

USDS SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>4-9-09</u>

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVIS SQUARE FUNDING I, LTD. :
et al., :
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Plaintiffs, :
:
- against - :
:
AIG FINANCIAL PRODUCTS CORP., :
:
Defendant. :
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09 Civ. 2062 (VM)

ORDER

VICTOR MARRERO, United States District Judge.

On April 6, 2009, upon a motion by plaintiffs Davis Square Funding I, Ltd., Davis Square Funding II, Ltd., Davis Square Funding III, Ltd., Davis Square Funding IV, Ltd., Davis Square Funding V, Ltd., Davis Square Funding VI, Ltd., and West Coast Funding I, Ltd. ("Plaintiffs") for an Order to Show Cause as to why the Court should not enter an order permitting all payments made by Plaintiffs to defendant AIG Financial Products Corp. ("AIG-FP") under the agreements at issue in this action to be paid into an escrow account rather than directly to AIG-FP pending resolution of Plaintiffs' request for declaratory judgment, this Court issued an order directing AIG-FP to respond to Plaintiffs' motion and directing the parties to attend a conference before the Court on April 9, 2009.

At that conference, Plaintiffs argued that (1) they are likely to succeed on the merits of the action; and (2) there is a serious risk that, if the payments due are paid directly

to AIG-FP, Plaintiffs may be unable to recover those payments at a later date, due to AIG-FP's alleged precarious financial condition. AIG-FP argued that (1) it, and not Plaintiffs, is likely to succeed on the merits of the action; and (2) Plaintiffs have not submitted sufficient evidence into the record that Plaintiffs would be unable to recover the disputed payments. According to AIG-FP, Plaintiffs must make a showing that AIG-FP is in imminent danger of becoming insolvent for such an order to be appropriate, and Plaintiffs' reliance on speculation or generalized fears that they would not be able to recover the disputed payments from AIG-FP is not a valid basis for placing the disputed payments into an escrow. See Warner-Jenkinson Co. v. Allied Chem. Corp., 567 F.2d 184, 189 (2d Cir. 1977) (rejecting request to order disputed payments to be paid into escrow pending resolution of a dispute "in the absence of any indication that Allied might be judgment-proof at the end of the litigation.").

For the reasons stated at the April 9, 2009 conference, including that (1) Plaintiffs have not made a sufficient showing on the record that AIG-FP's financial position is so precarious that Plaintiffs would be unable to recover the disputed payments;¹ and (2) the Court cannot yet make a

¹ As the Court stated at the conference, Plaintiffs' speculative statements that AIG-FP is in a precarious financial position, unaccompanied by hard evidence or expert opinion of AIG-FP's present and future condition, do not establish a sufficient record that AIG-FP will be insolvent or

determination of which party is more likely to succeed on the merits of the action, Plaintiffs' motion for the Court to enter an order permitting all payments made by Plaintiffs to AIG-FP under the agreements at issue to be paid into an escrow account pending resolution of this action is **DENIED**.

SO ORDERED.

Dated: New York, New York
9 April 2009



Victor Marrero
U.S.D.J.

otherwise judgment-proof by the end of the litigation.