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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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3 BEACON ASSOCIATES LLC I, et al.,

4 Plaintiffs,

5 v.

14-cv-2294 (AJP)

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

8 Defendants.

9 -----x

10 New York, N.Y.  
10 October 7, 2014  
11 9:45 a.m.

12 Before:

13 HON. ANDREW J. PECK

14  
15 Magistrate Judge

16 APPEARANCES

17 HERRICK, FEINSTEIN LLP  
18 Attorneys for Plaintiffs  
18 BY: ARTHUR G. JAKOBY, ESQ.

19 HISCOCK & BARCLAY, LLP  
20 Attorneys for Defendants  
20 BY: BRIAN E. WHITELEY, ESQ.

21 FOLKENFLIK & McGERITY  
22 Attorneys for Defendant David Fastenberg  
22 BY: MAX FOLKENFLIK, ESQ.

1 (In open court)

2 THE COURT: All right. I have reviewed the parties'  
3 submissions. I have also reviewed the submissions of the four  
4 other investors that were submitted through the Beacon fund --  
5 that is to say Decker, Ironworkers Local, Rabvogel, and Siegel.  
6 And I suspect, from one of the cover letters, that some of the  
7 folks sitting behind the rail are those people.

8 I am prepared to hear from you with as much as you  
9 want to tell me, not to merely repeat what's in your papers but  
10 to emphasize whatever you want to emphasize, and we'll go from  
11 there. I have three specific areas of inquiry, but I think  
12 I'll hold that and hear from you in the way you want to present  
13 things.

14 So I assume, Mr. Folkenflik, this is to some extent  
15 your application. Do you want to go first? Do you want to  
16 defer to the new investor-submitters if they want to talk?  
17 What's your pleasure?

18 MR. FOLKENFLIK: Well, whatever is most comfortable to  
19 your Honor, I'm prepared to start. I know Mr. Jakoby has  
20 prepared what he characterizes as proposed issues for  
21 adjudication, sort of a checklist, to try and make sure that we  
22 don't forget anything in the list of issues to be resolved.

23 THE COURT: Good. I didn't think there were that  
24 many, but, Mr. Jakoby, why don't you hand me whatever it is.  
25 And I assume you've already given copies to Mr. Whiteley and

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1 Mr. Folkenflik.

2 MR. JAKOBY: Yes, your Honor. I e-mailed these  
3 yesterday afternoon to Mr. Folkenflik and Mr. Whiteley, and I  
4 asked if there are comments. Mr. Folkenflik made comments and  
5 I incorporated all his comments. And Mr. Whiteley did not have  
6 any comments. And to the extent that the two attorneys did not  
7 assert a position on the issues, I footnoted the issue because  
8 I know there are one, maybe two issues that the attorneys did  
9 address but Mr. Siegel addressed it so I footnoted that.

10 With respect to the investors, I just handed them a  
11 copy this morning, as opposed to the lawyers, who got it last  
12 night.

13 THE COURT: All right. Give me a minute to --

14 MR. JAKOBY: It mere requires to a large extent the  
15 issues -- not to a large extent, to a full extent -- the issues  
16 that are set forth in the ad damnum paragraph of our complaint.  
17 Thank you, your Honor.

18 THE COURT: All right. Thank you.

19 MR. JAKOBY: The issues, your Honor, as you know, the  
20 main issue is whether the broad amount of money, the majority  
21 of the money to be distributed, should be distributed in  
22 accordance with either a value nature or equity. The fund does  
23 not take a position, as your Honor knows.

24 THE COURT: Are you taking a position on any of the  
25 other issues, including expense allocation?

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1           MR. JAKOBY: There is only one issue, and that's  
2 expense allocation. Mr. Folkenflik addressed it. Mr. Siegel  
3 addressed it. And specifically with respect to Andover,  
4 because they only have currently \$69,000 -- I think it's 69 --  
5 62,000 of undistributed moneys, it is not possible for Andover  
6 to undo certain allocations of expenses. They're just not  
7 going to get in enough money to make the adjustments that would  
8 need to be made, and that too is footnoted in here.

9           THE COURT: All right. Well, let me keep with you on  
10 expenses for one moment. And let me ask the other parties, I  
11 think you are all proposing, to the extent you're proposing  
12 doing anything about expenses, that expenses be coming out of  
13 money received, not clawing anything back from investors who  
14 have already received money. Correct, Mr. Folkenflik?

15           MR. FOLKENFLIK: That's correct.

16           THE COURT: And Mr. Whiteley?

17           MR. WHITELEY: Correct, your Honor, yes.

18           THE COURT: And if the people in the back want to have  
19 a say at any point raise your hand, tell me who you are. Right  
20 now I saw a head shaking in a "yes" direction, so I will accept  
21 that as such.

22           What are the expenses, how much are the expenses that  
23 are just coming up or have come up out of the work you needed  
24 to do to figure out these allocations, or how far back do the  
25 unallocated expenses go?

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1           MR. JAKOBY: All expenses have been allocated. The  
2 fund has enough money to pay expenses. There is a reserve that  
3 was set by the accountants. My personal opinion is it was too  
4 high of a reserve. However, the accountant firm, they're the  
5 experts, and they have said that for an ERISA fund, it's  
6 required to have a certain amount of reserves.

7           So in determining expenses on a going-forward future  
8 basis, there will be no problem allocating them any way the  
9 Court decides. We are worried about, as your Honor put it,  
10 clawback of expenses. We don't want to have to go to  
11 investors.

12           And you should know that in dealing with expenses  
13 we've given the amount of expenses to all, anybody who asks.  
14 You should know that in terms of discovery -- and I think  
15 opposing counsel and Mr. Siegel also asked for documents. We  
16 gave everybody whatever documents they wanted. We're an open  
17 book, your Honor.

18           THE COURT: What are the expenses, in broad  
19 categories?

20           MR. JAKOBY: In broad categories, the expenses are,  
21 most of them are legal fees and accounting expenses, and there  
22 are also rent. There are some management fees. Most of the  
23 management fees are forgiven pursuant to the order of the  
24 District Court. But there were some correlated stock taking  
25 management fees. There were a few, they are only in 2009. And

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1 there are no management fees going forward.

2 THE COURT: All right. On the legal expenses, how far  
3 back does that go?

4 MR. JAKOBY: To the date of the exposure to the Madoff  
5 fraud.

6 THE COURT: So none of that has been paid, or it's  
7 been paid and it's allocated?

8 MR. JAKOBY: The majority of the legal fees have been  
9 paid. The majority of all expenses have been paid in a timely  
10 manner. As your Honor will recall, with respect to Beacon, 70  
11 percent of the money, 70, 75 percent was attributable -- there  
12 was a big chunk of non-Madoff money, and your Honor ordered the  
13 method of the prior distribution. We reserved money to pay  
14 expenses on a going-forward basis. And we were able to fairly,  
15 accurately predict that the expenses were quite a bit under  
16 what was anticipated.

17 THE COURT: All right. What I'm trying to figure out,  
18 I guess, is, if one were required to allocate expenses based on  
19 what money coming in they went to, is that viable or is it  
20 really a question, assuming the Court were to approve two  
21 different methodologies for paying out, that it would have to  
22 be divided not proportional to what the work was but just  
23 proportional to the amounts under one method or the other?

24 MR. JAKOBY: With respect to Beacon, we could rejigger  
25 the numbers without going back to the investors. We would have

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1 to adjust, we would have to look at what they should have  
2 gotten under a different method, allocation of the expenses  
3 that your Honor decides. And we could figure out who's short,  
4 who's long, make an adjustment, because there is there will be  
5 plenty of money going forward that's going to be distributed to  
6 the investors. Andover, as I footnoted here, is a different  
7 story. It is not impossible but it is going to be a very  
8 significant, I'll call it reallocation of expenses. That will  
9 not be possible with Andover because, as turned out, the  
10 Madoff -- we distributed most of the non-Madoff money to all  
11 investors -- it was a small amount in reserve. That's not  
12 going to be enough for the reallocation. And with respect to  
13 Andover's, it's going to be 30 -- excuse me -- only about 25  
14 percent of its money was in Madoff. The Andover investors are  
15 not anticipating getting a lot more money back if the Beacon  
16 investors are getting a lot more money back.

