UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| BEACON ASSOCIATES LLC I, BEACON ASSOCIATES LLC II, ANDOVER ASSOCIATES LLC I, ANDOVER ASSOCIATES (q) LLC,<br><br>*Plaintiffs*,<br><br>vs.<br><br>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.,<br><br>*Defendants*. | Civil Action No. 1:14-cv-02294 (AJP) |

**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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Pursuant to Federal Rules of Civil Procedure 62 and 65, AIJED International, Ltd. ("AIJED") respectfully asks this Court to maintain the status quo pending resolution of AIJED's appeal of the Court's April 8, 2015 order (the "April Order") to the Second Circuit Court of Appeals by ordering Beacon to retain in certain escrow funds that Beacon set aside in January 2015 (the "AIJED Holdback") to provide a source from which AIJED can recover in the event it prevails on its position in this dispute.[1]

## PRELIMINARY STATEMENT

AIJED respectfully asks the Court to stay any further distributions of the AIJED Holdback pending determination of AIJED's appeal. The AIJED Holdback constitutes the only source of recovery for AIJED if it prevails on its appeal. If the April Order is not stayed, those funds will be paid out by Beacon in fractional amounts to Beacon's other investors who, on information and belief, number in the hundreds, rendering their recovery by AIJED impossible as a practical matter.

AIJED submits it is entitled to a stay as of right pursuant to Federal Rule of Civil Procedure ("FRCP") 62(d) because the April Order neither grants nor denies an injunction, but instead calls for the payment of readily calculable sums of money. AIJED further submits that the requirement of a bond should be waived. In the event a stay is entered, there will be no risk of substantial harm to Beacon or its other investors because the entire sum in dispute will remain in escrow earning interest during the course of the appeal, and will be available for distribution as appropriate once the appeal is decided.

If the Court concludes that FRCP 62(d) is not applicable to the April Order, AIJED asks the Court in the alternative to enter a discretionary stay and otherwise maintain the held back

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in AIJED's previous briefing in this matter (ECF Nos. 76 ("AIJED Br."), 86 ("AIJED Reply Br.")).

funds in escrow during the pendency of AIJED's appeal to prevent irreparable harm to AIJED. As noted, absent a stay, the only funds available to Beacon will soon be dispersed among Beacon's numerous investors. While Beacon anticipates that the *Madoff* Trustee will distribute additional sums to Beacon in the future, the amount and timing of any such further distributions is speculative, and therefore does not mitigate the present, concrete threat of irreparable injury to AIJED posed by a release of the remainder of Beacon's funds to other investors. In addition, absent a stay, any new *Madoff* funds that are collected by Beacon will be promptly paid out to Beacon's other investors, and AIJED will again have no remedy if its appeal is successful.

Beacon's other investors' interests are not compromised by the proposed stay. First, if the stay is granted and AIJED's appeal is not successful, recovery by Beacon's other investors of the sums held back (plus interest) will remain certain. In contrast, if the stay is denied and AIJED's appeal is successful, AIJED has a substantial risk of recovering nothing at all. Second, the amount at issue, while meaningful to a single investor like AIJED, represents a tiny fraction of the sums distributed by Beacon to the larger body of its investors. Given the large number of Beacon's investors, a typical retail investor would likely receive no more than a few hundred or thousand dollars from the amount currently in escrow, and is assured that even those sums will ultimately be paid if AIJED's appeal is not successful.

A discretionary stay is also justified because AIJED has a substantial likelihood of success on appeal. Just weeks before entry of the April Order, the *Madoff* bankruptcy court addressed exactly the type of inter-account transfer that is presented here. *SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, 522 B.R. 41, 57 (Bankr. SDNY 2014) (*"Madoff III"*). According to the Challenging Investors themselves, AIJED's account at Beacon was opened in 2005 with what they call a "transfer" from AIJED Associates LLC's ("Associates"), a separate

but related Beacon investor, in the nominal amount of [redacted]. Hence, they argue that this "Court is presented with the question . . . of applying the Net Investment Method. . . where there have been inter-account transfers between related accounts." Fastenberg Br., ECF No. 79 at 15.

In *Madoff III,* the court determined "the appropriate methodology for computing the 'net equity' in a customer account" at BLMIS "where the balance of the account depends, to some extent, on amounts previously 'transferred' into that account from another BLMIS account." *Madoff III*, 522 B.R. at 46. According to Madoff Trustee Irving Picard and the *Madoff* court, "the only method consistent with" prior decisions from this Circuit establishing and defining the Net Equity method as the basis for distributing Ponzi scheme assets is the Inter-Account Method. Under the Inter-Account Method, if the nominal amount of the transfer is greater than the Net Equity available in the transferor account (as in this case), the court "credit[s] the transfer up to that amount in the transferee account." *Id.* at 56.

The court held that the Inter-Account Method was superior to all others in part because it permitted the trustee to determine Net Equity on an investor-by-investor basis "in reliance on the non-fraudulent entries in [its own] books and records." *Id.* at 52-53. Applying the Inter-Account Method adopted by Mr. Picard and *Madoff III*, Net Equity for AIJED and Associates should be "computed separately" because Beacon's "non-fraudulent" books and records correctly identify AIJED and Associates as separate investors that made separate contributions and withdrawals to and from Beacon. *Id.* at 56, 53.

