for the class. If not for the attorneys' willingness to endure for many years the risk that the extraordinary efforts would go uncompensated, the settlement would not exist.").

Here, if not for Income-Plus' willingness to identify and litigate the "net equity" and Investor A issues, the common fund would not exist. Virtually all of Beacon's investors, many of whom as discussed above are ERISA plans, have and will recover additional amounts they would not otherwise have received.

Absent the requested award, Income-Plus will not be reimbursed for the expenses it has incurred and paid already. (Whiteley Dec. ¶20.) The requested award is, therefore, necessary to reimburse Income-Plus for the financial expense and risk it incurred to obtain the common fund on behalf of the Benefitted Class.

Thus, the requested award is justified as a reasonable percentage of the common fund.

III. THE REQUESTED AWARD IS JUSTIFIED BASED ON A LODESTAR CROSS-CHECK

Courts "use the lodestar figure as a 'cross-check' to assure that the percentage-based fee is reasonable." *Interchange*, 991 F. Supp. 2d at 440 (citing *Goldberger*, 209 F.3d at 50). The reasonableness of an attorney fee request using the lodestar calculation method, including any

multiplier, is evaluated using the same six *Goldberger* factors as the percentage of the fund method. 209 F.3d at 50. Moreover, "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court," and instead "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

A. Income-Plus' Counsel's Fees Are Conservatively Calculated for Lodestar Purposes

Based on the fees actually billed to Income-Plus from August 2013 through July 2015, the lodestar is $169,472.50 for 525.9 hours. The lodestar based on actual billings by Income-Plus' counsel is conservatively calculated for several reasons. *First*, it does not include bills prior to August 2013 for time spent by Income-Plus' counsel in connection with other aspects of this litigation, originally commenced in 2009. *Second*, the billings reflect heavily discounted hourly rates based on Income-Plus' base in upstate New York and the fact that it provides retirement and other employment benefits to employees in upstate New York.

B. Income-Plus' Counsel's Hourly Rates are Reasonable

In determining the reasonableness of an attorney's hourly rates for fee award purposes, as well as the reasonableness of hours expended, the paramount consideration is the result obtained. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."). Based on its discounted fee structure, Income-Plus' counsel's hourly rates for attorneys were $180 for an associate, $195 for a senior associate, and $350 for the partner.[8] (Whiteley Dec. ¶21.)

[8] These hourly rates are conservative for lodestar calculation purposes in several respects. First, courts in the Second Circuit have used current hourly rates to calculate the lodestar figure. *See, e.g.*, *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *64 (S.D.N.Y. Nov. 30, 2010) ("'The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts.'") (quoting *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-MDL-01695 (CM), 2007 U.S. Dist. LEXIS 16922, at *9 n.7 (S.D.N.Y. Nov. 7, 2007)). Second,

These rates are well within the normal range for counsel with the expertise necessary to prosecute a case of this complexity. *See, e.g.*, *Interchange*, 991 F. Supp. 2d at 448 (awarding fees where class counsel's supporting declarations indicated hourly rates ranging from $185 to $855); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2013 U.S. Dist. LEXIS 182701, at *11 (E.D.N.Y. Dec. 30, 2013) (approving hourly rates ranging from "a low of $375 per hour for junior associates to $980 per hour for senior partners"); *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 160764, at *7 (E.D. Pa. Nov. 9, 2012) (awarding fee request based on hourly rates that ranged from $0 to $950).

C. The Requested Award of $700,000 Results in a Modest Lodestar Multiplier

Courts routinely approve lodestar multipliers of between 3 and 4. *See, e.g.*, *Interchange*, 991 F. Supp. 2d at 448 (finding multiplier of 3.4 for $160 million lodestar to be "reasonable" and "comparable to multipliers in other large, complex cases"). *See also, e.g., Visa Check*, 297 F. Supp. 2d at 524 (awarding fee with a multiplier of 3.5 in megafund settlement); *Vitamin C*, 2012 U.S. Dist. LEXIS 152275, at *33 ("observing that lodestar multiples of between 3 and 4.5 had 'become common'") (quoting *Lloyd's*, 2002 U.S. Dist. LEXIS 22664, at *80); *Spicer*, 2012 U.S. Dist. LEXIS 137409, at *13 (finding that 3.36 multiplier was "well within the range of reasonableness"); NEWBERG ON CLASS ACTIONS, § 14.6 ("multiples ranging from one to four frequently are awarded in common fund cases"). Here, the $700,000 sought by Income-Plus results in a multiplier of just over 4 with respect to its $169,472.50 in fees – well within the 3 to 4.5 range referred to as "common" in the case law.

In sum, the requested award is justified by the lodestar cross-check.

(..continued)
courts have adjusted the lodestar to reflect the time value of money – *i.e.*, to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989).

IV. THE REQUESTED AWARD FOR REIMBURSEMENT OF EXPENSES IS JUSTIFIED

Expenses for this litigation during the time period August 2013 through July 2015 total approximately $5,930.79. These expenses were necessary for this case. They included routine litigation expenses, such as computerized legal research, PACER searches, delivery charges, and travel expenses for meetings with Income-Plus in Syracuse and court appearances in New York City.

"As a general rule, counsel are entitled to reimbursement for reasonable out-of-pocket expenses incurred over the course of litigating the case." *Interchange*, 991 F. Supp. 2d at 448. *See also, e.g., In re Vitamin C Antitrust Litig.*, 06-MD-1738 BMC JO, 2012 U.S. Dist. LEXIS 152275, at *33 (E.D.N.Y. Oct. 23, 2012) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (same). The expenses of $5,930.79 incurred by Income-Plus during the time period August 2013 through July 2015 to litigate the issues discussed herein are reasonable and reimbursement of these expenses is appropriate. Finally, Beacon has confirmed to Income-Plus that Beacon has a reserve liability of $3.3 million, an amount more than sufficient to pay the award requested herein even if Beacon did not receive any additional funds from the Madoff Trustee.

CONCLUSION

For the foregoing reasons, Income-Plus respectfully requests that this Court grant this Motion for Award of Attorneys' Fees and Expenses in the amount of $705,930.79.

DATED: September 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing Memorandum of Law in Support of Motion for Attorneys' Fees and Expenses 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