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.

Index No. 14-cv-2294

DEFENDANT FASTENBERG'S MEMORANDUM OF LAW IN OPPOSITION TO AIJED'S REQUEST FOR A STAY

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DEFENDANT FASTENBERG'S MEMORANDUM OF LAW ON COMPUTATION OF NET EQUITY

Defendant David Fastenberg[1] ("Fastenberg"), by his attorneys, Folkenflik & McGerity LLP, submits this Memorandum of Law in Opposition to the motion of AIJED International Ltd. for a Stay or Preliminary Injunction.

[1]Defendant David Fastenberg, appears as Trustee of the Long Island Vitreo-Retinal Consultants 401k FBO David Fastenberg. Mr. Fastenberg's counsel also represents approximately 170 other investors in the Plaintiff Beacon Funds.

PRELIMINARY STATEMENT

AIJED International LTD ("AIJED") seeks a "stay of execution" or a "preliminary injunction" to prohibit plaintiffs, the Beacon Funds[2] from distributing approximately $3.5 million (hereinafter the "Holdback Amount") to Beacon's investors. That amount was held back from a prior distribution due to unsettled issues concerning computation of AIJED's Net Equity in compliance with this Court's Order of October 31, 1014 (the "Distribution Order"). Those issues were resolved by this Court's order dated April 8, 2015 (the "Computation Order"), effectively directing Beacon to distribute the Holdback Amount. AIJED appealed, and claims that it would be irreparably injured if distribution of the Holdback Amount is allowed.

AIJED's showing of irreparable harm is not merely insufficient, it is demonstrably false. Beacon will be receiving many millions more than the Holdback Amount in future distributions from the Madoff Trustee, who is holding billions of dollars in his Customer Funds account which have not yet been distributed. Over a billion dollars will be distributed in the next few months, and Beacon will be receiving over $11 Million of that amount. Billions more will be distributed later, and many Billions more in claims are being litigated, and likely to lead to Billions in future recoveries.

While it is possible that at some future date AIJED could show that Beacon will simply run out of money and be unable to pay AIJED if required to do so, that time is not now, and it likely will not occur until after AIJED's appeal is decided.

AIJED has neither shown nor can it show that there is a substantial likelihood of success on the merits of its appeal. This Court made a discretionary equitable decision on how to apply

[2] 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 "Beacon".

its Distribution Order in an equitable manner. Although AIJED argues that review will be *de novo*, the Computation Order will, assuredly, be reviewed for an abuse of discretion. Since AIJED has not shown, and cannot show, that in issuing the Computation Order this Court (1) "based its ruling on an erroneous view of the law," (2) made a "clearly erroneous assessment of the evidence," or (3) "rendered a decision that cannot be located within the range of permissible decisions," [3] there is no "substantial likelihood" that AIJED will succeed on the merits of its appeal.

STATEMENT OF FACTS

On April 2, 2014, counsel for the Beacon Funds commenced an action in the United States District Court for the Southern District of New York, *Beacon Associates LLC I v. Beacon Associates Management Corp.*, No. 14-cv-2294, by filing a Complaint for Declaratory Judgment (the "Complaint"), seeking to have the Court reach an equitable determination and order the proper method of distribution, either the Net Equity Method or the Valuation Method, as those terms were defined in the Distribution Order.

Following notice to all Beacon Fund Investors and briefing on the issues by all interested parties, including Defendant Fastenberg and Defendant Income Plus Investment Fund, the Court held a hearing on October 7, 2014. A copy of the transcript of that hearing is annexed to the Declaration of Max Folkenflik ("Folkenflik Dec.") as Exhibit C. At that hearing the Court ruled that until investors received a return of all of their principal invested, all of the "Madoff" recoveries, including the amounts from the Madoff Trustee and "the various court

[3] *See, Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. N.Y. 2009), quoting, *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. N.Y. 2008); accord, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

actions in Nassau, etc., that we referred to, should be distributed based on the cash in, cash out method, also referred to as the net investment method." Folkenflik Decl. Ex A, 44:15-18.