There was only one supposed "transfer" between the two accounts – the [redacted] initial AIJED investment that was booked by Beacon as a transfer from Associates – while all other contributions by AIJED were indisputably cash contributions to AIJED's separate Beacon

account, made by wire transfer from AIJED's separate bank account. It is undisputed that, at the time of the 2005 transfer, Associates had just over [redacted] in Net Equity in its separate Beacon account. Under *Madoff III,* the amount credited in 2005 to AIJED – the "transferee – should be reduced to that amount, which will result in a corresponding reduction of AIJED's Net Equity.

In this case, the Court held that the accounts of AIJED and Associates should be combined for purposes of calculating Net Equity because AIJED is "related" to Associates. The Court's tacit holding that the Inter-Account Method does not apply to "related" accounts is in direct conflict with *Madoff III*. In *Madoff III,* the court specifically addressed transfers between "related" investors, including transfers from (x) an account contributed to jointly by a father and son to (y) a new Madoff account opened by the son, and transfers from (x) an account owned by a retirement plan to (y) a new Madoff account opened by a plan beneficiary. *Id.* at 60. If anything, these Madoff investors were much more closely related to one another than are AIJED and Associates. The *Madoff III* court never even suggested that such accounts should be "combined" or otherwise treated differently merely because they are owned by related persons. On the contrary, *Madoff III* held unequivocally that the Inter-Account Method applies with equal force to related investors, and that "the transferor and transferee accounts remain separate and their balances are computed separately." *Id.* at 57.

In view of the sheer number of Beacon and Madoff investors who engaged in inter-account transfers – for example, more than 400 Madoff investors appeared in connection with *Madoff III* alone – and the regrettable persistence of similar Ponzi schemes, resolution of the conflict between the April Order and *Madoff III* will be a matter of significance to numerous litigants and the Court of Appeals. AIJED submits that there is at least a substantial possibility

that the Second Circuit will agree with Mr. Picard and the *Madoff* bankruptcy court that the Inter-Account Method should be applied even to transfers among related accounts AIJED and Associates. Hence, in the event that the Court concludes the automatic stay of FRCP 62(d) does not apply to the April Order, entry of a discretionary stay pending AIJED's appeal is appropriate.

## STATEMENT OF FACTS

The relevant facts were set forth at length in AIJED's prior submissions. For ease of reference, below AIJED provides a truncated description of certain facts it believes are the most relevant for purposes of this motion, as well as information regarding the funds held in escrow by Beacon.

### Beacon's Own Books and Records at all Relevant Times Identified AIJED and Associates as Separate Investors, with Separate Beacon Accounts and Different Net Equity Totals

There is no dispute that AIJED and Associates are separately organized legal entities, subject to different governing documents, jurisdictions and subscription agreements. See Declaration of Arthur S. Gordon, ECF No. 75 ("Gordon Decl.") at ¶¶ 2, 4. It is likewise indisputable that from Beacon's perspective, as well as from the perspectives of AIJED and Associates, the two funds were at all times separate investors in Beacon, and Beacon treated them as such during the entirety of Beacon's existence.

Among other things, Beacon maintained separate accounts on its ledger for each of AIJED and Associates, recording the cash contributions and cash withdrawals of AIJED separately from the cash contributions and cash withdrawals of Associates, and separately calculating the two funds' respective balances. *See, e.g.*, Gordon Decl. ¶¶ 19, 29; *id.* Ex. B; Declaration of Mitchell P. Hurley, ECF No. 74 ("Hurley Decl.) Exs. D, F, J. Records available equally to Beacon and AIJED also demonstrate that, except for an initial transfer from Associates to AIJED in 2005, all of AIJED's cash contributions to Beacon were made by wire from AIJED's

bank account to AIJED's account at Beacon, and all of Associates' cash contributions to Beacon were made by wire from Associates' separate bank account to Associates' separate account at Beacon. *See, e.g.*, Second Declaration of Arthur S. Gordon, ECF No. 87 ("Second Gordon Decl.") ¶ 11; *id.* Exs. C-I. When AIJED made withdrawals, Beacon wired the necessary cash from AIJED's account at Beacon to AIJED's bank account, and when Associates made withdrawals, Beacon wired the cash from Associates' separate account at Beacon to Associates' separate bank account. *See id.*

Hence, "in reliance on the non-fraudulent entries in [its] books and records," *see Madoff III* at 52-53, Beacon was able to calculate the separate Net Equity of each of AIJED and Associates. And that is exactly what Beacon did throughout its entire existence, until the commencement of this dispute a few months ago:

| Year | | AIJED Int'l Ltd. | AIJED Associates |
|---|---|---|---|
| 1997 | ADD | | [redacted] |
| 1998 | ADD | | |
| 1999 | ADD | | |
| 2000 | ADD | | |
| 2001 | ADD | | |
| 2002 | ADD | | |
| | WITHDRAWAL | | |
| 2003 | WITHDRAWAL | | |
| 2004 | WITHDRAWAL | | |
| **2005** | **TRANSFER** | [redacted] | [redacted] |
| | WITHDRAWAL | | |
| 2006 | ADD | | |
| 2007 | WITHDRAWAL | | |
| 2008 | ADD | | |
| **Subtotal** | | [redacted] | [redacted] |
| 2010 (Non-Madoff) | | [redacted] | [redacted] |

| | | |
|---|---|---|
| 2013 (Non-Madoff) | [redacted] | [redacted][2] |
| (Settlement) | | |
| (Settlement) | [redacted] | -- |
| **Total Remaining Net Equity** | [redacted] | [redacted] |

