

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Plaintiff,	:	02 Civ. 8855 (LAK) (HBP)
	:	
-against-	:	REPORT AND
	:	<u>RECOMMENDATION</u>
BEACON HILL ASSET	:	
MANAGEMENT, LLC, <u>et al.</u> ,	:	
	:	
Defendants.	:	

-----X

PITMAN, United States Magistrate Judge:

TO THE HONORABLE LEWIS A. KAPLAN, United States Dis-
trict Judge,

I write to resolve the issue left open in my Report and Recommendation in this matter dated October 26, 2005 ("10-26-05 R&R").

In my 10-26-05 R&R I recommended the granting of the Joint Official Liquidators' ("JOLs'") application for approval of a payment in the amount of \$250,903.96 to Scott Berman, Esq. and his firms (initially the firm of Brown Rudnick Berlack Isarels, LLP, and subsequently the firm of Friedman Kaplan Seiler & Adelman, LLP) as compensation for services provided by Mr. Berman and his firms on behalf of the Master Fund through February 28, 2005. I reserved decision with respect to that aspect of the JOLs' application seeking approval of the Master Fund's payment

of \$500,000 to reimburse the plaintiffs in Fraternity Fund, Ltd. v. Beacon Hill Asset Management, LLC, 03 Civ. 2387 (LAK), Gibraltar Fund I v. Beacon Hill Asset Management, LLC, 04 Civ. 7900 (LAK) (HBP) and Banco Nazionale del Lavoro S.p.A. v. Beacon Hill Asset Management, LLC, 04 Civ. 7944 (LAK) (HBP) (collectively, the "Investor Actions") for legal fees for work performed by Mr. Berman in the Investor Actions that subsequently resulted in cost savings to the Master Fund. I reserved decision with respect to this aspect of the application because it appeared that the JOLs were seeking compensation from a subsequent client, namely the Master Fund, for services performed and expertise that Mr. Berman gained while representing prior clients, namely the plaintiffs in the Investor Actions. I directed the parties to make supplemental submissions addressing the legal and factual justifications for the payment of additional compensation to Mr. Berman.

The JOLs have made additional submissions in support of their application; Premier Hedge, Ltd., Premier Hedge L.P., Milestone Global Advisors, L.P. and the Securities and Exchange Commission have made submissions opposing the application. After considering those submissions, I respectfully submit that the JOL's application to approve the \$500,000 payment should be denied.

The theory underlying the JOLs' application is as follows: (1) as a result of Mr. Berman's work in the Investor Actions prior to his being retained by the Master Fund, he achieved substantial expertise concerning a number of legal and factual issues that are common to both the Investor Actions and the instant action, and (2) since the Master Fund will now enjoy substantial cost savings as a result of Mr. Berman's earlier work in the Investor Actions, the Master Fund should partially reimburse the plaintiffs in the Investor Actions for the work that Mr. Berman did that benefits both the plaintiffs in the Investor Actions and the Master Fund.¹ Although the objecting parties take issue with this theory, they assert no objection concerning the amount of the payment sought by the JOLs.

The principal problem with the JOL's application is that the payment for which they seek approval would constitute a gift to the plaintiffs in the Investor Actions. As I noted in my 10-26-05 R&R, almost every client derives some benefit from his or her lawyer's prior work. Seasoned civil rights attorneys almost always do a better job than first-timers, experienced FEELA attorneys are almost always better-versed in the law and the realistic value of a case than novices and criminal defense

¹Mr. Berman has represented that if the \$500,000 payment is approved, it will be distributed among the plaintiffs in the Investor Actions and will result in no benefit to him (Affidavit of Scott Berman, Esq., sworn to November 14, 2005, at ¶ 11).

attorneys with long records of trials in a particular jurisdiction know what paper-work is prepared in connection with an arrest and the significance of the absence of any relevant paperwork. In none of these situations, however, does a later client have any debt to the lawyer's earlier clients, notwithstanding the fact that the earlier clients have literally paid for the experience that will benefit the later clients. The earlier clients enter into their own retainers with their lawyers, and the lawyer's subsequent retention by other clients does not alter the terms of those retainers.

In this case, the plaintiffs in the Investor Actions entered into retainer agreements with Mr. Berman and his firms under which they agreed to pay for services performed for them. Those obligations are not affected by Mr. Berman's success in attracting new clients, and there simply is no basis in law, equity or human experience to burden the Master Fund with a portion of the fees for the services performed for the plaintiffs in the Investor Actions. Any ruling to the contrary would suggest the existence of an obligation that is unknown to the common law.

Moreover, denying reimbursement will not result in any unfairness to the plaintiffs in the Investor Actions. Their retainers were established when they initially hired Mr. Berman, and they make no claim here that they had any expectation of a

retroactive discount in the event that Mr. Berman was retained by new clients in related litigation. Thus, denying the reimbursement the JOLs seek to make will not result in any surprise to them nor will it deprive them of any aspect of their bargain.

Finally, to the extent that the prospect of reduced legal fees from cost sharing was a factor that motivated the plaintiffs in the Investor Actions to waive any conflicts resulting from the Master Fund's retaining Mr. Berman, the denial of reimbursement will not frustrate that prospect. To the extent that Mr. Berman's work after his retention by the Master Fund benefits multiple clients, the fees for that work have been and will, no doubt, continue to be spread among all clients who benefit.

In summary, the JOLs seek approval to make a payment that they have no legal, equitable or moral obligation to make and appears to be nothing more than a gift to the plaintiffs in the Investor Actions. Accordingly, I respectfully recommend that approval be denied for the payment of \$500,000 by the Master Fund to the plaintiffs in the Investor Actions for services rendered by Mr. Berman and his firms in those actions.

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten

(10) days from the date of this Report to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, United States District Judge, 500 Pearl Street, Room 1310, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Kaplan. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
January 4, 2007

Respectfully submitted,


HENRY PITMAN
United States Magistrate Judge

Copies mailed to:

Lee T. Silver, Esq.
Stenger & Stenger, P.C.
4095 Embassy Drive, SE,
Suite A
Grand Rapids, Michigan 49546

David Kagan-Kans, Esq.
Kevin O'Rourke, Esq.
Joshua Ravitz, Esq.
United States Securities and
Exchange Commission
450 Fifth Street, NW, Mail Stop 0911
Washington, D.C. 20549

Scott M. Berman, Esq.
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway
New York, New York 10019-6708

Thomas Bell, Esq.
Joseph McLaughlin, Esq.
Simpson, Thatcher & Bartlett
425 Lexington Avenue
New York, New York 10017

Seth M. Schwartz, Esq.
Skadden, Arps, Slate, Meager & Flom
4 Time Square
New York, New York 10036