The Court also held that "[t]he amounts already received by the Beacon fund participants through the class action settlement…should be included within that as money recovered by those who did recover." *Id.* at 44:18-22. The amounts to be distributed after all investors have received return of all of their principal invested will be distributed by the Valuation Method. The rulings were incorporated into the Distribution Order, a copy of which is annexed to the Folkenflik Declaration as Exhibit D, which defined the cash in/cash out method as the "Net Equity Method" and defined the point at which all investors received return of all of their principal invested as the "Net Equity Break Even Point." Folkenflik Dec. Ex. D at 3-4.

In essence, the Distribution Order sought to deny any further distributions to those who received any false Madoff profits until all Beacon investors are made whole. The Distribution Order was not appealed.

However, there were a few instances where transactions between two or more related accounts at Beacon, or accounts that were closed and then re-opened made computation of Net Equity for those accounts less straight forward. Beacon made a distribution of funds in January, but it held back amounts otherwise due to related accounts (the "Holdback Amount") until the court could determine how to treat the Net Equity calculation for those accounts. Following briefing by all interested parties who wished to participate, the Court issued the Computation Order on April 8, 2015. The Court held that related accounts should be treated "as a single entity for the purposes of determining Net Equity." Computation Order, Folkenflik Dec Exhibit E, at 1.

ARGUMENT

POINT I

AIJED HAS NOT SHOWN AND CANNOT SHOW IRREPARABLE INJURY

AIJED's argument about its "right" to a Rule 62(d) stay is dubious at best given the complex posture of this case,[4] and in all events irrelevant given that it has not posted and does not intend to post a bond. In all events, AIJED is asking for a stay or the equivalent preliminary injunction pending its appeal. The law which applies to the granting of a stay is not in dispute. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009), *citing Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." Moreover, the party requesting a stay "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. at 433-34.

The parties agree that the four factors to be considered are: "(1) whether the stay applicant has made a *strong showing* that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. at 534, *quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)(emphasis supplied).

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[4] The Computation Order AIJED is appealing merely interprets the manner in which Net Equity is calculated. Those calculations will lead to a distribution by Beacon pursuant to the terms of the mandatory injunction in the Distribution Order. It is hard to see how the Computation Order properly could be characterized as a "money judgment" rather than an "an interlocutory or final judgment in an action for an injunction" under Rule 62(a)(1) subject to a stay under Rule 62(c) and not Rule 62(d).

Notably, "simply showing some 'possibility of irreparable injury,' *Abbassi v. INS*, 143 F.3d 513, 514 (CA9 1998), fails to satisfy the second factor. ...the 'possibility standard is too lenient.'" *Nken v. Holder*, 556 U.S. at 534-35, *quoting*, *Winter v. NRDC*, Inc., 555 U.S. 7, 8 (2008).

Yet, as pointed out in the declaration of Max Folkenflik submitted in opposition, AIJED does not show even a possibility of injury if the funds currently held by Beacon are all distributed to the Beacon Investors. The Madoff Trustee's Sixth Interim distribution, expected by July, will be giving Beacon $11 million, far more than it needs to cover the AIJED Holdback Amount if AIJED's appeal is successful. *See*, Folkenflik Decl. ¶ 6. The Madoff Trustee customer fund currently holds billions of dollars which have not been distributed, including $2.2 Billion to litigation over claims that have been disallowed in whole or in part. The likelihood is slight that the Trustee will lose all of those cases, and he may lose none. The Trustee is pursuing $1.6 Billion in clawback claims and seeking before the Supreme Court a ruling that would put another $4.3 billion in claims into play. *See, id.* ¶ 7 and Exhibit B at 1, 3. In sum, before AIJED's appeal is decided, Beacon will receive a multiple of the amounts needed to pay AIJED's Holdback Amount, and we will know with greater certainty what further distributions Beacon is likely to receive in the future.

This should be contrasted with the situation in *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, 2012 U.S. Dist. LEXIS 102990, 9-10 (S.D.N.Y. July 24, 2012) on which AIJED relies. There money was held in escrow by a trust and absent the stay that money would be distributed. However, it was entirely "speculation" whether the trust in that case would generate funds sufficient to pay the amounts sought on appeal. Even if the funds were generated, they would be immediately distributed. Most significantly, "distributing the funds from escrow essentially

thwarts the right of priority that [the moving party was] asserting and which is the focus of this case and [the] appeal." *Id.* at 9-10. None of those problems exist in this case.