*See* Gordon Decl. ¶ 29; *id.* Ex. B; Declaration of Mitchell P. Hurley, ECF No. 74 ("Hurley Decl.) Exs. F, I.

**2005 Transfer of Funds from Associates to AIJED and Separate Operations**

As referenced above, Beacon identifies AIJED's initial contribution of $[redacted] to AIJED's Beacon account in 2005 as a "transfer" from Associates' Beacon account. *See generally* Gordon Decl. ¶¶ 5-14. Upon AIJED's formation in June 2005, [redacted] of Associates' approximately 100 members redeemed their investment in Associates and reinvested in AIJED because of AIJED's differing tax treatment as an offshore entity.[4] *Id.* ¶ 5. In order to fund its investors' withdrawals, Associates partially redeemed from the funds in which it was invested, including Beacon. *Id.* ¶ 7. However, rather than insist on Beacon wiring cash, Associates and AIJED consented to Beacon accounting for the transaction on its own books as a "transfer" from

[2] Unlike all other Beacon investors, both AIJED's account and Associates' account were invested solely in BLMIS. Gordon Decl. ¶ 20. The small "non-Madoff" distribution to AIJED and Associates represents the portions of their respective Madoff accounts that were held in cash when the fraud was discovered in 2008. *Id.* ¶ 25.

[3] A small part of the Settlement proceeds was split among all Beacon investors, regardless of whether the investor had positive Net Equity. Gordon Decl. ¶ 26. Hence, Associates received a small distribution, despite the fact that it had previously withdrawn more from Beacon than it contributed. *Id.*

[4] When the [redacted] former Associates investors became members of AIJED, they did so by withdrawing as investors in Associates, with the aggregate value of their Beacon investment "transferred" from Associates' Beacon account to AIJED's Beacon account. It is therefore literally true that there was no material overlap at any time between the identities of the investors in AIJED and the identities of the investors in Associates. *Compare* April Order at 2, FN 1. As discussed in the Argument section, below, the fact that a portion of AIJED's investors were once investors in Associates has no bearing on how an inter-account transfer such as the 2005 transaction is treated under *Madoff III*.

Associates' account at Beacon to AIJED's newly opened separate account at Beacon. *Id.* ¶¶ 13-14; *id.* Ex. A.[5]

Arguably, the fact that Beacon's "non-fraudulent" books and records identify AIJED and Associates as separate investors that made separate cash contributions and cash withdrawals is sufficient to require separate calculation of their respective Net Equity. It is worth noting in addition, however, that the two funds were not just formally separate entities and different investors with different Beacon accounts, they also were substantively distinct in every material way.

Among other things, between June 2005 and December 2008, AIJED received approximately [redacted] from new investors – including over [redacted] in 2008 alone – and contributed an additional [redacted] in capital to Beacon, while withdrawing just [redacted]. Gordon Decl. ¶ 17; *id.* Ex. B. ***None of that [redacted] in cash contributions came from Associates, or any investor that was also an investor in Associates at the time of the contribution.*** *See generally*, Second Gordon Decl. ¶¶ 7-11. During the same period, Associates and its investors withdrew about [redacted] from Beacon and made no cash contributions at all. Gordon Decl. ¶ 18; *id.* Ex. B. ***None of that [redacted] in withdrawals went to AIJED, or any investor that was also an investor in AIJED at the time of the withdrawal.*** *See generally*, Second Gordon Decl. ¶¶ 7-11. Beacon properly recorded these transactions on its books as taking place in the separate accounts of AIJED and Associates. *See* Gordon Decl. ¶ 29; *id.* Ex. B; Hurley Decl., Exs. F, I; *see also* AIJED Br. at 7; AIJED Reply Br. at 5-9.

[5] While AIJED initially argued that this 2005 transaction should be considered an investment of new cash and credited to AIJED in its full face amount, AIJED recognizes that a very similar argument was made, considered and rejected by the court in *Madoff III*.

**Beacon Places Holdback Amounts in Escrow in Connection with this Dispute**

On information and belief, at some point after November 6, 2014, counsel for the Challenging Investors contacted Beacon and argued that the account owned by AIJED should be combined with the account owned by Associates for purposes of calculating a single Net Equity amount for both. Beacon took no position on the merits of the Challenging Investors' position, but agreed to hold in escrow funds sufficient to cover the distribution otherwise due to AIJED in order for the parties to obtain a judicial resolution of their dispute. *See* ECF No. 53 (Letter to Judge Peck dated January 23, 2015).

