UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BEACON ASSOCIATES LLC I, BEACON ASSOCIATES LLC II, 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 (AJP)

REPLY MEMORANDUM OF LAW IN SUPPORT OF AIJED INTERNATIONAL LTD.'S MOTION FOR A STAY OF ENFORCEMENT OF APRIL ORDER PENDING APPEAL

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PRELIMINARY STATEMENT

AIJED respectfully asks the Court to enter a stay of the April Order pending determination of AIJED's appeal.[1] As demonstrated in AIJED's opening brief, the April Order is in the nature of a money judgment, and is therefore subject to the automatic stay of FRCP 62(d). The Challenging Investors argue that FRCP 62(d) does not apply because AIJED "has not posted" a bond, but they do not dispute that the Court can waive the requirement where a bond is unnecessary. In this case not even the Challenging Investors argue a bond is necessary, since the amount in dispute will remain in escrow earning interest throughout the course of the appeal.

In any event, the elements necessary for a discretionary stay under FRCP 62(c) are also met. With respect to irreparable harm, the Challenging Investors themselves acknowledge that, absent a stay, all of the assets currently available to Beacon for distribution will be dissipated long before AIJED's appeal can be decided, and that Beacon's consequent inability to pay AIJED's claim constitutes irreparable harm. Fastenberg argues that substantially more money may be received by Beacon in the future, but admits that the amount and timing of any such payment is speculative, and in any case, any sums received will go out the door as quickly as they come in absent a stay from this or another court.

AIJED respectfully submits that this Court should stay distribution of the AIJED Holdback currently in Beacon's possession – a sum which was specifically calculated and placed in escrow by Beacon to secure the interests of all of its investors in this dispute – rather than rely on the uncertain prospect that additional funds will be both received *and retained* by Beacon in

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Memorandum of Law in Support of AIJED International Ltd.'s Motion for a Stay of Enforcement of April Order Pending Appeal, ECF No. 99 ("AIJED Stay Mot.") and AIJED's previous briefing in this matter (ECF Nos. 76 and 86.

the future. This outcome is particularly appropriate since Beacon's other investors will not be harmed by entry of a stay.

AIJED has demonstrated a sufficient likelihood of success to warrant a stay as well. It is undisputed that AIJED and Associates were separate legal entities, were separate members of Beacon, had separate Beacon capital accounts, received separate K-1s from Beacon, and had separate, enforceable contractual relationships with Beacon. AIJED submits that merging these two distinct entities into one was an error of law subject to review *de novo,* or reversal as an abuse of discretion. Likewise, the Court's decision to eschew the Inter-Account Method established in *Madoff III* in favor of "combining" Associates and AIJED and treating them as a single investor for purposes of calculating Net Equity was a legal determination. AIJED submits there is a substantial chance that the Second Circuit will agree with Mr. Picard and Judge Bernstein that the Inter-Account Method is the better approach for determining Net Equity in connection with transfers among investors under either standard of review.

ARGUMENT

I. FRCP 62(D) IS APPLICABLE AND A BOND IS UNNECESSARY

The automatic stay of FRCP 62(d) "applies to any appealable order requiring payment." *Cohen v. Metropolitan Life Ins. Co.*, 334 F. App'x 375, 378 (2d Cir 2009). Here, even Fastenberg acknowledges that the April Order requires payment, because it "will lead to a distribution by Beacon pursuant to the terms of the mandatory injunction in the [October Order]." Fastenberg Opp. at 5 n.4. As the court explained in *Frommert v. Conkright*, it is not the form of the judgment, but the nature and effects of the relief ordered that determine whether the automatic stay under Rule 62(d) applies. 639 F. Supp. 2d 305, 309 (W.D.N.Y. 2009) (order requiring retirement plan to recalculate retirement benefits and then pay beneficiaries accordingly was "order to pay" subject to Rule 62(d)).

