

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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3 BEACON ASSOCIATES LLC I, et al.,
4 Plaintiffs,

5 v. 14 Civ. 2294 AJP

6 BEACON ASSOCIATES MANAGEMENT
CORP., et al.,
7 Defendants.

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11 April 27, 2015
12 4:30 p.m.

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16 Before:

17 HON. ANDREW J. PECK,
18 U.S. Magistrate Judge

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APPEARANCES

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Attorneys for Interested Party AIJED
BY: MITCHELL PATRICK HURLEY, Esq.
RACHEL JADE PRESA, Esq.
Of counsel

1 (In open court)

2 (Case called)

3 THE COURT: Okay. I have read all of your
4 submissions, and I do mean all, so let me tell you my
5 inclination is to grant the stay, conditioned on an appeal bond
6 to pay for any additional expenses that the Beacon Fund would
7 have based on a late distribution or a separate distribution of
8 this money, if any, and whatever the loss of value is on the
9 money as between the treasury rate and the current escrow,
10 unless you all agree to something more remunerative but more
11 risky versus whatever investors.

12 How it is going to be proved I don't really know, but
13 it's how they could have done if they had gotten this
14 distribution now instead of X months from now or years from now
15 and also conditional upon AIJED doing everything within its
16 power to expedite the deal. That is my thinking.

17 I assume Mr. Folkenflik and Mr. Whiteley are going to
18 want to go first on this, but whoever.

19 MR. FOLKENFLIK: Your Honor, if I may.

20 I certainly understand your Honor's decision and I
21 understand the general inclination to try and protect a party
22 from a loss, a potentially irreparable loss as a result of the
23 appeal. The problem here is there is no likelihood of any such
24 loss.

25 THE COURT: Let me ask you this:

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1 One, while there is a likelihood that Beacon will get
2 more money from the trustee, there is no guarantee, and we
3 certainly work throughout to avoid any clawbacks; and

4 Secondly, isn't that just kicking it down the road?

5 To the extent I believe it was your affidavit was that
6 there is likely to be additional money in the next three months
7 or over the summer or some such, with all due deference to my
8 friends in the Circuit, the odds of there being a ruling on
9 this before then are somewhere between slim and none. So all
10 we're doing if we go that route is having AIJED come in to make
11 an emergency application three months from now or whenever.

12 MR. FOLKENFLIK: That's right.

13 Your Honor, I agree it is kicking the can down the
14 road, but here's what the situation is. We have pending the
15 sixth application for an interim distribution. There is no
16 showing and, in fact, it has not been the case that any such
17 application by the trustee has been anything other than
18 approved by the bankruptcy court, and nothing has been
19 challenged I am aware of and the funds are certainly
20 forthcoming.

21 So the issue of the \$11 million which is approximately
22 Beacon's share of the sixth interim distribution will be before
23 the court, before the bankruptcy court on May 28th and will
24 almost certainly be granted. When granted, that money will be
25 certain to come to Beacon.

1 Are we kicking the can down the road? Yes. Why is
2 that appropriate? Why should we kick the can down the road?

3 And the answer is that there is a lot going on in
4 Madoff world. The trustee is always litigating cases. I can
5 tell you from my personal experience, I have three adversary
6 proceedings, all of which the trustee has gotten very energized
7 about mediating and trying to get resolved immediately. The
8 Trustee's web site talks about how they're at the period of
9 highest activity and they have enormous amounts of money in
10 reserve, billions of dollars literally.

11 THE COURT: Are your clients, however, willing to
12 guarantee that if for some reason there is no more money coming
13 to Beacon, that they will fund the AIJED distribution and the
14 other holdback investors in the event that the court, Second
15 Circuit rules differently than I've ruled?

16 MR. FOLKENFLIK: I don't think my clients are -- I
17 wouldn't believe that they would be willing to guarantee, nor
18 would that, if it were appropriate, be an appropriate position
19 of protection for AIJED because they would have to go out and
20 collect those monies unless there was a bond posted. That is
21 not what we're saying at all. What we're saying is --

22 THE COURT: With all due respect, I don't see how it
23 makes the least bit of difference whether I stay the
24 distribution of this money or I say okay, distribute this money
25 to the over folks which, by the way, probably means an extra

1 expense to Beacon, and then when the next funding comes in from
2 the trustee, the Madoff trustee, we go through this exercise
3 again. It doesn't make any sense.