Specifically, Beacon held back from a distribution to investors in January 2015 (the "January Distribution") [redacted] slated for distribution to AIJED (the "AIJED Holdback") and approximately $700,000 in distributions otherwise slated to be distributed to individual investors who made contributions to Beacon through more than one account (the "Other Investor Holdback"), for a total holdback of [redacted] (the "Holdback Amount"). *Id.* Beacon placed the Holdback Amount in an interest-bearing escrow account, where it remains. *Id.*

Beacon's counsel has represented that, other than the Holdback Amount and funds reserved to pay for the costs of Beacon's continuing operations, Beacon has distributed all currently available funds to its investors. Second Presa Declaration in Support of Motion for Stay of Enforcement and Preliminary Injunction Pending Resolution of Appeal ("Second Presa Decl.") ¶ 7. Beacon's counsel has indicated that he expects Beacon to receive additional distributions from the Madoff Trustee, but that the timing and amounts of any such distributions is uncertain. *Id.* ¶ 8. Beacon's counsel has acknowledged that Beacon may receive all remaining distributions from the Trustee and distribute those funds to its investors during the course of this appeal. *Id.*

**April Order, Appeal, and Beacon's Provisional Agreement Not to Distribute**

On April 8, 2015, the Court entered the April Order. ECF No. 91. The April Order holds that "each related account should be treated as a single entity for purposes of determining Net Equity." April Order at 1. On April 10, 2015, AIJED's counsel notified counsel for Beacon and counsel for the Challenging Investors that it intended to appeal the April Order, and on April 14, 2015 AIJED filed its notice of appeal. Second Presa Decl. ¶ 3; ECF No. 92. During a conference call on April 15, 2015, Beacon agreed temporarily not to distribute the AIJED Holdback or any part of it, until the Court can hear and decide this motion.[6] Second Presa Decl. ¶ 5.

## ARGUMENT

### I. AIJED IS ENTITLED TO A STAY AS OF RIGHT PENDING ITS APPEAL TO THE SECOND CIRCUIT PURSUANT TO FRCP 62(D)

FRCP 62(d) provides for an automatic stay pending appeal upon the posting of a supersedeas bond by the appellant. Although the rule provides that the stay takes effect upon the district court's approval of the bond, the Court has no discretion to deny the stay. *See, e.g., Frommert v. Conkright*, 639 F. Supp. 2d 305, 308 (W.D.N.Y. 2009) (citing *Am. Mfrs. Mut. Ins. Co. v. Am Broad.–Paramount Theatres, Inc.*, 87 S. Ct. 1, 3 (1966)); *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1248, 1249 (S.D.N.Y. 1992) (under Rule 62(d), party may "post a bond and stay execution of a monetary judgment as a matter of right."); *see also Becker v. U.S.*, 451 U.S. 1306, 1308 (1981) (referring, in dicta, to the "automatic stay provisions of Rule 62(d)." The Court does have discretion, however, to waive the bond requirement under 62(d). *See Frommert*, 639 F. Supp. 2d at 308. As discussed in more detail in Section III, below, AIJED submits that the bond

[6] During the April 15, 2015 conference call, Beacon's counsel informed AIJED's counsel that certain other Holdback Investors are considering appealing the April Order. Second Presa Decl. ¶ 4. By this motion, AIJED seeks a stay of the April Order only with respect to the Holdback funds currently set aside in respect of AIJED's claim.

requirement should be waived here because, if the stay is entered, the amount in dispute will remain in an interest-bearing escrow agreement throughout the pendency of the appeal.

The Challenging Investors have indicated that they believe the April Order is subject to the discretionary provisions of Rule 62(c), rather than the automatic stay provided under Rule 62(d). However, Rule 62(c) applies only to "interlocutory orders or final judgments that grant[], dissolve[], or den[y] an injunction." The April Order is not interlocutory – it "conclusively determines" how AIJED's Net Equity should be calculated. *Petrello v. White*, 533 F.3d 110, 113 (2d Cir. 2008) (a final order "leav[es] nothing for the court to do but execute its decision"). Nor does the April Order grant, deny or dissolve an injunction. Hence, by its terms, Rule 62(c) is inapplicable here.

Rule 62(d), in contrast, applies to judgments requiring the payment of money. *Frommert* 639 F. Supp. 2d at 309. Although the Order does not identify a sum certain for distribution to Beacon shareholders, the focus in determining whether an order is "monetary" is on the nature of the relief awarded, rather than the form of the judgment. *See id.*, 639 F. Supp. 2d at 309-310 ("the fundamental question in this regard, is not whether the underlying judgment itself put a dollar figure on the relief ordered, but on whether the monetary value of the judgment can be calculated and secured with relative ease"); *see also Hebert v. Exxon Corp.*, 953 F.2d 936, 938-39 (5th Cir. 1992) ("the applicability of Rule 62(d) turns not on that distinction [between declaratory and money judgments], but on whether the judgment involved is monetary or nonmonetary").