The rationale behind the application of FRCP 62(d) to money judgments – as opposed to injunctive relief – is that "where a party has been ordered to do or perform an act, the monetary value of a delay in performance is not so readily attained" as with an order pay money. *Id.* at 308 (internal citation omitted). The policy animating FRCP 62(d) is therefore applicable here, since the monetary value in dispute has already been ascertained and is being held in an interest bearing escrow account. Fastenberg argues incorrectly that FRCP 62(d) applies only where the appellant posts a bond; in fact, "the case law is uniform" that the requirement of a supersedeas bond can be waived where, as here, there is no risk of nonpayment to the appellees. *Frommert*, 639 F. Supp. 2d. at 313 (entering stay pursuant to Rule 62(d) and waiving bond requirement) *see also In re Winimo Realty Corp.*, No. 04 Civ. 7513, 2004 WL 2997784, at *5 (S.D.N.Y. Dec. 22, 2004) (holding that segregation of funds in dispute pending review offers protection similar to that "provided by a supersedeas bond").

II. THE REQUISITES FOR A DISCRETIONARY STAY ARE ALSO PRESENT

Even if the Court concludes that FRCP 62(c) applies rather than 62(d), the April Order should still be stayed because AIJED also satisfies the elements necessary for entry of a discretionary stay.

A. AIJED Will Suffer Irreparable Injury Absent a Stay While Entry of a Stay Poses No Material Threat to Any Other Party

There is no dispute that all funds currently available for distribution by Beacon will be dispersed among Beacon's hundreds of investors promptly unless the stay is granted, leaving nothing for AIJED if it prevails on its appeal. The Challenging Investors also tacitly concede that this is the kind of irreparable harm that will support issuance of a stay pending appeal. Opp. Brs. *passim*; *see also Six L's Packing, Inc. v. Alphas Co. of N.Y.*, No. 11 Civ. 2944, 2012 WL 505744, at *2 (S.D.N.Y. Feb. 15, 2012) .

The fact that Beacon may receive additional sums in the future from the Madoff trustee does not justify denying the stay. *Compare* Fastenberg Opp. Br. at 6-7; *see Wells Fargo Bank, N.A. v. ESM Fund I, LP*, 2012 WL 3023985 (S.D.N.Y. July 24, 2012) (ordering stay of distribution of sums in stakeholder's possession pending appeal despite likelihood that stakeholder would receive additional funds in the future). Fastenberg tries to distinguish *Wells Fargo* because the possibility that the stakeholder would receive additional funds in the future was supposedly "entirely speculation." Fastenberg Opp. Br. at 6. In fact, the *Wells Fargo* court found that it was "likely" that the stakeholder there would receive upwards of $900 million during the pendency of the appeal – many times the amount in dispute – but still stayed distribution of the funds actually in the possession of the stakeholder. *Wells Fargo Bank, N.A. v. ESM Fund I, LP,* No. 10 Civ. 7332, 2012 WL 3023997, at *5, *5 n.8 (S.D.N.Y. Apr. 3, 2012), *report and recommendation adopted*, 2012 WL 3023985 (S.D.N.Y. July 24, 2012). It is Fastenberg who engages in rank speculation, arguing that the stay should be denied here based in part on claims that the Madoff Trustee has not yet prevailed upon, and may not ever be able to pursue, much less collect and distribute. Fastenberg Opp. Br. at 6.

Fastenberg contends that as much as $11 million that is currently in the possession of the Madoff Trustee may be distributed to Beacon in the next several months. However, those potential inflows offer no protection to AIJED. Just like in *Wells Fargo*, "even those funds that are acquired . . . will be distributed through the payment waterfall, and therefore would not be available should it prevail on appeal." *Id.* at *3. Moreover, if the AIJED Holdback is distributed to Beacon's other investors while the appeal is pending, AIJED will lose its right under the October Order to receive payments *pari passu* with all Beacon Net Losers, and potentially its right to receive payment ahead of Net Winners, a loss of priority that "represents a form of

irreparable harm." *Wells Fargo Bank, N.A.*, 2012 WL 3023997, at *5; October Order, ECF No. 51 at 3-4 (requiring payment to Net Losers *pari passu* based on Net Equity Sharing Ratio, and before payment to any Net Winners).