17 THE COURT: Let me ask Mr. Folkenflik, since you are  
18 the one proposing allocation of expenses initially, and it  
19 seems from all the briefing everybody largely focused on Beacon  
20 and treated Andover as a me too, and you already said you're  
21 not seeking anything that would result in attempting to claw  
22 back money from investors, are you satisfied that, as to  
23 Andover, expenses should just get paid out of whatever money is  
24 there, period?

25 MR. FOLKENFLIK: Well, the question is -- and that's

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1 not a very important question because the dollars aren't much.  
2 The question is what happens with respect to, if there is any  
3 money to go to investors, how do you calculate that money.  
4 It's a bookkeeping exercise to say that this investor gets 10  
5 percent left and the other investor gets 10 percent more. If  
6 there's not enough to pay into pay expenses and distribute them  
7 it doesn't really matter. If there is enough to pay expenses  
8 and distribute, it doesn't really matter much because there  
9 won't be enough to distribute.

10 So I think with respect to Andover -- and I will say I  
11 think my client base in Andover is roughly the same as it is in  
12 Beacon, so the majority by number of the Andover investors, I  
13 believe.

14 I think the issue of expense -- and your Honor may be  
15 able to tell that from our proposal -- is more about doing  
16 things pragmatically than precisely. We don't want to have to  
17 fight over, have to allocate \$50,000 and spend \$50,000 of  
18 attorney and accounting fees trying to figure that out.

19 THE COURT: Right.

20 MR. FOLKENFLIK: So it really doesn't -- I think with  
21 respect to Andover we can -- what I would propose is that after  
22 your Honor enters an order today, the parties will propose an  
23 order to be signed by the Court which will address that issue  
24 based on whatever the decision is today.

25 THE COURT: OK. Let me ask, who are the people in the

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1 back, and are you going to want to speak at some point?

2 MR. SIEGEL: My name is Howard Siegel. I'm an  
3 investor in Beacon, an attorney, a CPA, and I do want to speak.

4 THE COURT: OK, Mr. Siegel. Thank you.

5 MR. DECKER: Your Honor, Robert Decker. I'm not an  
6 attorney. I'm a retired professor of surgery. I would like to  
7 speak.

8 MS. DECKER: Phyllis Decker, a listener.

9 THE COURT: All right. Any other folks in the back?

10 MR. DEUTSCH: I'm Herbert Deutsch. I represent an  
11 investor.

12 THE COURT: Do you wish to speak at all?

13 MR. DEUTSCH: No, sir.

14 MS. GREENE: I'm Audrey Greene. I'm just a paralegal  
15 for Mr. Folkenflik.

16 THE COURT: You don't have to say "just" before  
17 "paralegal." Paralegals rule the world.

18 MR. FOLKENFLIK: In Ms. Greene's case, it would be  
19 highly inaccurate.

20 THE COURT: All right. Let me ask one other factual  
21 question, probably to Mr. Jakoby but to whoever has the  
22 information. If the Court were to use the net investment  
23 method for, quote/unquote, Madoff funds, does management know  
24 how much investors recovered from the district court-approved  
25 settlement -- that is, the money that the Attorney General,

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1 etc., supposedly required but in any event caused to be  
2 distributed directly to the Beacon fund members based on their  
3 "Madoff" investments?

4 MR. JAKOBY: Yes, we do. We know that with precision  
5 because we helped prepare the statements that we used in  
6 connection with the district court action. We worked with an  
7 expert. And, also, there were accrued management fees that  
8 were canceled that the fund distributed in accordance with the  
9 method that was used in the district court action pursuant to  
10 the order of Judge McMahon. So we know the exact number with  
11 precision. Thank you.

12 THE COURT: All right. I think I'm going to take a  
13 leaf from the Central District of California practice at this  
14 point and tell you where my leaning is and let you argue  
15 accordingly. With respect to the "Madoff" money -- there have  
16 got to be quotes about that, I know, because it's not directly  
17 invested in Madoff, but for the money that is coming back  
18 through Mr. Picard, the Madoff trustee, I am inclined to use  
19 the net investment method to restore investors as much as  
20 possible to recover their Madoff losses. I am less sure about  
21 how I want to handle the 19-million-and-change clawback. And  
22 I'm not sure how much ultimately that matters compared to the  
23 other money to various investors. That's what I'm interested  
24 in hearing from each of you on. And anything else, any  
25 expenses will probably go with the way money that is being paid

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1 out is allocated unless, because of the way expenses have  
2 already been handled, that required more expense in the way of  
3 recalculation and accountant fees and whatever than it would be  
4 worth. And also, I think Mr. Folkenflik, to the extent you  
5 were suggesting a 50/50 split of expenses, that does not seem  
6 fair, and what Mr. Siegel, I believe, was suggesting in his  
7 pipers, which is allocating it based on where the money is  
8 going proportionally so if the Court were to say, OK, 50  
9 million is under the net equity method for the "Madoff" funds  
10 and 19 million of the clawback is treated differently, than  
11 whatever the math is, 40 percent of the expenses go to -- well,  
12 X percentage equivalent to the 19 million goes against that,  
13 and the percentage against the 50 million goes against that,  
14 probably two sevenths and five sevenths, whatever that would  
15 be.

16 OK. With that, Mr. Folkenflik?

17 MR. FOLKENFLIK: Yes, your Honor. Well, I'll try and  
18 be brief because your Honor has reviewed the submissions and, I  
19 think, the brief and the reply brief, and then my September 8th  
20 letter sort of set the stage of what our positions are, that  
21 the basic proposition is that, as your Honor seems to agree,  
22 this is an equitable action. That's clear if you look at CFTC  
23 v. Efrogman, where Judge Wood had an issue involving the return  
24 of Ponzi scheme funds that were found in a bank account, and  
25 SEC v. Credit Bancorp., both of which cases I cite in my

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1 papers, where Judge Sweet had a similar situation. It's  
2 obviously equitable. And the Court is supposed to do what  
3 represents equity and justice.

4           What that means, although the case law doesn't always  
5 say it in so many words, is that the Court is asked to do the  
6 best you can. With equity, you're not going to get  
7 mathematical precision in the same way that you might do with  
8 legal remedies. And you try and address issues, in an opinion  
9 that takes into account all of the equities of both sides.  
10 This is a perfect case to illustrate those principles, because  
11 we do have a mixed fund where you have some non-Madoff money  
12 and some Madoff money. And at this point we're dealing with  
13 simply Madoff money except to the extent that there is some  
14 future, and I understand it to be very small, amounts of  
15 non-Madoff money that may need to be paid.

16           THE COURT: Well, let me press you on that. Unless  
17 you're counting the court settlements, I thought any new money  
18 coming in is only Madoff-related.

19           MR. FOLKENFLIK: Some of what we'll refer to as the 25  
20 percent of non-Madoff investments. Those investments were  
21 gated in various ways, and so there were some that were  
22 illiquid. There are estimates, I think they're carried on the  
23 books at about \$100,000, although the return may be some  
24 multiple of that number, but still not very rough.

25           The difference between the statement values and the

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1 cash in, cash out values, just to put it in some order of  
2 magnitude, there was approximately \$138 million of Beacon  
3 investment in Madoff on a cash in, cash out basis. The claim  
4 is larger than that because of what's referred to as a  
5 springing claim, that the money that was clawed back is now  
6 being returned at the back end, I think Mr. Siegel wants to  
7 refer to that. That's how he would characterize the 19.7.  
8 I'll talk about that in a moment. But compare that to the  
9 overall statement value with the Madoff earnings inflation of  
10 \$358 million, so that the aggregate inflation of Beacon  
11 investment as a result of Madoff's fictitious profits was more  
12 than double the cash in, cash out value.

