

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.

**SUPPLEMENTAL 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, joined in the instant Motion and adopted the arguments 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. However, there is some confusion over the

amount of the recovery Fastenberg seeks from the Common Fund. This Supplemental Declaration is being filed to clarify Fastenberg's request.

2. Fastenberg seeks a recovery of 12 ½% of the benefit conferred on the Beacon Funds because of our efforts. Income Plus also seeks an award of 12 ½% of the amount of benefit conferred on the Beacon Funds due to their effort. Collectively, therefore, the moving parties are seeking 25% of the benefit conferred. However, footnote 4 in the Income Plus Memorandum of Law does make that clear. That footnote states:

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.

Dkt. No. 123, p.12, n.4.

3. Because my Declaration did not highlight the fact that I was seeking a 12 ½% recovery, however, it apparently led to the misperception that only the dollar amount of the Fastenberg fees and expenses were being sought.

4. The combined 25% recovery is well within the percentages granted in other Common Fund cases. The percentage of recovery is the standard means courts apply to determine the amount of the Common Fund and therefore provides a useful framework for the required analysis. It also accounts for, as courts have held they must, the various factors, including but not limited to risk, that the litigation funder should be compensated for.

5. I apologize to the Court and to the Beacon Funds for any

misperception I inadvertently caused.

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

Dated: November 1, 2019

/s/ Max Folkenflik
Max Folkenflik