Fastenberg argues that the stay should be denied because *if* Beacon receives more money in the future, and *if* AIJED receives sufficient notice before a distribution, AIJED can *try* to get an order (presumably from the Second Circuit) enjoining distribution of those (as yet immaterial) Beacon funds. Instead of relying on speculative future recoveries by Beacon, and the possibility of further motion practice before a different court, a stay should be entered now preserving the assets that are already in Beacon's possession, and that were carefully calculated and set aside by Beacon for the express purpose of preserving the interests of its investors while this dispute is pending. Entering a stay now will also save Beacon and the parties the burden of additional motion practice before the Circuit Court in the future, and is particularly warranted because the stay presents zero risk of harm to Beacon's other investors.

In many respects, this dispute is akin to an interpleader action, where "maintaining the status quo and holding the funds in escrow poses no risk – to any party – that the funds will not be distributed to them" after the appeal is decided. *Wells Fargo Bank, N.A.*, 2012 WL 3023985, at *3 (string cite of interpleader cases omitted). While distribution of the AIJED Holdback will be delayed, the sums in issue are a tiny fraction of the amounts Beacon has distributed to date, and the typical share of any individual investor in the AIJED Holdback if it were distributed now would amount to no more than a few hundred or thousand dollars. *See* AIJED Stay Mot. at 20 n.9

Finally, Fastenberg's claim that those individual investors would be able to obtain a higher investment return on their respective portions of the AIJED Holdback than the amounts

currently being earned in the escrow account is speculative, and is not supported by even a scrap of evidence. *Id.* In any case, Fastenberg's argument "could be made in virtually every case of this type involving title to moneys," and "entirely ignores the potential losses they might suffer" from a riskier investment. *Wells Fargo Bank, N.A.*, 2012 WL 3023997, at *6. Even if Fastenberg could establish a loss associated with the time value of money – and he has failed to do so – that relatively trivial harm would be "substantially outweighed" by the risk to AIJED that it will recover nothing if the funds are distributed. *Wells Fargo Bank, N.A.*, 2012 WL 3023985, at *5.

B. AIJED is Likely to Succeed on the Merits of its Appeal

As the Challenging Investors acknowledge, the factors for entry of a discretionary stay operate on a "sliding scale"; the stronger the showing on one element, the lower the threshold necessary on others to warrant a stay. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006); *Wells Fargo Bank, N.A.*, 2012 WL 3023985, at *1. As set forth above, the risk of irreparable harm to AIJED in the absence of stay is great and concrete, and the balance of harms swings decisively in AIJED's favor. Accordingly, AIJED need only present a colorable argument on appeal in order to justify a stay, a standard that AIJED meets and more.

First, AIJED submits that the Second Circuit will review the April Order *de novo* since, as the Challenging Investors tacitly concede, the Court neither confronted nor construed any issues of disputed fact. *See, e.g., U.S. v. Ramirez*, 344 F.3d 247, 250 (2d Cir. 2003). While the April Order employs the language of equity, it undoubtedly reached a number of important legal conclusions that must be reviewed by the Second Circuit without deference. For instance, AIJED's status as (i) an independently organized corporate entity; (ii) a separate member of Beacon; (iii) the owner of a separate Beacon capital account; and (iv) counter-party to a discrete contractual relationship with Beacon are undisputed legal realities that cannot be made to

disappear merely by invoking principles of "fairness and equity." *See* Third Declaration of Arthur S. Gordon, Exs. A-D.

Additionally, the April Order constituted an application of law to undisputed facts that is subject to *de novo* review. The April Order sought to construe the non-appealable October Order, which in turn adopted the Net Equity asset distribution method used and defined in *SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, 654 F.3d 229 (2d Cir. 2011); *see also* Fastenberg Br., ECF No. 79 at 11 (asserting that October Order was designed to "mirror[] precisely" the Net Equity approach taken in *Madoff*); Declaration of Max Folkenflik dated Aug. 27, 2014, ECF No. 29 ("Fastenberg seeks distribution by the Net [Equity] Method, the same method that has been used by the [Madoff] Trustee, the same method as was insisted upon by the DOL and the AG, the same method as has been used in every Madoff case dealing with distribution of BLMIS estate assets.").