13 Now, I mention that because there are issues -- when  
14 your Honor issued the last ruling, your Honor said, we'll  
15 distribute it on net asset value basis, on a net equity basis,  
16 cash in, cash out, because not to do so would deny investors  
17 earnings that they were entitled to on the non-Madoff  
18 investments. And that's true. But those investors, as a  
19 result of that order, which I urged the Court to adopt, did  
20 receive an inflated return on the non-Madoff amounts at that  
21 time because of the effect of the Madoff inflation on those  
22 numbers. There did not seem to be a better method at that time  
23 of distributing the non-Madoff money. And so whatever that  
24 inflation is, it will be corrected to some extent by applying  
25 the cash in, cash out method to the Madoff money.

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1           And another metric that I think your Honor might be  
2 interested in thinking about also is that the difference  
3 between the cash in, cash out and the valuation method is not  
4 enormous.

5           THE COURT: Well, it's enormous for certain investors.

6           MR. FOLKENFLIK: It may be enormous for certain  
7 investors. In the aggregate, Mr. Jeanneret computed it to be  
8 54 percent versus -- would do better in cash in, cash out. I'm  
9 not saying it's not enormous for some investors in dollars.  
10 Certain some investors, like Mr. Rabvogel, who wrote to the  
11 Court, got all his money back already, and he's saying, so I'd  
12 be denied money. Well, yes, but he got all his money back  
13 already. And it was a Ponzi scheme. The fact that there is an  
14 intermediate party in the chain of payment from the investors  
15 to Madoff and from Madoff back to the investors shouldn't  
16 change the equities in a meaningful way from just getting back  
17 Madoff money.

18           Another metric that your Honor might look at is, it's  
19 over time, the Madoff premium, if you will, from the fictitious  
20 profits, gross. So, for example, if you are earning 10 percent  
21 on all of the investments, Madoff and non-Madoff, and 70  
22 percent of the fund was invested in Madoff, in year one you  
23 have 7 percent investment in Madoff; in year two another 7  
24 percent plus 7 percent of the first 7 percent. And so by the  
25 end of year five you have significantly more than 35 percent;

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1 by the end of year 7 you have more than half. The value of  
2 your capital account is represented by fictitious profits.

3 Now, every court who has considered the matter has  
4 found that perpetuating the Madoff fraud through distributing  
5 profits based on Madoff's fiction would be against public  
6 policy. And as I said in our submission, it would effectively  
7 turn Beacon into a Ponzi scheme, doing exactly what Ponzi  
8 schemes do, making new investor money and using it to pay off  
9 the old. And Mr. Rabvogel is a prime example of where  
10 Mr. Rabvogel received more than his money back and is seeking  
11 more at the expense of innocent investors who didn't get their  
12 money back. This the courts have found to be inequitable as  
13 well as against public policy. And I believe your Honor's,  
14 what they refer to in California as "the tentative decision,"  
15 takes that into account.

16 Mr. Whiteley has mentioned that this implicates ERISA  
17 considerations. And certainly ERISA requires an ERISA plan to  
18 be applied as written to a large extent. There may be  
19 exceptions. But this isn't an ERISA plan. And when you  
20 consider what the requirements of ERISA are, the Department of  
21 Labor, in the In re Beacon Securities cases, which were settled  
22 before Judge McMahon, the Department of Labor, the agency  
23 responsible for enforcing ERISA, took the position that it was  
24 required to bypass Beacon and distribute the money directly to  
25 the investors pro rata based on the cash in, cash out

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1 computation.

2           So I think the fact of the existence of ERISA or  
3 non-ERISA, certainly the Department of Labor's actions, while  
4 we might not give it Chevron deference, under the circumstances  
5 it's certainly worth taking into account.

6           Mr. Whiteley refers to collateral estoppel, and I  
7 think we've pointed out and I think your Honor understands that  
8 the last determination was not determinative. We didn't brief  
9 it at all. It was discussed in oral argument. But there was  
10 only non-Madoff money at stake. And that case, like this case,  
11 was an injunction issue addressed to specific funds. And those  
12 funds, non-Madoff money, are not these funds. Different  
13 equities apply.

14           I think that, to address your Honor's comments about  
15 the 19.7 million -- let me divide that into two pieces.  
16 Mr. Jakoby's presentation treats that as having been paid back.  
17 Now, here is what happened. There was approximately \$20  
18 million held in reserve. That was then given to the SIPIC  
19 trustee. The SIPIC trustee granted what's called the springing  
20 claim that comes into effect at the end of the day for 19.7  
21 million based on that clawback payment. But the trustee then  
22 proceeded to distribute the portions of the initial claim for  
23 the \$138 million cash in, cash out loss, and gave the funds \$69  
24 million. The funds then treated the 19.7 that they effectively  
25 had reserved and then gave back as moneys that were non-Madoff

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1 funds, that had been originally covered by non-Madoff  
2 investments. They were then replenished. And they were  
3 distributed in accordance with your Honor's earlier order.

4 And I don't really have any problem with that. If  
5 your Honor wants to address, however, the 19.7 million --

6 THE COURT: But just from your point of view, you and  
7 Mr. Whiteley, I think, come out the same, which is the 19.7,  
8 which is what I now learn has been distributed using the  
9 valuation method, should stay as such, although Mr. Siegel, at  
10 least, differs on that.

11 MR. FOLKENFLIK: Well, Mr. Siegel, I don't think,  
12 disagrees as to the amount that is already distributed. But  
13 his view is that the springing claim, if he ever gets the last  
14 19 million, the \$158 million, the last \$19.7 million should be  
15 treated as Madoff money. And I think that's his position. But  
16 he'll state it.

17 THE COURT: He'll get his chance.

18 MR. FOLKENFLIK: In any event, if there is anything to  
19 be done differently with the 19.7, I think it should be clear  
20 that it's only as to the last moneys received from the SIPIC  
21 trustee, from any other Madoff --

22 THE COURT: At least from your point of view, if I  
23 stick with my initial thoughts, which are, any money coming in  
24 from the trustee in the future, from now and in the future,  
25 gets treated under the net equity, then it doesn't matter

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1 whether it's the last 19.7 or it's last the 107; it all goes  
2 to --

3 MR. FOLKENFLIK: That's correct. And if your Honor  
4 were to come up with a different view about the 19.7, I think,  
5 unless you made it clear it only applies to the last money  
6 received, it would have unintended consequences, which we don't  
7 want. We are satisfied with what the funds, under Mr. Jakoby's  
8 direction, did to comply with your Honor's prior order.

9 THE COURT: OK. Wrap it up, please.

10 MR. FOLKENFLIK: Yes. With respect to the expense,  
11 the reason I said 50/50, I think the reserve for expenses is in  
12 the neighborhood of \$5 million. The amount that would be  
13 shifted from one side to the other, if it's 55/45 or 50/50 or  
14 40/60, is not that material. And the problem that I was  
15 speaking about to Mr. Whiteley of doing it based on money  
16 coming in is that could be a moving target.

17 THE COURT: Let me explore this a little further,  
18 which is, I did not realize that the 19.7 was already  
19 distributed. So assuming I disagree with Mr. Siegel and  
20 everybody else is happy that the 19.7 has been distributed, it  
21 seems to me any additional expenses or any expenses that have  
22 not been paid for, allocated, whatever the accounting firm is,  
23 will be deemed paid out of reserves which are essentially  
24 Madoff money. So it's a hundred percent under that method.

25 MR. FOLKENFLIK: We have no problem with that. I also

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1 believe with Mr. Jakoby that the reserves are too high. And I  
2 think that the accountants, while they have a role to play, the  
3 financial condition of the entity is up to the management of  
4 the entity, which your Honor has now taken over from  
5 management.

6 THE COURT: That issue is not in front of me and  
7 hopefully will not ever be.

8 MR. FOLKENFLIK: OK. So we have, I think I have  
9 addressed the issues that your Honor is concerned with. I  
10 believe that the "tentative" should be adhered to. And thank  
11 you.

12 THE COURT: OK. You don't have to sum up as such.  
13 Mr. Whiteley, the floor is yours.

14 MR. WHITELEY: Thank you, your Honor. I've been in  
15 the Central District of California. I never like being on this  
16 end of the platform.

