Daniel J. Wadley (10358)
wadleyd@sec.gov
Thomas M. Melton (4999)
meltont@sec.gov
Cheryl M. Mori (8887)
moric@sec.gov
Paul N. Feindt (8769)
feindtp@sec.gov
Attorneys for Plaintiff
Securities & Exchange Commission
351 South West Temple Street, Suite 6.111
Salt Lake City, Utah 84101
Tel. 801-524-5796
Fax: 801-524-3558

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual,

DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING THE SECURITIES & EXCHANGE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION (DKT. NO. 38) AND DENYING CURTIS L. DeYOUNG'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND SUSPEND OR DISSOLVE ORDER APPOINTING RECEIVER (DKT. NO. 66)

Case No.: 2:14-cv-00309

Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead

At a hearing on July 23, 2014, the court heard argument on Plaintiff Securities and Exchange Commission's Motion for Preliminary Injunction (Dkt. No. 38) and Defendant Curtis DeYoung's Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order

Appointing Receiver. (Dkt. 66.) At the conclusion of the hearing, the court granted the Commission's Motion and denied DeYoung's. The court made extensive findings of fact and conclusions of law on the record at the hearing. The Commission has memorialized the court's ruling by preparing the following findings of fact and conclusions of law, which the court now adopts.

PROCEDURAL HISTORY

On April 24, 2014, the Commission filed a Complaint (Dkt. No. 1) alleging that Curtis L. DeYoung ("DeYoung") and American Pension Services, Inc. ("APS") had violated Sections 17(a)(1) and (3) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §77q(a)(1) and (3), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5(a) and (c) thereunder, 17C.F.R. §240.10b-5(a) and (c). On that same date, the Commission also submitted its *Ex Parte* Motion for Temporary Restraining Order, Order Appointing Receiver, Freezing Assets and Other Ancillary Relief and Memorandum in Support Thereof ("TRO Motion") (Dkt. No. 3). The court granted the Commission's Motion, issuing a Temporary Restraining Order and Order accelerating Discovery ("TRO") (Dkt. No. 8) and an Order Appointing Receiver, Freezing Assets, and Other Relief ("Receivership Order") (Dkt. No. 9). Both APS, through counsel for the Receiver, and DeYoung, through his then-counsel of record Snow Christensen and Martineau, were served with the Complaint on Monday, April 28, 2014 (Dkt. Nos. 21 and 22).

On May 6, 2014, the Commission submitted its Motion for Preliminary Injunction and Memorandum in Support Thereof ("Motion for Preliminary Injunction") (Dkt. No. 38), requesting the entry of a preliminary injunction enjoining the defendants from violating the

federal securities laws during the pendency of these proceedings. On May 19, 2014, DeYoung submitted a Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver ("Motion to Dissolve") (Dkt. No. 66). Considering the Motion to Dissolve to effectively function as an opposition to the Commission's Motion for Preliminary Injunction, the court established a briefing schedule pursuant to which the Commission would submit an opposition to the Motion to Dissolve, after which DeYoung would have the opportunity to submit a Reply. As the Commission bore the burden in seeking a preliminary injunction, the court then instructed the Commission to submit a response to DeYoung's reply memorandum. Consistent with this schedule, the Commission submitted its Opposition to the Motion to Dissolve on June 17, 2014 ("Opposition") (Dkt. No. 110). DeYoung submitted his Reply in Support of the Motion to Dissolve on July 7, 2014 ("Reply") (Dkt. No. 137), and the Commission submitted its Response to the Reply on July 17, 2014 ("Response") (Dkt. No. 152). The hearing on these Motions was held on July 23, 2014.