In this case, the October Order requires Beacon to distribute funds to its investors based on the Net Equity method in a deliberate attempt to "mirror precisely" the Net Equity distribution method adopted in *Madoff*. Fastenberg Br., ECF No. 79, at 11. The April Order

construes how the Net Equity method applies to transfers between related accounts. The April Order therefore effectively requires Beacon to distribute readily calculable amounts to its investors, and Beacon has indicated that it in fact intends to pay those moneys out if the Order is not stayed. Since the April Order binds Beacon to pay money, it is more akin to a money judgment than injunctive or declaratory relief, and is subject to Rule 62(d). *See, e.g., Frommert*, 639 F. Supp. 2d at 305.

*Frommert* is illustrative. There, an ERISA pension plan administrator sought a stay pending appeal of a district court order that dictated the method by which payments were to be calculated for certain employees, but did not order a specific amount to be paid. *Id.* at 307. The district court determined that the order was "clearly . . . an order to pay rather than an order to do." *Id.* at 309 (internal citation omitted). Because "the relief ordered was indisputably monetary in nature," the automatic stay under Rule 62(d) applied, even though the order did not set forth a specified payment amount. *Id.* The court explained, "the fundamental question . . . [is] whether the monetary value of the judgment 'can be calculated and secured with relative ease.'" *Id.* at 310 (quoting *J. Perez & CIA, Inc. v. United States*, 747 F.2d 813, 816 (1st Cir.1984). The same logic and outcome should obtain here: the amount to be paid pursuant to the Order can be "calculated and secured with relative ease," and Rule 62(d)'s automatic stay provisions therefore apply.[7]

[7] *See also Hebert*, 953 F.2d at 938 (finding that declaratory judgment holding excess insurer liable for insured's share of certain damages was properly characterized as a money judgment under FRCP 62(d)); *United States v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 18 F.3d 208, 214 (3d Cir. 1994) (agreeing with district court that order directing disbursement of funds held in registry account was a "money judgment" subject to stay under Rule 62(d)); *Bolt v. Merrimack Pharm., Inc.*, No. S-04-0893, 2005 WL 2298423, at *8 (E.D. Cal. Sept. 20, 2005) (finding that FRCP 62(d) applied where declaratory judgment was "more akin to a money judgment rather than injunctive relief" because it that laid the foundation for plaintiff's right to redeem his stock); *In re Miranne*, 94 B.R. 413, 415 (E.D. La Aug. 5, 1988) (ordering stay under FRCP 62(d) because while "not literally a money judgment, [the order being appealed] is best understood as such for stay purposes since the ultimate issue in dispute is who . . . should recover a sum certain of money.").

## II. ALTERNATIVELY, A DISCRETIONARY STAY OR INJUNCTION SHOULD BE ISSUED TO MAINTAIN STATUS QUO PENDING APPEAL

The standards for grant of a discretionary order under FRCP 62(c) and FRCP 65 are also met in this case. A court determining whether to issue a discretionary stay pending appeal must consider: (1) whether the stay applicant can demonstrate it has a "'substantial case on the merits,' even if ultimate success is not a mathematical probability," (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. *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F. Supp. 2d 223, 253 (N.D.N.Y. 2002) (citing *Morgan Guar. Trust Co. v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y.1988)).

No one factor is determinative; instead, the Second Circuit has "treated these criteria somewhat like a sliding scale," in which a stronger showing on certain factors lessens the required showing on the remaining factors. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006). There is "substantial overlap" between these factors and those governing issuance of a preliminary injunction under Rule 65 because "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Here, AIJED meets the standard under both rules.

### A. AIJED Will Be Irreparably Harmed if Beacon Distributes the AIJED Holdback

A party will suffer irreparable harm "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999); *see also United States ex rel. AntiDiscrimination Center of Metro N.Y., Inc. v. Westchester Cnty*, N.Y., No. 06 Civ. 2860, 2012 WL 1758109, at *3 (S.D.N.Y. May 17, 2012)

(an irreparable harm is "'one that (sic) cannot be remedied if the party seeking the stay is granted relief on appeal.'") (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)).

Monetary injury can constitute irreparable harm where a judgment would likely become uncollectible, or it is otherwise "shown that a money judgment will go unsatisfied absent equitable relief." *Alpha Capital A.G. v. Advanced Viral Research Corp.*, No. 02 CV 10237 (GBD), 2003 WL 328302, at *4 (S.D.N.Y. Feb. 11, 2003) (citing *Alvenus Shipping Co., Ltd. v. Delta Petroleum (U.S.A.) Ltd.*, 876 F. Supp. 482, 487 (S.D.N.Y.1994)). AIJED will suffer irreparable harm if Beacon distributes the AIJED Holdback because the AIJED Holdback comprises all of the funds currently available to Beacon for distribution, and because those funds will be distributed in in fractional amounts among hundreds of investors, rendering their recovery following a successful appeal a practical impossibility. *See* Presa Decl. ¶¶ 6-7; *In re Netia Holdings S.A.*, 278 B.R. 344, 357 (Bankr. S.D.N.Y. 2002) (granting preliminary injunction where money owed to plaintiff would be "distributed to diverse parties, and be difficult or impossible to recover."); *In re Advanced Min. Sys., Inc.*, 173 B.R. 467, 468-69 (S.D.N.Y. 1994) (granting a stay pending appeal where debtors' assets would be distributed without any reserve for the appellants' claim). The Court has also previously indicated that is unlikely to permit any attempts to claw back funds once they are distributed to Beacon's investors. *See* Jan. 14, 2015 Tr., ECF No. 61, 7:17-21.