17 THE COURT: At least you know what you're doing.

18 MR. WHITELEY: So I'll briefly explain why I'd like  
19 you to change your mind, and then talk about the practical  
20 issues.

21 And the issue I wanted to talk about up front was, to  
22 me the most challenging aspect for the advocates of the  
23 valuation methodology is the concept of fairness. Is it fair  
24 to use the valuation methodology in this context? I think  
25 there are two points that we tried to raise in the briefs and I

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1 want to raise here in that context. The first, your Honor, is  
2 that the net equity method that's proposed here is really not  
3 the net equity method that's been used by the trustee, because  
4 the trustee -- if we accept -- in the first place, as you know,  
5 we dispute the issue of non-Madoff versus Madoff capital. It's  
6 all Beacon money in our view, and you already decided that.  
7 But if you accept there's non-Madoff and Madoff money in the  
8 plan, then to look at the distribution and to include the  
9 distribution that occurred after your Honor's order in 2010 is  
10 to include what clearly at that point was non-Madoff money in  
11 the determination as to sort of what an investor's net equity  
12 amount was vis-a-vis Madoff. So that, to us, is problematic.

13 But more, I think more importantly -- and I think your  
14 Honor was getting at this with your question to us up front, or  
15 to Mr. Jakoby, which is, well, what about the distributions  
16 that were made in the context of a global settlement? Because,  
17 as I understand the net equity method that's been proposed, it  
18 does not include those distributions. So if you put in a  
19 hundred dollars into Madoff --

20 THE COURT: Well, let me stop you there. Mr. Jakoby,  
21 the calculations you gave to all these folks, does it include  
22 or -- is the money that went through the, what I'll call Judge  
23 McMahon settlement, is that in the calculations or not?

24 MR. SIEGEL: Yes.

25 THE COURT: It is in the calculations?

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1           MR. SIEGEL: Yes. The people's net capital investment  
2 has been reduced by it.

3           MR. JAKOBY: Correct. It affected the net capital.  
4 That is correct.

5           THE COURT: All right. So I think --

6           MR. WHITELEY: My understanding from my client was  
7 not, and then my computations, it's not --

8           MR. JAKOBY: One second, your Honor.

9           MR. FOLKENFLIK: Your Honor, I -- although it maybe  
10 not in my interest to say so, in the interests of candor to the  
11 Court, I don't believe that's correct, because it was  
12 distributed directly to investors.

13          MR. SIEGEL: Right. It has been.

14          MR. FOLKENFLIK: And it didn't go through the --

15          MR. SIEGEL: I believe he knows --

16          MR. JAKOBY: We know the number.

17          THE COURT: So if I were ordered to distribute based  
18 on that being subtracted, you could do so, and how expensive  
19 would that be?

20          MR. JAKOBY: We have not -- we could probably do so,  
21 yes. We could definitely do so. But we have not done the  
22 calculations.

23          THE COURT: Are the accounting fees or whatever such  
24 that doing that is a significant expense or not?

25          MR. JAKOBY: No, because we have an in-house person

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1 who is very competent and who can do all calculations.

2 MR. FOLKENFLIK: If I may, your Honor, there was an  
3 entity called the Brattle Group, a group of economists in  
4 Boston, who computed person by person the amount of the  
5 distribution, and the distributions were made according to the  
6 best computation. So you could, but I'd like to speak about  
7 why you should not.

8 THE COURT: All right. Well, you've had more than  
9 your time on your piece so far.

10 MR. WHITELEY: Here's why I would say you would, your  
11 Honor, and also with respect to any other collateral recovery,  
12 because we're talking about what your money was into Madoff and  
13 then what you have received to date. And any dollars you  
14 received in the context of that Madoff investment, I think,  
15 are, you know, a return of your capital, your so-called Madoff  
16 capital, one way or the other. And I think it may make a large  
17 difference.

18 The reason that that is important is that at some  
19 point, at some point, it may be that more and more investors  
20 have indeed received all of their capital back. To the extent  
21 they all potentially receive all of their capital back, then  
22 there may be at that point a return to the valuation  
23 methodology or some other methodology, because otherwise, we  
24 may actually have the reverse of the fairness problem we had  
25 under the valuation methodology, yet the valuation methodology

1 does favor long-term investors who took little or no money  
2 out -- who are may have taken some money out. Now you're going  
3 to be impacting the short-term investors.

4 THE COURT: Let me ask you and Mr. Jakoby, is that a  
5 likely outcome, that we get to the point, if I stick to my  
6 initial thoughts, which is the net investment method, with  
7 McMahon settlement funds incorporated into that as cash  
8 received back, that we will ever get to the point where all of  
9 the Beacon and Andover investors are made whole so that any new  
10 Madoff money would then be, in essence, returned to the  
11 valuation method under the operating agreement?

12 MR. JAKOBY: It is, with respect to Beacon, it is  
13 expected that, under the proposition that your Honor just  
14 articulated, I would suspect that every investor would be  
15 making profits. There is one investor in Beacon who was  
16 treated differently because that investor directed that their  
17 money only go into Madoff. An exception was made. So that  
18 investor never got back the non-Madoff money because they  
19 didn't invest in any non-Madoff investments. But that's a lone  
20 exception.

21 With respect to Andover, because the Andover Madoff  
22 money was a much smaller portion, I can't answer the question  
23 with accuracy. Most investors should make a profit, if you  
24 look at money in, money out, depending upon when they invested,  
25 when they got in, when they got out. It's certainly possible

1 that one or two did not make a profit, but probably unlikely.  
2 Probably all investors would not make a profit. That's what's  
3 anticipated. And Beacon investors will probably walk away with  
4 a greater profit because the fund has more money in Madoff.

5 THE COURT: OK. All right. Continue.

6 MR. WHITELEY: So with that backdrop, your Honor, I'm  
7 happy more or less to rely on the arguments we made in our  
8 briefs. I know you've read them. We've made them to the best  
9 of our ability. I think, you know, just so I'm reserving my  
10 points on those, I do believe an initial decision covered the  
11 issue because the claim had been submitted. There was no  
12 question at that point that there was a significant claim with  
13 respect to the trustee. There was even a discussion --

14 THE COURT: Since I wrote my opinion, I certainly know  
15 what I was thinking. And it was that the only money on the  
16 table was the non-Madoff money. So I do not find there is any  
17 collateral estoppel from the prior opinion. Whatever passing  
18 references there were to the fact that there was a zero value  
19 claim against Madoff, that was not the issue that the Court  
20 decided. I appreciate --

21 MR. WHITELEY: You've answered the question that I  
22 have said I don't know the answer to, to others, and that is, I  
23 don't know what Judge Peck was thinking when he wrote the  
24 decision. I can tell what you I --

25 THE COURT: Usually when people say that, it's a bit

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1 more pejorative than I know you mean it.

2 MR. WHITELEY: That was not the case.

3 THE COURT: No, I know.

4 MR. WHITELEY: So with that, your Honor, unless I  
5 would need to respond to anybody, I'm concluded.

6 THE COURT: All right. Mr. Siegel, if you could come  
7 up at the podium, please. And at the very end, give your card  
8 to the reporter so you can be fully documented. And the same  
9 thing for Mr. Decker.

10 MR. SIEGEL: OK, your Honor.

11 May please the Court: My name is Howard Siegel. I'm  
12 an attorney and a CPA. I was a partner with Deloitte & Touche,  
13 spent my whole career there of 40 years. I've written a  
14 memorandum to you, which --

15 THE COURT: Which I have read.

16 MR. SIEGEL: -- I hope you've had a chance to go  
17 through. I don't need to preach to the converted, and it  
18 sounds like you've got the message from Mr. Folkenflik and  
19 myself.

20 The basic thesis of mine was that the operating  
21 agreement doesn't prevent you from doing what you need to do in  
22 this matter. And neither does your prior decision. And you've  
23 reached that conclusion.

24 I would say this. I misspoke when I said before I was  
25 thinking in terms of the valuation money that we distributed

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1 has been reduced from people's capital accounts, as has the  
2 19 -- well, maybe the 19.7 hasn't been done yet, but  
3 contemplated.