Section 20(b) of the Securities Act, 15 U.S.C. §77t(b), and Section 21(d) of the Securities Exchange Act, 15 U.S.C. §78u(d), vests the court with the authority to temporarily and permanently enjoin a defendant from future violations of the federal securities laws upon a showing that the defendant has engaged in or is about to engage in acts or practices constituting a violation of the federal securities laws. To obtain preliminary injunctive relief in the course of a civil proceeding, the Commission bears the burden of demonstrating a *prima facie* case of previous violations by the defendant and a reasonable likelihood that the wrong will be repeated.

The court has concluded that the Commission has satisfied its burden and is entitled to the issuance of a preliminary injunction against DeYoung and APS. Accordingly, the court

orders that the Defendants are enjoined from violating the federal securities laws during the pendency of this litigation. In connection with this conclusion and Order, the court denies DeYoung's Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver. The Receivership Order, including the asset freeze, remains in full force and effect.

FINDINGS OF FACTS

A. Customer Funds Rolled Over to APS

1. For purposes of opposing the Commission's Motion for Preliminary Injunction, DeYoung agreed to not contest the factual allegations as pled by the Commission, including the misappropriation of $24 million of customer funds, the fact that the misappropriation was concealed from customers by overstating their assets in the annual customer account statements, mailed to customers each year, and that DeYoung brought in new investor funds, primarily through the liquidation of customers' securities held in IRA and 401(k) accounts, and rolled over the proceeds of these sales into APS in order to supplement and sustain APS in the face of the $24 million shortfall in its Master Trust Account. *See* Motion to Dissolve (Dkt. No. 66) at p. 4, n. 1.

2. The liquidation and rollover of customer funds from other retirement plans to APS was central to the business of APS. In fact, APS made available on its website, and provided to new APS customers, a Funds Transfer Form that investors could fill out, return to APS, and then have APS mail to the existing financial institution. *See* Opposition to Motion to Dissolve (Dkt. No. 110) at Ex. 2, APS Letter/Fund Transfer. Among the options that new customer could select was the option to "liquidate ALL assets and transfer the proceeds to

American Pension Services, Inc." *See id.* It was APS's responsibility, as the Administrator, to facilitate these rollovers and ensure they were done properly and in accordance with applicable laws and regulations. *See* Opposition to Motion to Dissolve (Dkt. No. 110) at Ex. 3, Custodial Services Agreement, Article 3.1.4.

3. Investors obtained the Funds Transfer Form either from the APS website or directly from the APS offices, completed the form—including the election as to the sale and disposition of current securities holdings—and gave it to APS. APS would then facilitate the transfer by mailing the form to the existing financial institution to instruct it to sell some or all securities of the new APS customer and transfer the proceeds to APS. *See* Opposition to Motion to Dissolve (Dkt. No. 110) at Ex. 4, Deposition of Curtis DeYoung ("Curtis DeYoung Dep."), 6/12/2014, pp. 68-72; Ex. 5, Deposition of Michelle DeYoung ("Michelle DeYoung Dep."), 6/12/2014, p. 19. APS knew from the form what the customer's elections were at the time it mailed the transfer form to the customer's current financial institution, and it ensured that the proceeds of the sales arrived and were deposited into the APS Master Trust Account. *See id.*, Ex. 4, Curtis DeYoung Dep., pp. 68-72; Ex. 5, Michelle DeYoung Dep., pp. 19-23.

4. APS deposited the proceeds from the sale of its customers' securities, which were transferred from the resigning financial institution, into its Master Trust Account, where all customer funds were held in a commingled account. *See id.*, Ex. 6, Testimony of Curtis DeYoung ("DeYoung Test."), 1/9/14, pp. 39-40; Ex. 5, Michelle DeYoung Dep., pp. 22-23.

5. APS was obligated to hold the funds in trust until the customer directed APS to invest the funds pursuant to written directions from the customer. *See id.*, Ex. 4, Curtis

DeYoung Dep., p. 23; Ex. 7, Form 5305-A, Traditional Individual Retirement Custodial Account, Article VIII, § 8; Ex. 3, Custodial Services Agreement, Article 4.1.