If AIJED seeks to expedite its appeal, and we will cooperate in that effort, the most likely result is that AIJED's appeal will be resolved long before there is any possible threat that Beacon will run out of money. AIJED may be able in the future to show that absent a stay there is a threat of irreparable injury, but it has not done that and cannot do that at this time.

To address that possible remote future threat, we would agree that after distribution of the funds Beacon currently has on hand, Beacon should be ordered to give notice to all parties to this proceeding of the receipt of any further funds, and two weeks prior notice before distributing any such funds. As a result of that notice, the Court and the parties could address the situation that exists at that time to determine if there is a meaningful risk of irreparable injury.

POINT II

AIJED HAS NOT SHOWN AND CANNOT SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS

A second separate and independently sufficient ground for denying the requested stay/injunction is the failure of AIJED to meet its burden of proving a substantial likelihood of success on appeal. On its appeal, AIJED will face the daunting task of showing that this Court "abused its discretion" in determining how to calculate Net Equity for the purpose of where there are related account transfers in circumstances where the related accounts, treated together, already received millions of dollars in fictitious Madoff profits

AIJED argues, in a footnote, that "[s]ince there were no disputed issues of material fact presented by the parties or resolved by the Court, but only an application of law, the standard of review of the April Order is de novo." *See*, AIJED Mem. at 16, n. 8, citing *Kreisler v. Second*

Ave. Diner Corp., 731 F.3d 184, 187 n.2 (2d Cir. 2013) and *Bano v. Union Carbide Co.,* 361 F.3d 696, 716 (2d Cir. 2004) (internal citation omitted). However, it is untrue that this Court's decision involved "only an application of law," or an application "of law" at all. The relief sought from this Court and granted in the Distribution Order and the Computation Order was all equitable in nature. *See*, *DiTolla v. Doral Dental IPA of New York*, 469 F.3d 271, 276 (2d Cir. 2006)(injunctive and declaratory relief are equitable in nature).

In the words of Judge (later Justice) Cardozo, this Court exercised "equitable discretion... to avoid harm to the public interest or unconscionability to a party that would be the consequence of the unflinching application of legal principles." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 389 (1919), *see, also*, *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005) (footnote omitted), *citing*, *Kaminsky v. Kahn*, 23 A.D.2d 231, 259 N.Y.S.2d 716, 723 (1st Dep't 1965) (noting that court has equitable power to adapt relief to "exigencies of the case"). The Court granted a mandatory injunction ordering distribution in the Distribution Order, and interpreted its own Order in the Computation Order. The Computation Order was most assuredly an exercise in equitable discretion and not "only an application of law" as AIJED incorrectly argues.

As the Supreme Court has held, "[i]t is not enough that the chance of success on the merits be 'better than negligible.' *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999) (internal quotation marks omitted). More than a mere 'possibility' of relief is required.'" *Nken v. Holder*, 556 U.S. at 434.(quotation and citation omitted). Here, AIJED's chance for reversal on appeal is not even "better than negligible."

The Second Circuit will only find an abuse of discretion where in rendering the decision on appeal, the court "has (1) based its ruling on an erroneous view of the law," (2) made a

"clearly erroneous assessment of the evidence," or (3) "rendered a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted). *See, also*, Lynch v. City of New York, 589 F.3d 94, 99 (2d Cir. 2009); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

AIJED cannot show that the decision was based on "an erroneous view of the law," since the Court was making a purely equitable determination and there were no cases which were binding authority requiring any particular determination. AIJED argues that this Court's decision is "directly at odds with the conclusion reached recently by Irving Picard and Bankruptcy Judge Bernstein concerning inter-account transfers in *Madoff III*." AIJED Mem. at 16. Yet that conclusion, even if true, which it is not, would not establish that this Court's decision was based on an *erroneous* view of the law that would require reversal under the highly deferential abuse of discretion standard. AIJED concedes "*Madoff III* is not controlling precedent for this Court," and that the value of that decision is limited to its "persuasive" force. *Id.*

Moreover, *Madoff III* involved the application of what the case calls the "Inter-Account Method" and applied the Net Equity of the transferor account to a transferee account. In that case, absent the use of that method, *would be eligible* for distributions of fictitious profits. As the Second Circuit made clear in *In re Bernard L. Madoff Investment Securities, LLC*, 654 F.3d 229, 232 (2d Cir. 2011) ("Madoff II"), the guiding principle established by the case law developed in the Madoff cases is to avoid "[t]he inequitable consequence of ... those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment [deriving] additional benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Madoff II*, 654 F.3d 229, 238.