The fact that AIJED may receive substantial additional distributions from the Madoff Trustee in the future does not mitigate the harm that AIJED would suffer if the AIJED Holdback is distributed before its appeal can be heard. First, the amount and timing of any such distributions remains speculative. *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, No. 10 civ. 7332,

2012 WL 3023985 (S.D.N.Y. July 24, 2012) (staying distribution of amounts held in escrow pending appeal of interpleader decision despite possibility that stakeholder would likely receive additional money in future sufficient to cover amount in dispute). Second, if any more money is received by Beacon, it could easily come in before AIJED's appeal has been decided. If that happens, and the April Order is not stayed, the Challenging Investors and Beacon have indicated that such future receipts will promptly be paid ratably to Beacon's other investors, again leaving AIJED with no source for recovery if its appeal is successful. *See id.*

In *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, 2012 WL 3023985 (S.D.N.Y. July 24, 2012), the prevailing parties in an interpleader action argued that the appellant would not be harmed by a distribution of the escrowed *res* monies, because the stakeholder would likely generate enough income in the future to cover the amount subject to appeal. The court rejected this argument, in part because it was "based on speculation" that the stakeholder would generate such funds. *Id.* at *3. In addition, the district court noted that any funds that the stakeholder acquired during the pendency of the appeal would be immediately distributed to investors pursuant to a payment waterfall, and thus would not be available to pay the defendant-appellant when the appeal was resolved. *Id.* Accordingly, the district court found that the defendant-appellant would suffer "substantial irreparable harm" if the funds were distributed, and thus ordered a stay pending resolution of the appeal. *Id.* at *6. The threat of irreparable harm to AIJED in the absence of stay is likewise present here.

Significantly, moreover, counsel for Beacon carefully calculated the Holdback Amounts – and the amounts distributed to Beacon's other investors in January 2015 – to represent exactly the sums that would currently be due to AIJED (and Beacon's other investors) in the event that AIJED prevailed on its arguments in this dispute. By leaving the AIJED Holdback in escrow

pending the appeal, the Court, Beacon and the parties can be certain that no Beacon investors receive funds to which they later are determined not entitled.

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

The likelihood of success on appeal necessary to support a stay "will vary according to the court's assessment of the other stay factors." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (internal quotations and citations omitted). Where, as here, a movant demonstrates a high likelihood of irreparable harm absent a stay, the court may require a lesser showing on the merits. *Id. See, e.g., Wells Fargo Bank*, 2012 WL 3023985, at *2 (staying distribution of disputed funds to diverse recipients per order subject to appeal where appellant had raised "colorable arguments" that the order should be reversed on appeal, and would suffer clear and irreparable harm if the funds were distributed in the meantime). AIJED would satisfy the "likelihood of success" prong of the stay analysis under even a much higher standard than is applicable here, since the April Order is contrary to the recent holding in *Madoff III* and the other *Madoff* opinions upon which the October Order was expressly modeled.

The April Order is directly at odds with the conclusion reached recently by Irving Picard and Bankruptcy Judge Bernstein concerning inter-account transfers in *Madoff III*.[8] While *Madoff III* is not controlling precedent for this Court, it is highly relevant and persuasive. Indeed, the Challenging Investors themselves argue vigorously that Net Equity related precedents in the *Madoff* cases, including *Madoff III,* are "directly applicable" to this case, in part because the October Order was intended to "mirror[] precisely" the approach to distributing assets adopted by Mr. Picard and the Second Circuit in *Madoff.* Fastenberg Br., ECF No. 79, at 11.

[8] Since 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*. *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 n.2 (2d Cir. 2013) (internal citation omitted); *see also Bano v. Union Carbide Co.*, 361 F.3d 696, 716 (2d Cir. 2004) (internal citation omitted) (erroneous application of law is subject to correction regardless of applicable standard of review).

*Madoff III* addresses the exact question at issue here. According to the Challenging Investors, this "Court is presented with the question of . . . applying the Net Investment Method . . . where there has been inter-account transfers between related accounts." Fastenberg Br., ECF No. 79, at 10. In *Madoff III,* the court considered and determined "the appropriate methodology for computing the 'net equity' in a customer account" at BLMIS "where the balance of the account depends, to some degree, on amounts previously 'transferred' into that account from another BLMIS account." After considering objections made by more than 400 BLMIS customers, and numerous briefs submitted by dozens of sophisticated parties and law firms, the Bankruptcy court agreed with Mr. Picard that the Inter-Account Method is "the only method" for handling inter-account transfers that is "consistent with" prior decisions from the Southern District of New York ("*Madoff I*") and Second Circuit Court of Appeals ("*Madoff II*") defining how Net Equity is to be calculated. *Madoff III* at 49.