4 THE COURT: It has been.

5 MR. JAKOBY: It has.

6 MR. SIEGEL: Has been reduced?

7 MR. JAKOBY: Yes. In December.

8 MR. SIEGEL: It was the latest, the conversation I had  
9 with Debbie last week, she indicated to me it was --

10 THE COURT: That will be squared away.

11 MR. SIEGEL: That will be squared away.

12 The concept you talked about --

13 THE COURT: Let me be clear, since we have almost  
14 unanimity or maybe unanimity. Are you suggesting that the 19.7  
15 should be recalculated?

16 MR. SIEGEL: Yes.

17 THE COURT: Currently?

18 MR. SIEGEL: Yes. There should be an adjustment --

19 THE COURT: Why?

20 MR. SIEGEL: There should be an adjustment for this  
21 next distribution.

22 Because we argued long and hard with the trustee about  
23 the set-off. He refused, continually refused. I was part of  
24 the team with Mr. Jakoby and Mr. Folkenflik in negotiating.  
25 They refused to do a settlement. And effectively what Beacon

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1 has done is set the money off.

2 I believe that the matter with the trustee is about  
3 recovering people's capital, which is the \$1389 million, OK,  
4 that we're all out. And it seems to me wrong to take 19.7 off  
5 the first distribution we get from the trustee, which in my  
6 opinion should go towards the hundred -- the whole 69 million  
7 should go towards our recovery of the \$138 million.

8 This became a springing claim, an add-on claim, where  
9 the trustee is allowing us to recover the amount of our  
10 fallback amount. To me that should be at the end, after we  
11 recover our lost capital. And I don't see taking the whole  
12 19.7 off the top. I proposed in my memorandum a compromise,  
13 which was to say, if you don't want to go that route, that we  
14 should be prorating the amount of the 19.7 million out of each  
15 distribution we receive. So if you take 19.7 over the 159  
16 million, which is the total amount, you get to about 12.8  
17 percent. To me the compromise would be, you take the 69  
18 million, you take 12.9 percent of that, 12.8 percent of that,  
19 if my math is right, and you allocate that under the valuation  
20 method. That comes to about \$8 million. And you leave the  
21 balance, the 61 million, and you allocate that under the cash  
22 in, cash out. You get another payment, you do the same thing.  
23 And that to me is a compromise that balances this out in terms  
24 of where the 19.7 belongs. I don't think it belongs off the  
25 top, because the trustee wouldn't let us do that. Had he set

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1 it off, we wouldn't be here discussing it. We would have only  
2 gotten back 51 million.

3 THE COURT: Nevertheless, if it hadn't been reserved  
4 at the time the Court said Pay everything out using the net  
5 valuation method, the trustee would have had no choice but to  
6 lop it off the top.

7 MR. SIEGEL: That's true.

8 THE COURT: OK.

9 MR. SIEGEL: So anyhow, that's my point on the 19.7.

10 I'd like to go back to the proposition that somehow  
11 the amount we got in the class action settlement should reduce  
12 the basis for recoveries from the trustee. To me that's  
13 totally wrong. I look -- I'm an investor --

14 THE COURT: If you're doing cash in, cash out, why  
15 isn't this cash out, or cash --

16 MR. SIEGEL: But it's not a recovery of my capital,  
17 right. Here's the way I look at it. To me the settlement that  
18 we received in the class action are damages. They're damages  
19 for the last six years, in working on that. They're not a  
20 recovery of my capital. They're a payment for fraud that was  
21 perpetrated on me face to face with Mr. Larry Simon when I met  
22 with him in 2001 and asked him all these questions.

23 THE COURT: Except that you are one of a myriad of  
24 investors here, and while you may have had a direct  
25 communication with people, we're looking at everybody. And the

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1 settlement that Judge McMahon approved was getting people their  
2 Madoff money back, not psychological recovery or time-value  
3 recovery or fraud damages. You know, if one is going on a cash  
4 in, cash out basis, it's pretty hard to say that, for all  
5 investors, or even for one investor, that that's not part of  
6 the recovery of the Madoff funds.

7 MR. SIEGEL: Well, let me just throw in another  
8 factor. When we negotiated settlement with the trustee, one of  
9 the most important factors in that that we insisted on was that  
10 he would not set off the amount that we recovered in the class  
11 action against our recovery from his fund. OK. So it's not  
12 treated as a recovery of our capital. And that's in the  
13 agreement with the settlement with the trustee, that it cannot  
14 offset that amount against our recoveries. Otherwise, it would  
15 be in there. But it's not in there. And therefore we have the  
16 possibility of recovering 138 million.

17 I, to me, under the valuation method that we used, I  
18 wrote you a letter. I supported it, because I believe that the  
19 restatement methods had issues with that. And therefore -- but  
20 the fact of the matter is, I cost myself \$140,000 out of my  
21 recovery by voting for the valuation method, in which Income  
22 Plus and others recovered a nice amount of other people's  
23 investment. And now we're in the throes of trying to recover  
24 what my remaining investment is. I don't see taking the  
25 500-some-odd thousand that I recovered in the class action

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1 settlement and offsetting that against my capital recovery in  
2 Beacon. To me the two are two different things. And, you  
3 know, I haven't taken a poll of investors on that, but I would  
4 think that most investors would think of that as damages and  
5 the recovery for the pain and suffering we've been through.

6 THE COURT: We don't do that in securities fraud.

7 MR. SIEGEL: Well, I understand that, but it is fraud.  
8 And that's what they're paying for, OK.

9 THE COURT: I understand.

10 MR. SIEGEL: So that's my point about that. I've  
11 given you my point about the 19.7 million and I believe that in  
12 the worst-case scenario there should be an adjustment back on  
13 that amount. And the last thing, on expenses: We did talk  
14 about, I did talk about the normal way to apportion things.  
15 And I think, if we went that route, there aren't a lot of  
16 expenses that have been incurred up to date that would be  
17 solely attributable to the Madoff money. OK. Because I don't  
18 regard the amount of legal expenses that were expensed in  
19 connection with the class action settlement belong charged  
20 against the Madoff money, in the same way I don't believe that  
21 the --

22 THE COURT: So where does it get charged?

23 MR. SIEGEL: It has to be split, because it doesn't  
24 belong to either place. Just like, you know, I --

25 THE COURT: OK.

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1           MR. SIEGEL: There are a lot of expenses that have  
2           been incurred to date, like the administrator expenses. Where  
3           do they go? They have to be -- if you were going to do a pure  
4           apportionment, they have to be split, OK. The ones that have  
5           been incurred today, one could argue, belong to the valuation  
6           pool because that's all we've had so far and that's all that's  
7           been done.

8           I had a conversation with Mr. Jakoby a few days ago in  
9           which we talked about the fact that the likelihood is we may  
10          recover the same amounts from the trustee that was distributed  
11          in the recovery of the non-Madoff funds, and that the simple  
12          solution may be to charge everything that went up so far to the  
13          non-Madoff and charge everything that happens subsequent to  
14          that to the Madoff and let it go at that. I don't know what's  
15          involved. I know what the expenses were. I got a schedule.  
16          But I think they've already been all paid, up to this point in  
17          time. And they showed a breakdown within the deal and  
18          whatever, and a surprise number that I saw in there was for  
19          some 2 1/2 million dollars in liquidation fees for the  
20          non-Madoff funds that were early liquidation fees that were  
21          part of the expenses.

22          So those are my points. I hope your Honor comes  
23          through with the cash in, cash out, because that really is the  
24          method that needs to be used.

25          THE COURT: Thank you.

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1           Mr. Decker.

2           MR. DECKER: I'll try to be very brief, your Honor.  
3 As I recall four years ago -- maybe things are different now  
4 than they were four years ago. Four years ago, you challenged  
5 us, said, What about the equity method? How can that not be  
6 considered? Well, obviously we were not offered that method.  
7 The methods were accumulated by our accountants and management,  
8 the restatement method, I believe, the valuation method.

9           I as well as many people, we were desperate at that  
10 time to get some money back. And why were we desperate? We  
11 were desperate because the trustee had made us a non-customer.  
12 A non-customer, no SIPIC money. The class action suit had just  
13 started at that time, didn't have a lot of nails in it. And we  
14 didn't have any nails until the Attorney General got involved.