6. Upon receiving specific investment directions, DeYoung was contractually and legally obligated to invest the funds pursuant to the customer's instructions. *See id.*, Ex. 4, Curtis DeYoung Dep., pp. 36-37. Investing funds on behalf of customers had the effect of reducing the balance of the APS commingled Master Trust Account. *See id.* at pp. 47-48.

7. Notwithstanding DeYoung's confirmation that neither APS nor DeYoung had any discretionary authority over the customer funds, and that those funds could only be deployed and invested pursuant to specific customer authorization and direction, when asked about the $24 million shortfall in the APS Master Trust Account and whether he had in fact deployed, invested, or transferred investor funds without the specific authorization of APS customers, DeYoung invoked his Fifth Amendment privilege and refused to answer. *See id.*, Ex. 4, DeYoung Dep., pp. 36-39.

8. Michelle DeYoung managed the day-to-day operations of APS's business, while DeYoung, although exercising control over all aspects of the entity, focused his efforts primarily on marketing. *See id.*, Ex.5, Michelle DeYoung Dep., p. 5; Ex. 4, Curtis DeYoung Dep., pp. 55, 58.

9. APS customer records confirm the scale of the customer rollovers during the relevant time period. From 2004 through the filing of this action, customers liquidated over $308 million in assets held in previous IRA and 401(k) accounts and rolled over the proceeds into APS. *See id.*, Ex. 8, Declaration of Mark Hashimoto ("Hashimoto Decl. II") dated June 2, 2014, ¶ 9 and Ex. A attached thereto. From 2009 through the filing of this action, that amount

exceeded $146 million – securities that customers sold in order to roll the proceeds over into accounts at APS. *Id.* The proceeds of these sales and transfers were deposited as cash into APS's commingled Master Trust Account.

10. More precisely, in 2009 the amount of rollover funds into accounts at APS was $32,734,594; in 2010 the amount was $24,446,601; in 2011 the amount was $30,082,489; in 2012 the amount was $27,622,125; in 2013 the amount was $31,542,950; and through April 2014, the amount was $8,596,816. *Id.*

11. The rollover of cash proceeds from APS customers' previous accounts dwarfed any other source of funds coming into APS. The rollover proceeds from securities sales were ten times greater than any new, non-rollover funds that came into APS from customers. *See id.*, Ex. 8, Hashimoto Decl. II, ¶¶ 10-12 and Ex. B attached thereto. Rolling over customer funds was the primary method pursuant to which APS obtained customer funds.

12. A comparison between the funds held by APS on behalf of its customers in the Master Trust Account and the amounts that APS represented in investor statements it was holding on behalf of its customers confirmed the $24 million discrepancy that existed between the customer trust account and the amounts set forth in the investor statements. *See id.*, Ex. 9, Declaration of Mark Hashimoto ("Hashimoto Decl. I") dated May 6, 2014, ¶ 6.

13. APS maintained its Master Trust Account at First Utah Bank. Mr. Hashimoto reviewed the bank statements for the Master Trust Account and concluded that, as of April 25, 2014, APS held $26,067,278.61 in cash on behalf of its customers. *See id.*, Ex. 9, Hashimoto Decl. I, ¶ 6.

14. Mr. Hashimoto then calculated, from APS's customer database, the amount of cash that APS should have been holding, and in fact represented to its customers that it was holding, on behalf of its customers. According to APS's customer records, APS should have been holding $50,653,871.85 in its customer trust account. *See id.*, Ex. 9, Hashimoto Decl. I, ¶ 5. Mr. Hashimoto found a discrepancy of $24,586,593.24 between the cash APS should have been holding and the amount it actually held in the Master Trust Account. Based on these findings, it is apparent that the Master Trust Account is short over $24 million of the funds it should be holding on behalf of the APS customers. *See id.*, Ex. 9, Hashimoto Decl. I, ¶ 6.