AIJED was created as a spin-off of AIJED Associates, LLC ("AIJED Associates"). AIJED Associates already has received the benefit of approximately $[redacted] million in fictitious profits. Considered collectively with AIJED, the two AIJED entities are approximately $[redacted] million ahead because of those fictitious profits. Yet AIJED seeks $[redacted] million more. That $[redacted] million, if distributed to AIJED, will be taken from those investors who have not yet received their initial investments back.

Unlike the case of the father/son inter-account transfers discussed in *Madoff III* and at page 18 of AIJED's Memorandum of Law, where the Inter-Account Method was applied to *prohibit* the receipt of fictitious profits, here AIJED will be seeking a ruling that *allows* the two related AIJED entities to keep fictitious profits and get further distributions "at the expense of those customers who had not withdrawn funds before the fraud was exposed." This Court's opinion avoids that iniquitous result.[5]

"The power of equity is as broad as equity and justice require . . . ." *London v. Joslovitz*, 279 A.D. 280, 110 N.Y.S.2d 58, 59-60 (3d Dep't 1952) (per curium). A Court sitting in equity has equitable power "to devise whatever remedy it believes in its discretion is necessary to make injured parties whole." *Grand Union Co. v. Cord Meyer Dev. Co.*, 761 F.2d 141, 147 (2d Cir. 1985) (applying New York law) (internal quotations marks and ellipsis omitted) (emphasis supplied).

This Court initially determined that equity demanded the use of the Net Investment Method of distribution "to make injured parties whole" by returning to investors what they have

[5] While the judgments of the Madoff Trustee do not bind this Court, and the Distribution Order itself departs from those judgments, it is also worth noting that there is no showing that the Madoff Trustee would not apply the Inter-Account Method differently in this situation to reach the same result reached by this Court. The Folkenflik Declaration demonstrates that the Inter-Account Method is not applied inflexibly. *See*, Folkenflik Decl. ¶ 10.

lost. The Court was then faced with a refinement of that decision to address those few instances where the same investor, or closely related investors, may receive a windfall because of transfers of funds from one account to another related account. The Court decided that the most equitable approach was to treat the related accounts as one for the purposes of the Net Equity calculation. That determination was well "within the range of permissible decisions" and is unlikely to be disturbed on appeal.

As the Second Circuit has held, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (citation omitted). A stay is proper, for example, where the plaintiff can "demonstrate [ ] some possibility of success and the balance of hardships tips decidedly in his favor." *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2004). As a result, a showing of "serious legal questions" going to the merits must be accompanied by a "balance of hardships [that] tips sharply" in favor of the applicant "in order for a stay pending appeal to be granted." *Mohammed v. Reno*, 309 F.3d 95, 100-101 (2d Cir. 2002).

AIJED has made no showing sufficient to prove the existence of or even a meaningful risk of irreparable injury. Its probability of success on the merits is very low, and insufficient to support the stay/injunction it requests.

CONCLUSION

The Beacon investors have been waiting for nearly seven years to get their original investments back. The distribution of those funds should not be delayed absent a clear and compelling showing that such a delay is justified by a substantial risk of irreparable injury and a strong showing of a likelihood of success on the merits. AIJED has not made such a showing, and having received, along with its sister fund approximately $[redacted] million in fictitious profits, it

lies ill in its mouth to claim, as it does, that the balance of hardships tips in its favor. Instead, the hardship falls on the investors who have not yet reached the Net Equity Break Even Point.

For all of these reasons, we respectfully submit that AIJED's motion should be denied.

Dated: New York, New York
April 23, 2015

Respectfully submitted,

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