15           So they were reversed in 2010, based on the valuation  
16 method. It then cost me at least 30 percent less money because  
17 we took it. We took it because the other methods were not  
18 compatible with anybody and everybody wanted to get some money  
19 back. I tried to get that point across.

20           I was very active at that point and very upset with  
21 the trustee. I wrote him a personal letter. And he sent me  
22 back a personal letter, explaining why we would never be a  
23 customer.

24           And also I had a lot of dialogue with the attorney in  
25 the class action suit. They were going over it as well, until

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1 a couple years later the Attorney General found the e-mails  
2 from the active management of the company.

3 So as far as I'm concerned, things are different  
4 today. I can't see any other way besides the cash in, cash out  
5 method. This is the default method of all the Madoff payments,  
6 and it makes sense to me. Thank you.

7 THE COURT: All right. Let me ask Mr. Jakoby one  
8 question. And that is, the recently settled and/or pending  
9 litigations, do you consider that -- and I'll ask the same  
10 question to the other folks -- as Madoff settlements or -- in  
11 other words, if the Court takes the view the Madoff money goes  
12 under the net investment method, non-Madoff money goes under  
13 the valuation method, nobody has spent much if any time talking  
14 about those cases.

15 MR. JAKOBY: Your Honor, the funds use the current  
16 non-trustee litigation where it's likely in one case it's going  
17 to happen, certainly with respect to Beacon, that it will  
18 receive back money, also, with the JP Morgan Chase class action  
19 settlement, that both funds will receive back some money. We  
20 consider all that money to be Madoff money.

21 THE COURT: Does anyone feel differently?

22 MR. WHITELEY: I wouldn't disagree with that.

23 MR. FOLKENFLIK: We don't disagree.

24 THE COURT: And I saw Mr. Siegel and Decker agreeing  
25 as well.

1 MR. SIEGEL: Yes.

2 THE COURT: OK. Mr. Jakoby.

3 MR. JAKOBY: Just several comments on things that were  
4 said by various parties. First of all, with respect to the  
5 \$19.7 million, with respect to Andover, the reserves for the  
6 Madoff trustee were set pursuant to negotiations that I had  
7 with the Madoff trustee back in 2009. And the trustee  
8 indicated right up front that they were going to not only  
9 disallow our claim in its entirety but they were going to be  
10 seeking callbacks. When they saw that we approached your Honor  
11 in 2009 seeking that your Honor declare a method of  
12 distribution, they recalled me to say, unless you consent to  
13 reserves we're going to intervene in that action. I thought it  
14 prudent to work something out with the trustee. And that is  
15 why we set the reserves -- we set much greater reserves for  
16 Beacon than for Andover, and that was set in negotiations.

17 So when we went to settle with the trustee, the  
18 trustee wanted checks not only from Beacon but also from  
19 Andover. Andover had not set aside enough reserves. It was  
20 not possible to give the trustee a check. So the trustee  
21 agreed to net out the money.

22 The reason that the trustee wanted the money -- I know  
23 the reason why, they told me -- was because it looks good for  
24 the trustee to get a check. It doesn't make much sense to me  
25 because what little happened with respect to Beacon is, there

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1 was a simultaneous exchange of checks. It was literally  
2 simultaneous. The fund was not out of the money at any point  
3 in time. Since the only money that we had at that point in  
4 time was non-Madoff money, we had to take the 19.7 million from  
5 non-Madoff money and, since we got it back, it was a  
6 simultaneous exchange, we returned it, the non-Madoff money.  
7 It did not seem fair to penalize the investors and  
8 specifically, for example, that one investor that didn't  
9 participate in the non-Madoff. You're basically taking money  
10 from the non-Madoff and putting it over into the Madoff  
11 category. So we -- it wasn't easy. I'm not saying that we  
12 simply snapped our fingers. We thought about it long and hard.  
13 And also since Andover -- we made back the money -- they didn't  
14 have money to make, fall back on, the trustee. It seemed to me  
15 fair to treat all investors the same. That is why we treated  
16 it that way.

17           It is true that the trustee -- let me go on to another  
18 point that was made. It is true that, with respect to Beacon  
19 and Andover, the trustee did not look at the money that we got  
20 out of the entire class action settlement money. But we are  
21 unique, of all the Madoff claim cases, because in all of the  
22 other cases, not only did the trustee consider that money to be  
23 a return of investor money, but the trustee actually sued to  
24 grab the money. We are unique. And therefore I don't know  
25 that you can look at the actions of the trustee and say the

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1 trustee indicated one thing or the other. We're simply unique.  
2 And that is, it's because of its uniqueness, is why our  
3 investors, two of them, enormous large percent of money,  
4 overwhelming of all investors, will be making more money on  
5 Madoff.

6 With respect to the expenses, your Honor will see that  
7 what we proposed is almost identical to what your Honor raised.  
8 That's the only thing that we proposed something on. And  
9 that's on page 4 of the second paragraph of the post-Madoff  
10 expenses. We proposed -- this is really the only thing that  
11 they look askance on -- only because we know what we can do and  
12 we know what we can't do -- we're basically asking the Court  
13 that we be given some discretion but we strive to apportion the  
14 expenses pro rata in accordance with whatever your Honor  
15 decides in terms of how expenses should be allocated. We do  
16 our best to meet that pro rata formula.

17 THE COURT: Well, since expenses have already been  
18 paid, let me try to understand this. Everything that has been  
19 paid, you're saying leave it where it is, expenses going  
20 forward?

21 MR. JAKOBY: Expenses going forward, we can do  
22 whatever your Honor wants. That's easy.

23 THE COURT: OK. Well, and for expenses --

24 MR. JAKOBY: Well, since we're not going to be paying  
25 out much non-Madoff money because there isn't much left, it may

1 not be possible. But we can certainly strive, within our  
2 discretion, to do whatever --

3 THE COURT: What I'm asking is, is there any economic  
4 reality or any reason to say, OK, you've been paying expenses  
5 for the last year, now they should be allocated differently  
6 than wherever they are on the books?

7 MR. JAKOBY: We need some authority from the Court so  
8 that we're not challenged by the investors. So we're going to  
9 need some direction from the Court.

10 THE COURT: No, I understand that. What I'm asking  
11 you is, in that direction, it's already been paid out of  
12 whatever money it was paid out of.

13 MR. JAKOBY: Mostly non-Madoff money, but not -- we've  
14 been getting in Madoff money from the trustee since the end of  
15 2012. So the first four years, three and a half years, where  
16 the expenses were made paid out of non-Madoff money.

17 THE COURT: All right.

18 MR. JAKOBY: Because we didn't know that we were going  
19 to get in on it. We had no idea.

20 THE COURT: I understand that. It hardly seems worth  
21 it to reallocate old expenses.

22 MR. JAKOBY: Correct. And it doesn't move the needle  
23 much.

24 THE COURT: Particularly since it now appears that the  
25 investors are all going to recover all their money.

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1           OK. Anything else, Mr. Jakoby?

2           MR. JAKOBY: Thank you, your Honor.

3           THE COURT: All right. Mr. Folkenflik, only if you  
4 desperately need to say something, because we're already deep  
5 into the hour of the case that's waiting behind you.

6           MR. FOLKENFLIK: Well, I'll be very brief. Just one  
7 issue, the only issue that I think needs to be discussed, is  
8 what I would refer to generally as collateral source payment,  
9 and that is the settlement in front of Judge McMahon, the  
10 Beacon Securities case. But that's not all. I mean, there  
11 will be payments under the Madoff Victims Fund. There will be  
12 payments, direct payments, under the Shapiro case.