15. DeYoung concealed this discrepancy from APS employees. Michelle DeYoung testified that only DeYoung had the ability to compare and reconcile the bank account funds with the funds that APS should have been holding on behalf of its customers, and that no other employee performed such a comparison or reconciliation. Ex. 5, Michelle DeYoung Dep., pp. 74-75. Because only DeYoung had the ability to perform this reconciliation, there was no risk that an APS employee would inadvertently learn of the existing discrepancy.

16. DeYoung also concealed this misappropriation of customer funds from APS customers. Notwithstanding the fact that by 2009, APS records reflect that DeYoung had misappropriated $24 million in customer funds, he caused annual account statements to be mailed to APS customers showing inaccurately inflated asset values each year subsequent to the loss.

17. APS has never made enough in profit to cover the $24 million discrepancy. *See, e.g.*, Ex. 10, 2012 American Pension Services Profit & Loss (APS cleared only $300,000 in profit in 2012); Ex. 11, Reconciliation of Balance Sheet Retained Earnings 2001 Forward. But

for the new investor funds coming into APS, which totaled tens of millions of dollars each year, the company would never have had enough funds to cover DeYoung's earlier misappropriation of customer funds.

18. Because DeYoung was $24 million short with respect to the customer cash that should have been held on deposit with First Utah Bank, and because the cash account was continually diminishing due to customers' directions to invest their funds, it was necessary for DeYoung to bring new funds into APS to resupply the ever-diminishing bank account. He knew that if his efforts stalled, it would cause the cash balance that he was supposed to be holding on behalf of his customers to dip below $24 million, which would have meant the cash account would have been emptied, immediately revealing the massive discrepancy that DeYoung successfully had been concealing for so many years.

19. LaMont Smith, APS's contract accountant, testified that in late March and early April 2014, he undertook a project to reconcile the customer trust account with the amounts set forth in the investor statements. *See* Motion for Preliminary Injunction (Dkt. No. 38) at Ex. C, Deposition of LaMont Smith ("Smith Depo"), May 2, 2014, pp. 20-21. Smith testified that he decided to undertake this project after he was asked about it during his investigative testimony before the Commission in March 2014. *See id.* DeYoung initially attempted to dissuade Mr. Smith from performing the reconciliation by telling Mr. Smith that it wasn't necessary because it had already been done. Mr. Smith learned that a reconciliation had not been done, and it was apparent to DeYoung that Mr. Smith was determined to conduct the reconciliation. DeYoung then told Mr. Smith that his work need not go back before November 2009 because APS was in balance as of that date. *See id.*

20. Mr. Smith chose to disregard this direction from DeYoung, taking his investigation back to January 2009. Mr. Smith testified that he found that in October 2009, a $24 million adjustment had been made to the APS books, accounting for a $24 million discrepancy that existed between the balance held in the APS Master Trust Account and the amount that APS should have been holding on behalf of its clients. *See id*, Ex. C., Smith Depo, pp. 22-23. In short, Mr. Smith discovered evidence of DeYoung's misappropriation, and the accounting entry made by DeYoung in an attempt to conceal the misappropriation and loss. Mr. Smith distilled his findings, including the $24 million adjustment, into a worksheet he created in or around April 2014. *See id.*, Ex. D. He approached DeYoung and alerted to him the discrepancy, but DeYoung neither appeared surprised by the finding nor offered Smith any explanation for it. *See id.*; *see also* Transcript of Motion Hearing before the Honorable Robert J. Shelby ("Hearing Transcript"), July 23, 2014, p. 65.

21. On May 6, 2014, after the asset freeze and TRO were entered in this case, the Receiver learned that on April 28, 2014, the DeYoungs transferred at least $150,000 from APS administered IRA investments held at Zions Bank to separate bank accounts set up by Dean Becker at Brighton Bank on behalf of the DeYoungs. *See* Motion for Preliminary Injunction (Dkt. No. 38) at Ex. F, Collection of Fund Transfer Documents, including Zions Bank Checking Account Withdrawal and associated Cashier's Check charged to DLC2 Investments, dated April 28, 2014, in the amount of 70,050.58; and Zions Bank Checking Account Withdrawal and associated Cashier's Check charged to RE Ventures, dated April 28, 2014, in the amount of $81,744.70.