4 MR. FOLKENFLIK: The only explanation I have for how
5 it makes sense -- your Honor may disagree -- is that we're
6 talking about the \$11 million that is coming in June or July.
7 It may be that by June or July there will be more information
8 available to us that will show there is still more money coming
9 in.

10 If Mr. Hurley seeks to expedite the appeal, and so far
11 I don't believe Form C and D have been filed, or at least I
12 haven't been notified of that, he isn't moving as quickly as he
13 could. If there is an effort to expedite the appeal and he
14 says he'll file his --

15 THE COURT: Maybe what makes more sense then is for me
16 to issue a stay that expires in X months unless renewed, which
17 then gives us all -- and particularly me -- a chance to see
18 whether AIJED is proceeding as quickly as it can with the
19 appeal but, look, let's be realistic. Even if they dot their
20 I's, cross their T's, file their forms, CD and whatever else,
21 it usually takes six months to two years for the circuit to
22 deal with X.

23 So, you know?

24 MR. FOLKENFLIK: It will take time. We are talking
25 about under Nycam versus Holders, it says possibility of

1 irreparable injury isn't enough. I think that if your Honor
2 wants to stay the distribution of this amount until after the
3 court hearing on May 28th or for three months, see if AIJED
4 pursues its appeal diligently, and to then at the end of the
5 three months to determine on a motion to renew whether there
6 are new facts, I can understand that. That is a medium
7 position.

8 I just don't see there being any, at this point any
9 material risk that this money will not be available to Beacon
10 because we don't have -- not only do we have the \$11 million
11 coming, but we also have the likelihood we will have a better
12 fix of how much additional money is coming.

13 THE COURT: I say easy for you to say, okay?

14 Anything else?

15 MR. FOLKENFLIK: That will do it.

16 MR. WHITELEY: I don't have anything to add to that,
17 your Honor.

18 THE COURT: All right. Mr. Jakoby, before we go to
19 the AIJED folks, from Beacon's point of view, I know you have
20 been neutral on this, but in terms of both additional
21 distributions and in terms of the bond amount, assuming that
22 holding this money back in escrow causes additional
23 distribution expense down the road, which it may or may not
24 depending on other money coming in so it flows through, et
25 cetera, what would you say is needed to protect Beacon?

1 MR. JAKOBY: Frankly, as your Honor put it, there may
2 or may not be additional costs. Every time we distribute these
3 costs with the accountants, the costs to the fund is minimal,
4 but there is a cost.

5 THE COURT: Minimal? Can you put a dollar amount on,
6 "minimal"?

7 MR. JAKOBY: There is a mailing expense.

8 THE COURT: I don't need a description.

9 MR. JAKOBY: I can't as I stand here, but I have to
10 consult with the fund. We are hoping the accounting cost will
11 be less in the future than it was on the first distribution
12 because there was a learning curve for the accountants to
13 verify everything, but it was quite expensive on the last
14 distribution that we had.

15 Mr. Folkenflik is right, we are likely, I use the word
16 "likely" we can't get money. We expect to get money. I put it
17 in the high percentage, over 90 percent, but can we get a
18 guarantee we get more money from the trustee?

19 THE COURT: I moved to the Drexel, Michael Milken era
20 where it was highly likely to fund, it was almost a guarantee,
21 but it is still not a guarantee.

22 MR. FOLKENFLIK: However, it was bankable in that
23 case.

24 THE COURT: That is true. Look where that got people!

25 MR. JAKOBY: Certainly not a guarantee. We could

1 never guarantee we are getting additional funds.

2 One issue, assuming your ultimate ruling will be the
3 same as your inclination, as additional funds come in, I am
4 assuming your Honor will want us to withhold AIJED and the
5 other holdback investor monies from those from any future
6 distributions so that the holdback amount will continue to
7 grow. That is what we are prepared to do.

8 THE COURT: Correct, correct.

9 Mr. Hurley.

10 MR. HURLEY: Thank your Honor.

11 I guess with the question of the bond, in this case I
12 don't believe -- I read their opposition papers pretty
13 carefully -- I don't believe a bond was actually signed by the
14 challenging investors.

15 THE COURT: I am not so sure about that, but let's
16 find out. Considering what I have just said, Mr. Folkenflik,
17 bond or no bond?

18 MR. FOLKENFLIK: Absolutely. Your Honor, I think an
19 amount of, if we are talking about potentially two years of
20 holdbacks, additional funds coming in to be held back, I think
21 we need to talk about 10 percent of the existing amount as a
22 minimum bond for damages for delay, loss of use or other
23 damages.