13          THE COURT: Is there any reason those should not be  
14 treated under the net investment method?

15          MR. FOLKENFLIK: No. Those also should be treated  
16 under the net investment method and will be in accordance with  
17 their terms. The question is, do you treat as part of the  
18 capital accounting in Beacon the money received from those  
19 other sources? And I think there are several problems with  
20 that. First of all, with respect to the Beacon Securities  
21 case, if you directed that those funds be treated as  
22 recoveries, first of all, there is the matter of equity.  
23 Because the 2010 distributions under the valuation method, as I  
24 mentioned, overstated the amount that those investors should  
25 have received, because they got paid an inflated amount, the

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1 investment on a cash in, cash out basis in the Beacon  
2 Securities case understated to some degree what those investors  
3 could have received, but it, to a substantial degree, offsets  
4 each other. If we are going to go into collateral sources,  
5 then we can't pick and choose which collateral sources. Some  
6 people have received recoveries from lawsuits such as  
7 Mr. Deutsch's claim for the Jordan Group. Some people have  
8 received recoveries, we believe, from insurance policies. As I  
9 said, there will also be recoveries from the Madoff Victims  
10 Fund.

11 THE COURT: Isn't the short answer to that no method  
12 used here is perfect and you have to do the best you can and  
13 the only method where the funds managers have -- the only area,  
14 not method -- the only area, it appears, where the fund  
15 managers would have the information of what investors received  
16 is the money from the, for lack of a better term, I'm calling  
17 it the McMahon class action settlement?

18 MR. FOLKENFLIK: I think, your Honor, that I agree  
19 with the first point and not the second. There are some things  
20 that are going to be known, the lawsuit settlements, some of  
21 which are known. We could have people file affidavits. But  
22 the problem, I think, is that picking out one collateral  
23 source, the McMahon settlement, isn't as imperfect -- it's not  
24 as imperfect to leave it where it lies as it might appear on  
25 its face because of the prior distributions having

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1 overdistributed. I do believe that nothing is perfect, we have  
2 to do the best we can, but I think that not including the  
3 distributions in the Judge McMahon settlement is a better  
4 combination of the conflicting interests than including them.

5 MR. SIEGEL: Can I ask one question, your Honor, about  
6 that?

7 THE COURT: Yes.

8 MR. SIEGEL: My question about that is, assuming we  
9 have an investor, when you add in all these things, that has  
10 received his capital back and then we get another distribution  
11 with the trustee, what are you proposing, perhaps, as to how  
12 that's going to be treated? I mean, I --

13 THE COURT: Well, the way I thought you all were  
14 talking about it -- and it seems to make sense -- is that if  
15 investor A has now been made 100 percent whole and the next  
16 round of money comes in, investor A doesn't participate. At  
17 the end of the day, if all of the Beacon investors have been  
18 made whole, then it seems to me we revert back to the valuation  
19 method for future distributions, because that's what the  
20 operating agreement says, once we're past the Ponzi scheme  
21 fraud.

22 MR. SIEGEL: I mean, that allocates money with  
23 fictitious income money. That doesn't make any sense to me. I  
24 mean, when it's coming back from the trustee on a calculation  
25 that's based on capital that removes any income component from

1 it. I don't --

2 THE COURT: What other method is there to distribute  
3 it at that point, once everybody has been made whole?

4 MR. SIEGEL: A cash in, cash out method.

5 THE COURT: But everybody has gotten their -- is zero  
6 at that point, on cash in, cash out.

7 MR. SIEGEL: But --

8 THE COURT: So what's left? Proportionate to what?

9 MR. SIEGEL: Well, when we talk about proportionate to  
10 what, we've already made a distribution, your Honor, of --  
11 based on fictitious calculation.

12 THE COURT: That I understand. But, look, what we're  
13 trying to do -- and it may be, you know, if you had told me we  
14 were going to be having discussion three years ago or four  
15 years ago, when I wrote my first Beacon opinion, you know, I  
16 would have thought you were crazy. We're now posing a  
17 hypothetical of, with the net investment method now used -- and  
18 that is going to be the Court's ruling -- what happens if, you  
19 know, after two or three more distributions from Mr. Picard,  
20 everybody has been made whole, then what? I thought, in prior  
21 discussion, when Mr. Whiteley was talking to me, it sounded  
22 like at that point one should revert back to the operating  
23 agreement and the valuation method. If you all want me not to  
24 resolve that now, because that's technically not in front of me  
25 other than I don't really want another one of these lawsuits,

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1 you know, I'm open for what to do at that point. I'm not sure,  
2 when everybody is down to zero on the cash in and cash out  
3 basis, how cash in and cash out would have any methodology at  
4 that point.

5 MR. SIEGEL: Well, the problem only arises because  
6 you're merging apples and oranges, in my opinion, by merging in  
7 the amount from the class action settlement. We haven't  
8 recovered our capital from the trustee.

9 THE COURT: But I'm ruling against you on this. So if  
10 you have any way to help me with the final issue, other than  
11 that you don't like part of the prior ruling -- but it would  
12 seem to me that we revert back to the operating agreement and  
13 therefore the valuation method at that point. I'm not sure  
14 what anyone's net whatever value is at that point either. But  
15 maybe, Mr. Jakoby, since you will have to deal with this at  
16 that point, you could help me here.

17 MR. JAKOBY: If your Honor wants, we can do the  
18 calculations fairly quickly. I don't know the answer sitting  
19 here today.

20 I did want to point out, your Honor, that, with the  
21 money that we have in hand, in the bank, if we made a  
22 distribution with that money, there are quite a few people who,  
23 I believe, are going to reach their break-even. Not everybody.  
24 So if there is an issue that's going to be left on the table  
25 for another day, or to be supplemented with briefs, what we at

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1 least want to be able to do is be able to distribute up to  
2 everyone's, up to the point where everybody breaks even and  
3 then we hold off, and then we could adjust at a later date.

4 THE COURT: The question becomes -- and we are  
5 unfortunately running short on time. We're already over. The  
6 question is -- to the extent no one has thought about this, I  
7 guess if you want to put in supplemental briefing, we can. I'm  
8 not sure whether that's even in this lawsuit as such, other  
9 than it came up during discussion today.

10 MR. JAKOBY: I think it is in the lawsuit, to the  
11 extent they're asking for --

12 THE COURT: Only because you want to be able to close  
13 the funds and be done with this. Do you all want to put your  
14 heads together and maybe you could even agree and if not you'll  
15 submit briefs to me in a week?

16 MR. JAKOBY: I think what makes sense is taking more  
17 than a week because they're going want to want the financial  
18 information from the fund, probably.

19 MR. FOLKENFLIK: Your Honor, just to be clear, if your  
20 Honor doesn't include the McMahon settlement, many people will  
21 not break even. I think that was the implication of  
22 Mr. Siegel's comments, but I'm not sure your Honor was aware of  
23 that. If you do include it, I think there will be, most people  
24 will make a profit, I think somewhere in excess of 10 percent.  
25 I don't know that the swing is that huge. I would agree that,

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1 if your Honor does include the McMahon settlement people, then  
2 those collateral sources that people know about should be  
3 disclosed to the funds.

4 THE COURT: That's not going anywhere, because that  
5 requires --

6 MR. JAKOBY: No way for to us know --

7 MR. FOLKENFLIK: In all events, applying those  
8 approaches, your Honor, I think that the valuation method is  
9 the only place the Court can go. And I don't think  
10 mathematically there is anything else that the Court can do.

11 THE COURT: All right. Well, I'll give you some time  
12 to brief that, all of you. But perhaps you'll all agree.

13 So here's the Court's ruling. And then you can all  
14 tell me whether you want it supplemented by a formal opinion or  
15 not. The money coming in from Madoff, including the various  
16 court actions in Nassau, etc., that we referred to, should be  
17 distributed based on the cash in, cash out method, also  
18 referred to as the net investment method. The amounts already  
19 received by the Beacon fund participants through the class  
20 action settlement, what I've been calling "the McMahon  
21 settlement," should be included within that as money recovered  
22 by those who did recover.

23 With respect to the 19.7 million, it has already been  
24 distributed under the valuation method, as is clear from the  
25 fact that it was netted out from Andover because there wasn't

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1 money from which Andover could write a check that would not  
2 dribble down the court to the trustee. The Court had ruled  
3 that that money initially should be distributed based on the  
4 valuation method. However, it needed to be reserved because of  
5 the potential litigation with the trustee. It has already been  
6 distributed using the valuation method. And there is no reason  
7 to do otherwise, particularly because it is now clear that all  
8 of the investors will be making a full recovery.