22. DLC2 Investments is an LLC of which DeYoung's IRA is the sole member and is administered by APS. RE Ventures is an LLC of which Michelle DeYoung's IRA is the sole member and is administered by APS. Mr. Becker was asked by the DeYoungs to transfer these funds to new accounts, together with two other funds administered by APS on account of two of the DeYoungs children – Funding Ventures and CMD Funding. Upon discovering the transfers, the bank froze the accounts, preserving the remaining balances in the accounts.

CONCLUSIONS OF LAW

I. THE DEFENDANTS ARE PRELIMINARILY ENJOINED FROM FUTURE VIOLATIONS OF THE FEDERAL SECURITIES LAWS.

1. This court has subject matter jurisdiction over this proceeding by authority of Sections 20(b), 20(d)(1), and 22(a) of the Securities Act, 15 U.S.C. §§77t(b), 77(d)(1), and 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e), and 27 of the Exchange Act, 15 U.S.C. §§78u(d)(1), 78u(d)(3)(A), 78u(e), and 78aa.

2. Venue is proper in this district pursuant to Section 22(a) of the Securities Act, 15 U.S.C. §78v(a), and Section 27 of the Exchange Act, 15 U.S.C. §78aa.

3. The Commission seeks to preliminarily enjoin DeYoung and APS from future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

4. Section 17(a) of the Securities Act provides, in pertinent part:

> (a) Use of Interstate Commerce or Purpose of Fraud or Deceit. It shall be unlawful for any person in the offer or sale of any securities . . . by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly –
>
> (1) to employ any device, scheme, or artifice to defraud, or

> (2) to obtain money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

5. Section 10(b) of the Exchange Act makes it unlawful:

> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

6. Rule 10b-5 provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

7. To obtain preliminary injunctive relief in the course of a civil proceeding, the Commission bears the burden of demonstrating a *prima facie* case of previous violations by the defendant and a reasonable likelihood that the wrong will be repeated. The court concludes that the Commission has satisfied its burden and has established a *prima facie* case that the

Defendants violated these provisions of the federal securities laws. The court further concludes that unless restrained, there is a reasonable likelihood that the wrongs will be repeated.

A. The Defendants Violated the Federal Securities Laws.

8. To sufficiently state a claim under Rule 10b-5(a) and (c), the Commission must allege that (1) the defendant committed a deceptive or manipulative act or conducted his business, (2) in furtherance of the alleged scheme to defraud, (3) with scienter. *See In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 433, 474 (S.D.N.Y. 2005); *see also SEC v. Patel*, 2009 WL 3151143 at *8 (D.N.H. Sept. 30, 2009) ("subsections (a) and (c) encompass much more than illegal trading activity: they encompass the use of *any* device, scheme or artifice, or *any* act, practice, or course of business used to perpetrate a fraud on investors.") (emphasis in original)) (citations omitted).

9. The requirements to state a claim under Sections 17(a)(1) and (a)(3) of the Securities Act are similar in scope and effect as those under Rule 10b-5(a) and (c), except that there is no element of scienter in a Section 17(a)(3) claim. *See SEC v. Wolfson*, 539 F.3d 1249, 1256-57 (10th Cir. 2008).

10. Taking all of this together, under these provisions, to obtain a preliminary injunction the Commission is required to make a *prima facie* showing that the Defendants (1) operated a scheme to defraud, or conducted a practice or course of business which operates as a fraud, (2) in connection with the offer, purchase, or sale of a security, (3) in interstate commerce or with the use of the mail, (4) with reckless intent (except as to Section 17(a)(3) which requires a showing of negligence).