24 People might have other consequences. There are about
25 360 investors in Beacon. For many of them, the money will not

1 be all that material to their lives. For some of them, it may
2 be otherwise. Mr. Whiteley can tell your Honor about a pension
3 fund, Taft Hartley Fund he is familiar with and what might be a
4 problem with that.

5 MR. WHITELEY: If you don't mind, I will fill that in.

6 There are a group of pension funds. This was just
7 looking at, your Honor, a delay. Mr. Hurley's papers noted
8 that on a lot of investors, we may be talking a hundred or some
9 thousands of dollars. With respect to one group of pension,
10 pension annuity, welfare funds altogether, it is closer to
11 \$500,000 is what is being held back from them.

12 That is another factor I ask your Honor to consider.

13 THE COURT: If it is so guaranteed more money is
14 coming in, presumably they can get a loan. I understand, okay?

15 Mr. Hurley, the floor is yours.

16 MR. HURLEY: Right. I guess in the papers there was
17 some discussion about what might happen if the money is held
18 back, but there was no evidence it was offered. There was
19 speculation from Mr. Folkenflik that maybe they could earn more
20 money in the market than is going to be earned on the money
21 saved is escrow. This is like in Wells Fargo where the
22 prevailing party in that case made exactly the same argument.
23 I know there is escrow, and it is sitting there, but I can do
24 better in the markets. One of the responses was yeah, you can
25 do worse, too.

1 THE COURT: That is true.

2 MR. HURLEY: And no evidence has been put forward to
3 show what you would invest that money in.

4 THE COURT: The court can take notice that the return
5 on T-Bills at the moment is pretty close to zero.

6 MR. HURLEY: If there is some investment that is maybe
7 slightly more risky and gets a slightly better return, I am not
8 saying we wouldn't be open to considering something like that.

9 It doesn't compare apples-to-apples. It is not T-Bill
10 versus the historical return of the stock market. I would
11 certainly be open to that. If Mr. Jakoby concludes there is
12 some amount of money he thinks needs to be bonded associated
13 with costs, I don't know exactly what that would be, I would
14 certainly be happy to have a conversation about that. That
15 strikes me as a relatively de minimis sum, if anything at all,
16 in part because if there are future distributions -- and the
17 expectation is there will be future distributions -- they will
18 be able to do it at the same time.

19 THE COURT: Maybe. Everybody sort of wants their cake
20 and to eat it, too. If there were future distributions, and
21 certainly it sounds likely the post-May 28th distribution is
22 likely to be more than sufficient to cover this, you know, you
23 can't have it both ways.

24 MR. HURLEY: The difference is, is that absent a
25 stay -- and this part isn't disputed -- if the stay isn't

1 entered, it doesn't matter how much money is coming in because
2 it is going back out the door.

3 THE COURT: It doesn't go out instantly.

4 MR. HURLEY: Correct.

5 THE COURT: The question is whether I like you guys
6 enough that I want to see you again in two months. When you
7 say we just got notice from Mr. Jakoby that they got another
8 eleven million bucks in, and after the accountants deal with it
9 in three weeks they're going to cut checks unless you stop
10 them, I would rather deal with it now.

11 Anything else?

12 MR. HURLEY: Just on the amount of the bond, I don't
13 know if there is an amount that the court had in mind.

14 THE COURT: The amount of all the holdbacks combined
15 is -- does somebody want to remind me?

16 MR. HURLEY: AIJED first, the amount associated with
17 AIJED is \$2.5 million. There was other money held back. I
18 don't know the status.

19 MR. JAKOBY: The total of \$4,150,487.00, that is being
20 held back, of which 3.5 million is the AIJED money.

21 THE COURT: Sorry? How much?

22 MR. JAKOBY: Total of \$4,150,487.00, and of that 3.5
23 million represents AIJED's money.

24 THE COURT: AIJED said two and a half.

25 MR. HURLEY: I said that.

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1 THE COURT: Are you serious?

2 MR. HURLEY: Yes, I said three and a half.

3 THE COURT: I guess the related question is -- and
4 this goes in part to Mr. Jakoby -- the only one who has applied
5 for a stay is AIJED. I didn't reason --

6 MR. JAKOBY: Your Honor, presumably if your Honor's
7 decision is reversed, then presumably monies would be owed not
8 just to AIJED, but also to the other holdbacks.