Pursuant to the Inter-Account Method, the Trustee first "recompute[s] the amount in the transferor account at the time of the transfer" using the Net Equity method. *Id.* at 48. It is undisputed in this case that the relevant transferor – Associates – had more than [redacted] in Net Equity at the time of the 2005 transfer. Next, the trustee must credit "the transfer up to that amount in the transferee account. Hence, applying the holding of *Madoff III*, AIJED should be credited for the 2005 transfer up to the amount of Net Equity in Associates account at the time of transfer – just over [redacted] – and the two funds "accounts [should] remain separate and their balances . . . computed separately." *Id.*

Income Plus argued, and this Court tacitly agreed, that where a transfer is made between two accounts owned by "related" parties, the Inter-Account Method does not apply, and instead those two accounts must be "merged" for purposes of determining Net Equity. In *Madoff III*,

however, the court made clear that the Inter-Account Method applies to transfers between accounts regardless of whether or not the owners of the accounts are "related," and that ***"the transferor and transferee accounts remain separate and their balances are computed separately***." *Id.* at 55-56 (emphasis added).

For example, one of the transfers at issue in *Madoff III* involved an investor who initially invested in Madoff through an account to which both he and his father had made contributions. *Id.* at 522 B.R. at 60. Later, the son withdrew from the account shared with his father and opened a new Madoff account, which the son funded with an initial transfer from the father's account, just as AIJED's initial 2005 investment in Beacon was funded by a transfer from Associates' Beacon account. *Id.* Applying the Inter-Account Method, the Trustee credited the son with the amount of Net Equity in his father's account at the time of the transfer – which happened to be zero. *Id.* at 60-61.

Significantly, the *Madoff III* court did not "combine" the transferor account with the "related" transferee account and calculate a single, combined Net Equity value as though the two investors were one, as provided under the April Order. Rather, *Madoff III* focused exclusively on how much of the face amount transferred should be credited to the transferee account, while continuing to calculate Net Equity for the two accounts separately. In this case, Associates is analogous to the father and AIJED to the son, but Associates had more than [redacted] at the time of the transfer, and AIJED's account must therefore be credited in that amount. Based on the Inter-Account Method, AIJED's remaining Net Equity should be reduced from [redacted] to [redacted].

Treating AIJED and Associates separately is also consistent with the mandate that Net Equity be determined in reliance upon the fund's own books and records. *In re Bernard Madoff*

*Inv. Secs. LLC*, 654 F.3d 229, 238-39 (2d Cir. 2011); *see also Madoff III* at 52-53 (noting that Inter-Account Method allows the Madoff Trustee to calculate Net Equity "in reliance on the non-fraudulent entries in BLMIS's books and records"). There is no dispute in this case that if one considers only Beacon's own books and records, AIJED and Associates are separate Beacon investors, with separate Beacon accounts, that made separate contributions and withdrawals to and from Beacon and their respective separate bank accounts. Indeed, the Court acknowledged as much in the April Order, but still treated the two investors as one for purposes of calculating Net Equity. *See* April Order at 2-3 ("AIJED I and II, and not their investors, were members of Beacon.").

Resolution of the conflict between the April Order and *Madoff III* will likely be a matter of significant interest to the Second Circuit, and the many hundreds of investors involved in *Madoff* and other, similar Ponzi schemes, and will be required to avoid significant confusion within the courts and among affected investors. In light of the extensive briefing of the question in *Madoff*, Mr. Picard's conclusions, and the thorough and persuasive analysis supplied by the court in support of its conclusion in *Madoff III*, AIJED submits that there is at least a substantial chance it will prevail on its appeal of the April Order

### C. The Balance of Hardships Tilts in AIJED's Favor

As discussed above, AIJED will be harmed irreparably if the stay is not entered, because all of Beacon's current funds will have been distributed to hundreds of other investors before AIJED's appeal can be heard. In contrast, just as in the *Wells Fargo* case, "maintaining the status quo and holding the funds in escrow pending the outcome of the appeal proses no risk – to any party – that the funds will not be distributed as required once this [appeal] reaches final disposition." *Wells Fargo Bank*, 2012 WL 3023985, at *3.

In examining the balance of hardships, the Court should compare the impact that denying the motion would have on AIJED against any adverse impact granting the motion would have on Beacon or the other investors. *See, e.g., In re Netia Holdings S.A.*, 278 B.R. at 357. If Beacon is enjoined or stayed from distributing the AIJED Holdback, the only harm that Beacon's other investors will suffer is that they will have to wait to receive their respective portion of the AIJED Holdback. Even in the event the stay is granted, Beacon and its investors will be protected because the full sum in dispute will remain in an escrow account gathering interest. The AIJED Holdback at issue while a significant sum for a single investor like AIJED, represents just a tiny percentage of the Madoff money distributed to Beacon's investors thus far, and an even smaller percentage of the money Beacon apparently expects it will distribute following additional transfers to Beacon from the Madoff trustee.[9]