9           With respect to expenses, since expenses have already  
10 been paid to date, or to the extent they have been paid to  
11 date, the Court is not going to require a reallocation of them.  
12 Again, the mathematics before were that it was 54/46 or  
13 something. In bulk as to who gains or loses it's just not  
14 worth the extra expense. On a going-forward basis, the money,  
15 the expenses will be allocated to the money on hand, which is  
16 going to be almost predominantly Madoff money, and it does not  
17 seem to the Court, since this is an attempt to do justice, that  
18 an allocation going forward where 90-something percent if not  
19 99 percent is going to be Madoff needs to be handled any  
20 differently than the source of income.

21           In the event we get to the point where everybody has  
22 been made whole, that's the only issue that is left for further  
23 briefing, and that might affect expenses incurred at that  
24 point. Whatever method is being used for that money will apply  
25 to the expenses.

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1           What I would like from all of you is two things.  
2       First -- and let me just note that with respect to the one  
3       legal issue on collateral estoppel, the Court does not find  
4       that there is collateral estoppel or any other reason that the  
5       Court is bound by its prior decision. The prior decision was  
6       unequivocally based on the fact that the only assets under  
7       consideration were non-Madoff assets, that Beacon's financial  
8       statements at the time reflected a \$358 million loss on Madoff  
9       funds, which were written down to a zero valuation. So while  
10      there was a claim outstanding, the Court never considered  
11      Madoff money in its prior opinion. It was only considering  
12      what to do with what then appeared to be the only assets of the  
13      funds, which is to say the non-Madoff assets.

14           Do you all require a full-blown opinion, or is this  
15      sufficient?

16           MR. FOLKENFLIK: Your Honor, speaking for my clients,  
17      I think this is sufficient, although we would like an order,  
18      and the order should have a deadline for the distribution of  
19      the funds.

20           THE COURT: The order -- speaking of order, what I  
21      would like to do is take you off, one of you, perhaps  
22      Mr. Jakoby suggested that once I ruled, you would all give me  
23      an order that I could enter as a final or quasi final order if  
24      you still have to decide what happens post full recovery. And  
25      so my question is, how soon, Mr. Jakoby -- I'll put you in

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1 charge of that, but obviously getting the input of the other  
2 folks here -- how soon can you get me back these things?

3 MR. JAKOBY: I would hope that I can get a proposed  
4 order to the parties by the end of the day. We may need  
5 another day to turn it around, incorporate comments, and I  
6 suspect that there will not be any disputes among the parties  
7 here, that we can come up with something that works together  
8 collaboratively. So certainly by late tomorrow or morning of  
9 the next day we should be able to get something for the Court.

10 I don't know if that --

11 MR. WHITELEY: It should be OK by us.

12 MR. FOLKENFLIK: Yes.

13 THE COURT: All right. Do any of the other parties  
14 who were either parties or appearers today require a formal  
15 written decision? Which will take longer, but if anybody is  
16 planning on appealing, I would probably want to have that on  
17 the record for that purpose. If you don't know yet, you can  
18 advise me subsequently.

19 MR. WHITELEY: I would have to talk to my client on  
20 the issue of an appeal. If you want me to advise you whether  
21 we need an opinion, after two or three days would be fine.

22 THE COURT: All right. Why don't we leave it that by  
23 Friday you'll advise me of that, that Mr. Jakoby will hopefully  
24 have a proposed order approved, at least as to form, by  
25 everybody for me. Whether that will be the final judgment

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1 order or the interim order depends on where you all come out on  
2 the post full recovery approach. How soon can you either  
3 resolve that amongst yourselves if possible or get me a  
4 submission or multiple submissions on that?

5 MR. JAKOBY: Your Honor, depending upon everybody's  
6 schedule, including Mr. Siegel and Mr. Decker, I can try to  
7 schedule a conference call this afternoon to see what  
8 information they are going to need. And while I can't  
9 guarantee, I would imagine that -- because I don't know what  
10 they're going to ask for -- I would imagine that we can provide  
11 them with whatever they need within five business days at most.

12 THE COURT: Why don't we approximate that by a week  
13 from Friday, subject to anyone writing in and saying they need  
14 a little more or a little less, whatever submissions you're  
15 going to give me on the post full recovery method of  
16 distribution, that's what you will do.

17 And Mr. Siegel and Mr. Decker, if you decide, why  
18 don't you, either working through Mr. Whiteley or Mr. Jakoby,  
19 let me know by the end of this week whether you would, if  
20 nobody else wants a full opinion for possible purposes of  
21 appeal. Mr. Decker, you're raising your hand, so --

22 MR. DECKER: Yes. I want something clarified, two  
23 things. As I understand it, the money that's in Beacon right  
24 now would be distributed on a net equity basis. There will be  
25 more money coming in. That will also be distributed on a net

1 equity basis. And how are we determining whether we're  
2 complete?

3 THE COURT: Mr. Jakoby, why don't you respond.

4 MR. JAKOBY: Right. The funds will determine when  
5 everybody is complete, taking into account the McMahon class  
6 action settlement. Although I don't know for sure, I  
7 anticipate that with the money that the fund is currently  
8 holding, everybody can become complete. So we do not need to  
9 wait for further distributions from the trustee, but I am not  
10 positive of that fact.

11 MR. DECKER: I don't believe we would be complete with  
12 money --

13 MR. JAKOBY: Some people would. Others would not be.

14 THE COURT: All right. You all can work that out on  
15 your own.

16 MR. JAKOBY: Your Honor, one other thing. Before we  
17 distribute money, we have to give notice to our investors, so I  
18 assume we should put it into an order. The fund will give  
19 notice by a certain date. And then we would certainly need to  
20 wait about 30 or 40 days to see if anybody pops up and objects,  
21 although I doubt there is going to be some objector.

22 THE COURT: Understood.

23 OK. Then I will ask -- it's going to be a fund  
24 expense anyway, I guess, Mr. Jakoby, if you can order the  
25 transcript --

1 MR. JAKOBY: I will.

2 THE COURT: -- expedited in case -- well, you all may  
3 need it and I may need it if anybody decides they want an  
4 opinion for appeal purposes.

5 Mr. Siegel, is there something you --

6 MR. SIEGEL: I just wanted, I wanted to appeal the  
7 part of the decision that includes the McMahon settlement.

8 THE COURT: Well, you know, since you're not  
9 technically a party, I'm not exactly sure what you would have  
10 to do. You're a former lawyer. Figure it out. The one thing  
11 that is, I think, clear, and we may be at the point where,  
12 unlike four years ago, time is not of the essence, but if  
13 anyone winds up appealing, I assume the fund is not going to be  
14 able to distribute any money because they would then be in a  
15 position of, you know, if they gave it out, being subject to it  
16 either being clawed back from people who got more than they  
17 should or whatever. So if you want to wait for your money for  
18 two, three years, do what you got to do.

19 MR. SIEGEL: I don't know that appealing on that item  
20 would impact what the Court is --

21 THE COURT: It probably would.

22 MR. SIEGEL: -- distributing now.

23 MR. JAKOBY: It would because it becomes two  
24 complicated and we don't want to ever have to go to investors  
25 and seek money back, because of the expense and the time that

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1 would be incurred if we did so.

2 MR. FOLKENFLIK: Just so everyone is aware, I would  
3 take the position that nobody should be able to stay  
4 distribution without posting a bond for the loss of these  
5 different funds.

6 THE COURT: All right. You all usually get along  
7 somewhat.

8 MR. FOLKENFLIK: We do.

9 THE COURT: Good. Talk outside of the courtroom for  
10 whatever else you need to resolve.

11 MR. JAKOBY: Your Honor, thank you very much and thank  
12 you for taking on this case voluntarily, and also for your  
13 expedited decision. We very much appreciate it.

14 MR. SIEGEL: Thank you, your Honor.

15 MR. FOLKENFLIK: And also by all investors. Thank  
16 you, your Honor.

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