9 THE COURT: I understand that. Since they haven't
10 moved for a stay, why shouldn't -- and particularly with more
11 money clearly coming in and their total being somewhere in the
12 neighborhood of 600,000 or 700,000, not to say that that is not
13 real money?

14 But it is not three and a half million. Why should
15 the stay be for anyone besides AIJED? I am willing to stay it
16 for perhaps another 20 days, 10 days, whatever is left before
17 the appeal would be due and that you notify the members if you
18 think that is fairer, or if you want to take on that
19 application, Mr. Jakoby, but otherwise it seems to me it should
20 be a stay related on AIJED.

21 MR. JAKOBY: You should know we give notice all of the
22 holdback investors of everything that has happened in the case.

23 In other words, as soon as somebody, one of the
24 parties files a brief, literally within an hour or two we send
25 copies to all of the holdback investors so they know what is

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1 going on. They're aware of not only all the legal arguments
2 that were made, but they're also aware there was a hearing
3 today.

4 THE COURT: Okay.

5 MR. FOLKENFLIK: Your Honor, if I may just very
6 briefly.

7 The bond also should secure appellate costs as well,
8 although I guess AIJED might be good for that. I represent
9 many of the people who are subject to the other holdbacks, and
10 because I do believe in the arguments I made, I don't have a
11 problem with it, there not being a holdback as to them.

12 I do believe that your Honor's been through a lot.
13 There has been discussion about how AIJED was trying to get
14 leverage over the funds to get some sort of settlement and
15 negotiation. I believe the bond is put-up-or-shut-up money.
16 They should be able to post a bond. I suggested a 10 percent
17 amount.

18 THE COURT: Okay.

19 MR. HURLEY: Judge, we would just submit, because the
20 money in escrow is in escrow now, it is earning interest and
21 there has been no evidence whatsoever --

22 THE COURT: Reputation of getting the last word is
23 called --

24 MR. HURLEY: Well --

25 (Simultaneous voices)

1 THE COURT: The court rules as follows:

2 A stay of distribution limited to AIJED is or will be
3 entered subject to posting of a bond in the amount of \$100,000.

4 In addition, the stay will expire on August 3 unless
5 request to renew is made. That is my way of saying I will want
6 to see at that point that you have filed everything you
7 possibly can both in terms of the Second Circuit forms and a
8 request for expedition, which may well get denied by the
9 Circuit, but you can at least try.

10 Assuming that you get the bond here and that assuming
11 you do, indeed, file all the right forms and don't ask for
12 extensions in the circuit and have moved for expedition, the
13 odds are overwhelming that I will renew the stay at that point.

14 MR. HURLEY: We do intend to expedite.

15 MR. FOLKENFLIK: Your Honor, in the Second Circuit
16 rules, unless they changed very recently, they can request up
17 to 120 days in which to file their appellate record and --

18 THE COURT: I see no reason why it can't be done in
19 less than 30.

20 MR. FOLKENFLIK: Not the next 30 days because of Mr.
21 Hurley's other commitments.

22 THE COURT: I don't know what that means, but --

23 MR. FOLKENFLIK: He is getting married.

24 MR. HURLEY: I will be out of the country a few weeks.
25 We will take all the steps to expedite, and I don't have to be

1 here for all the steps. We will do that.

2 THE COURT: Very good. I will let you all
3 collectively draft the stay. I think that much agreement you
4 all have been able to do in the past.

5 In addition, while it is not a formal stay, Mr.
6 Jakoby, I don't think you're planning on distributing the
7 amounts left over from the other holdback parties in the near
8 future, but why don't we give them until May 8th just as a
9 courtesy. They will have filed a notice of appeal by counsel,
10 unless they're an individual and all of that, and then make a
11 motion to me for a further stay. I am not sure when their time
12 has run out. I don't think it has run out yet.

13 May 8 is probably the 30th day. That sounds like a
14 good day. Do what you need to do to get the bond filed, and
15 all of you get something to me for signature on the exact
16 language of the stay.

17 All right. Hopefully, the Madoff trustee will keep
18 funneling lots and lots of money back to Beacon and everybody
19 will be not only be made whole, but will be making some profit
20 on their investment.

21 The usual drill, you all figure out how to split the
22 cost of the transcript, but everybody is somehow -- somebody is
23 required to buy the transcript. The more people who buy, the
24 cost gets split proportionately. Thank you, all.

25 (Court adjourned)