Under the Net Equity asset distribution method used in *Madoff*, a transfer between investor accounts of the kind made by Associates to AIJED in 2005 is subject to the Inter-Account Method. *Madoff III* at 62. Indeed, according to the Trustee himself, the Inter-Account Method is the *only* method for addressing transfers between investor accounts that is consistent with Net Equity. *Id.* at 49. Under the Inter-Account Method, the transfer is capped at the amount of Net Equity in the transferor account at the time of the transfer, but the transferor and transferee accounts remain separate, with their Net Equity balances calculated separately. *Id.* at 56. It is undisputed that Associates had approximately [redacted] of Net Equity at the time of the 2005 transfer to AIJED, but instead of applying the Inter-Account Method, the Court "combined" AIJED and Associates and treated them as though they were a single investor.

Whether the April Order's departure from the reasoning of *Madoff III* and Mr. Picard is consistent with the law of this Circuit will be decided by the Court of Appeals without deference.

Moreover, even if the Court of Appeals were to review the April Order for abuse of discretion, AIJED would still likely succeed. First, an error of law is an abuse of discretion. *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.) (A district court abuses or exceeds its discretion when "its decision rests on an error of law"). Second, an exercise of discretionary powers is not without limits, and must remain within a range of permissible decisions. *See In re Sims*, 534 F.3d 117, 142 (2d Cir. 2008) (district court's order requiring disclosure of mental health records was "beyond the permissible limits of discretion"). In this case, the Challenging Investors themselves argue that while the *Madoff* cases "arose in other contexts, [] ***the equities they recognize are directly applicable to the matter before this court***." Fastenberg Br., ECF No. 79, at 14. According to Mr. Picard and *Madoff III*, there is one, and only one, approach to inter-account transfers that is consistent with Net Equity: the Inter-Account Method. By eschewing the Inter-Account Method in favor of "merging" Associates and AIJED together, the Court exceeded the bounds of its discretion.

Fastenberg speculates that perhaps Mr. Picard would not apply the Inter-Account Method to supposedly "related" accounts like AIJED and Associates, despite the fact the Trustee applied exactly that method to accounts owned by much more closely related investors – a father and son. Fastenberg Opp. Br. at 10 n.9; *compare Madoff III*. Fastenberg also claims falsely that application of the Inter-Account Method in this case would "allow" the "receipt of fictitious profits." *Compare* Fastenberg Opp. Br. at 10. In reality, the Inter-Account Method would ensure that AIJED is credited with the 2005 transfer only up to the amount of Net Equity that was in Associates' account when the transfer was made, thus stripping out any portion of the

transfer consisting of fictitious profits. *Id.* In other words the Inter-Account Method would accomplish precisely the goal for which it was designed by the Madoff Trustee, and exactly how *Madoff III* held it must be applied.[2]

CONCLUSION

For the foregoing reasons, AIJED respectfully requests that the Court maintain the status quo by ordering Beacon to retain in escrow the AIJED Holdback pending determination of the appeal of the April Order, and waive the bond requirement.

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[2] Fastenberg's counsel claims by declaration that he knows someone who once shared a joint Madoff account with his brother-in-law, and who, after "breaking up" with the brother in law, got only $2 million credited to his new individual account at Madoff, rather than the full $4 million in Net Equity that was supposedly in the joint account at the time of the break up. Folkenflik Decl., ECF No. 101, ¶ 10. Mr. Folkenflik's claims must be disregarded. First, they are rank hearsay, and wholly incompetent to establish anything in connection with this motion. Second, based on the limited information Mr. Folkenflik purports to provide, the Inter-Account Method may well have been applied to his friend's case. For instance, if 50% of the joint account were transferred to the individual account at the time of the "break up," Mr. Folkenflik's acquaintance would indeed have received $2 million under the Inter-Account Method. We will never know, however, since Mr. Folkenflik offers no competent evidence of any kind, and even in his hearsay declaration does not purport to identify the amount of the alleged transfer or whether it was made before or after December 4, 2014, when *Madoff III* was decided.