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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.

14-CIV-2294

**DECLARATION OF MAX
FOLKENFLIK IN IN
OPPOSITION TO ALJED'S
REQUEST FOR A STAY**

I, Max Folkenflik, hereby declare:

1. I am a member in good standing of the Bar of New York and of this Court, and a Partner at the law firm of Folkenflik & McGerity LLP, formerly Folkenflik & McGerity,

counsel for Defendant David Fastenberg.¹ I make this Declaration in in opposition to the motion of AIGED International LTD ("AIJED") for a "stay of enforcement or preliminary injunction" which seeks to prohibit the Beacon Funds from distributing approximately \$3.5 million to defrauded investors until AIJED's pending appeal of this Court's order of April 8, 2015, is determined. AIJED asserts that it will be "irreparably injured" if distribution of those funds is not stopped now. The motion should be denied because AIJED has no risk of suffering any injury if those funds are distributed now, and AIJED's appeal is likely to be determined before there is any risk at all that Beacon will not have funds to distribute AIJED's holdback amount to it if the appeal is determined in AIJED's favor.

2. AIJED claims that it will be irreparably injured if Beacon "distributes the AIJED Holdback because AIJED could not recover those funds as a practical matter." Presa Decl. at ¶ 7. However, there is no showing that AIJED would be required to clawback distributed amounts in order to get paid. The only relevant question is whether Beacon will have the funds to make payment to AIJED if the appeal is decided in AIJED's favor. AIJED has made no showing that Beacon will not have those funds and the irrefutable evidence shows that it will.

3. AIJED's claim that Beacon has "distributed all currently available funds to investors" other than "the Holdback Amount and funds reserved to pay for the costs of Beacon's continuing operations" Presa Decl. in Support at 7, is untrue, misleading, and irrelevant. It is untrue because as a result of a recent settlement of a derivative action and a

¹ Defendant David Fastenberg, appears as Trustee of the Long Island Vitreo-Retinal Consultants 401k FBO David Fastenberg. While not formally parties to the action, as they were the last time, Fastenberg's counsel also represent approximately 170 other investors in the Plaintiff Beacon Funds.

the recent Fifth Interim Distribution by the Madoff Trustee, Beacon has recently received over \$5.9 million which can and should also be distributed without any threat of injury to AIJED for the reasons described below.

4. It is misleading because Beacon's accounting reserves for ongoing operations are millions of dollars, and AIJED makes no showing that those reserves will be depleted, and Beacon will be left without funds to pay AIJED's holdback amount in the unlikely event that such a payment is required.

5. Most importantly of all however, AIJED's claim about Beacon's current resources is irrelevant, because of the virtual certainty that Beacon will receive much more money from the Madoff Trustee in the near future, and the virtual certainty of still further distributions in the future. Should AIJED seek expedited treatment for its appeal, the appeal will likely be decided long before there is any risk at all of Beacon running out of funds to be available for AIJED.

6. The Madoff Trustee moved on April 15 for an order approving a Sixth Interim Distribution to Customers. Annexed hereto as Exhibit A is a true copy of the Madoff Trustee's Motion For An Order Approving Sixth Allocation Of Property To The Fund Of Customer Property And Authorizing Sixth Interim Distribution To Customers (hereinafter the "Sixth Distribution Motion"). If approved, and there is no reason to believe it will not be approved as the prior five distribution motions were, then over \$1.2 Billion will be approved for distribution equaling of 6.883% allowed claims of those qualified to receive distribution. *Id.* at ¶¶ 41-43. As the Court noted in the Order of October 31, 2014, Beacon's allowed claim is \$159,867,924.62. The Sixth Interim distribution to Beacon of in excess of \$11

million. The hearing on the Sixth Distribution is set for May 28, 2015. I anticipate that distribution to Beacon will occur in June or July.

7. After the Sixth Interim Distribution, the Customer Fund will continue to hold billions of dollars which will result in further substantial distributions. \$2.2 Billion is in reserve with respect to claim determinations which are in litigation. And that is only one side of the equation. The Trustee is actively pursuing claw back \$1.6 billion in litigation against “net winners” for amounts they withdrew in excess of their “net equity” in the two years prior to Madoff’s bankruptcy, and is seeking a ruling from the United States Supreme Court to allow the claw backs to extend for six years prior to the bankruptcy which would add another \$4.3 billion in claims. *See*, excerpts from the website of the Madoff Trustee annexed hereto as Exhibit B at 1 and 3.

8. Suffice it to say that AIJED has not met, and on the facts cannot meet, its burden to show that the Beacon Funds will not have funds available to them absent a restraint on distribution of the Holdback amounts.

9. As to the balance of the hardships, this is not the usual case where withholding payments during an appeal would pose limited hardship. My clients, and all of the Beacon investors, lost many millions of dollars they had and which many of them were counting on to fund their retirements. Worse than that, those who are receiving this current distribution all have not even gotten the amount of their investment back. Those funds may be needed for living expenses. Even if they are not, these injured investors should not be limited as to what they can earn on those funds, which is undoubtedly more than the meager earnings of Treasury instruments in the current interest rate environment.

10. Finally, AIJED argues that the decision in *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, 522 B.R. 41 (Bankr. S.D.N.Y. 2014) ("*Madoff IIP*") establishes that the Madoff Trustee's invariable policy in the event of an inter-account transfer is to credit the transferee with the full amount of the Net Equity in the transferor account, up to the amount of the transfer. I know of my personal knowledge that is not true. One of my clients invested in BLMIS with his brother-in-law. Prior to the discovery of Madoff's fraud, they broke up their joint investment and my client opened a new Madoff account. In determining the amount of my client's customer claim, he was credited with \$2 million, the amount of his individual cash contributions to the joint account, and not with \$ 4 million, the full amount of Net Equity in those accounts.

11. For the reasons set forth in the accompanying Memorandum of Law, AIJED also cannot meet the burden of showing a substantial probability of success on the merits of its appeal.

12. Annexed hereto as Exhibit C is a true copy of the transcript of hearing before this court on October 7, 2014.

13. Annexed hereto as Exhibit D is a true copy of the order issued by this court on October 31, 2014

14. Annexed hereto as Exhibit E is a true copy of the Computation Order issued April 8, 2015.

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

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2015
New York City, New York



Max Folkenflik