The harm to AIJED, should the AIJED Holdback be distributed, leaving AIJED unable to collect funds to which it is entitled, is much greater. *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974) (finding balance of hardships tips decidedly in favor of a party facing "dissipation of an important asset, leaving little for [it] to recapture if it should eventually succeed in this lawsuit."). Courts have specifically found that the risk that funds will be unavailable for distribution upon resolution of an appeal is a lesser hardship than the harm from delay in receiving funds to which a party is entitled. *See Wells Fargo Bank*, 2012 WL 3023985, at *5 (agreeing with magistrate judge that "temporary loss of the time-value of [investors'] money while it remains in an interest-accruing escrow account is substantially outweighed by the harms [appellant] may suffer if the funds are distributed" in event appeal is successful); *see also*

[9] The share of the AIJED Holdback to be distributed pursuant to the April Order would be material only to the very largest Beacon investors. As an illustration, the individual other Holdback Investors represented by Mr. Folkenflik in this case have an average Net Equity Sharing ratio of just [redacted]%. *See generally*, Hurley Decl. Exs. D, E. Applied to the AIJED Holdback amount, each of these "main street" type investors would receive barely [redacted] amounts which they will ultimately receive in any event if the April Order is stayed and the appeal is denied.

*In re St. Johnsbury Trucking Co., Inc.*, 185 B.R. 687, 690 (S.D.N.Y. 1995) (granting a stay of appeal where former employees had already waited two years to collect their overdue wages and the stay pending appeal would not necessarily cause a lengthy delay). The balance of the hardships weighs decidedly in AIJED's favor.

### D. The Public Interest Favors a Stay or Injuntive Relief

Finally, when determining whether to grant a stay or injunctive relief, courts consider the effect on the public interest. *Cayuga Indian Nation,* 188 F. Supp. 2d at 251. In a private litigation such as this one, the public interest factor is deemphasized. *Greendige v. Allstate Ins. Co.*, No. 02 Civ.9796, 2003 WL 22871905, at *2 (Dec. 3, 2003 S.D.N.Y.) ("the public interest is not implicated in a private litigation"). In any case, the public interest certainly would not be disserved if the stay or preliminary injunction is granted and the AIJED Holdback remains in escrow pending the outcome of the appeal.

## III. NO BOND IS NECESSARY TO SECURE THE PARTIES

AIJED respectfully submits that the bond requirement should be waived in this case. It is settled law that a district court may waive the posting of a supersedeas bond where there is no significant risk that the judgment subject to appeal will not be paid in the event the appeal fails. *Cayuga Indian Nation of N.Y.*, 188 F. Supp. 2d at 254-55 ("[F]actors germane to the determination as to whether to waive the posting of a bond include 'the degree of confidence that the district court has in the availability of funds to pay the judgment...; [w]hether the defendants' ability to pay the judgment is so plain that the cost of a bond would be a waste of money.'" (citing *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988)); *see also Silverman v. Nat'l Union Fire Ins. Co. (In re Suprema Specialties, Inc.)*, 330 B.R. 93, 96 (Bankr. S.D.N.Y. 2005) ("The posting of a bond, however, is discretionary and is not a prerequisite to obtain a stay pending appeal.").

Even where the stay is granted as of right under FRCP 62(d), the bond requirement may be waived if the waiver does not create risk that the judgment will not be paid. *Frommert*, 639 F. Supp. 2d at 313 (waiving bond requirement but granting stay under FRCP 62(d) where the court was "confident that the judgment debtor [would] continue to have sufficient funds to satisfy the judgment"); *Ortiz v. N.Y.C. Hous. Auth.*, 22 F. Supp. 2d 15, 40 (E.D.N.Y. 1998) (granting stay under FRCP 62(d) and waiving bond requirement where debtor had "ample means" to pay the judgment ) (*aff'd on other grounds*, 198 F.3d 234 (2d Cir. 1999)); *see also Port Chester Elec. Constr. Corp. v. HBE Corp.*, No. 86 Civ. 4617, 1991 WL 258737, at *1 (S.D.N.Y. Nov. 27, 1991) (district court may "use equitable principles to grant a stay. . . pending appeal without a supersedeas bond, or with only a partial one, if the filing of a supersedeas bond would irreparably harm the judgment debtor and, at the same time, such a stay would 'not unduly endanger the judgment creditor's interest in ultimate recovery.'") (quoting *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154–55 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987)).

Here, the full amount at issue is available in cash and with interest. If the escrow is stayed, the AIJED Holdback will remain in an interest-bearing escrow account during the appeal. Therefore, there is absolutely no risk that the judgment will go unpaid if AIJED's appeal is not successful. Accordingly, the stay would have no economic impact on Beacon or its other investors, and no bond should be required. *See Wells Fargo Bank, N.A.* 2012 WL 3023985, at *3 ("In contrast, 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 as required once this case reaches a final disposition."); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 675 F. Supp. 2d 411, 439 n.37

(S.D.N.Y. 2009) (no security is required where "[t]here is no evidence in the record to support a finding that Defendant will suffer any monetary damages as a result of this injunction.").

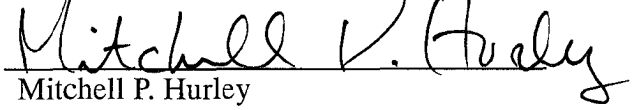
## CONCLUSION

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.

DATED: New York, New York

April 20, 2015

AKIN GUMP STRAUSS HAUER & FELD LLP



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