1. The Defendants Operated a Scheme to Defraud, or Engaged in a Practice or Course of Business which Operated as a Fraud Upon APS Clients.

11. First, the facts above establish that DeYoung was engaged in a scheme to defraud in the offer or sale, or in connection with the purchase or sale of a security, in interstate commerce, with the intent to deceive.

12. DeYoung at all times exercised control over APS's finances, including the Master Trust Account that held all of the customer's cash deposits. It is undisputed, for purposes of the Commission's Motion for Preliminary Injunction, that DeYoung misappropriated millions of dollars from the Master Trust Account. Through at least one misleading accounting entry in October 2009, which adjusted APS's records in light of the missing $24 million of customer funds, DeYoung has concealed this loss from investors and other APS employees.

13. In or around April 2014, LaMont Smith discovered this concealing accounting entry, and the existence of the cash shortfall, through his own review and reconciliation of the balance APS held on behalf of APS customers and the amount it should have been holding on behalf of its customers. DeYoung at first attempted to discourage Smith from undertaking this reconciliation, and then tried to limit Smith's review to a period after the misleading accounting entry had been made. DeYoung's efforts to prevent Smith from learning of the misleading accounting entry were unsuccessful, and Smith discovered the October 2009 entry in connection with his reconciliation efforts. Upon sharing his findings with DeYoung, DeYoung neither seemed alarmed by the discovery nor provided Smith with an explanation.

14. The court finds this to be evidence of DeYoung's knowledge of the prior loss and participation in an effort to conceal it, including making the accounting entry that was later discovered by Smith.

15. Further, in light of the missing customer funds, the court finds that APS and DeYoung have for years mailed annual account statements to investors that contain inaccurately inflated asset values. The statements concealed an aggregate loss similar to the amount alleged by the Commission in its Complaint and in the amount Smith uncovered in his reconciliation.

16. In response to questions asked during the sworn examinations of DeYoung regarding the discrepancy between the customer accounts and the actual amount of cash being held in the Master Trust Account, DeYoung invoked his Fifth Amendment Privilege against self-incrimination. Such an invocation of the Fifth Amendment Privilege in a civil case, albeit available, nevertheless gives rise to an adverse inference by the reviewing court. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308 (1976). The court draws an adverse inference from DeYoung's invocation of this privilege regarding his knowledge of, and participation in, the misappropriation of APS customer funds and efforts to conceal this misappropriation from APS employees and customers

17. In an effort to sustain APS's business operations in the face of the existing shortfall caused by DeYoung's misappropriation of customer funds, DeYoung engaged in regular marketing efforts to generate new sources of cash. Through these marketing efforts, DeYoung encouraged customers liquidate their current retirement holdings, including the sale of securities held in these accounts, and transfer the proceeds to APS.

18. These new APS customers authorized APS to facilitate the sale of their securities holdings and the transfer of their resulting assets from their former institutions to APS. APS provided all new APS customers with Funds Transfer Forms. The customer obtained the form from the APS website, completed the form, including the election to liquidate all or a portion of

their retirement holdings, and returned it to APS. APS then reviewed the form, executed it to certify it would act as the administrator of the IRA funds, and mailed it to the financial institution for processing. The resigning financial institution, upon receiving the completed Funds Transfer Form, executed upon its clients instructions and wired the funds to APS.

19. The rollover funds were essential and critical to DeYoung's efforts to conceal the substantial deficiency in the APS accounts. But for these rollover funds, DeYoung would not have been able to sustain APS's business operations and/or conceal the misappropriation of investor funds. Moreover, the rollover funds substantially dwarfed any other source of APS funds available throughout all relevant periods of time, including up until the filing of this action.

20. Taken together, these facts convince the court that after DeYoung suffered a loss of many millions of dollars, he concealed that loss and intentionally undertook a fraudulent scheme to obtain cash to continue to conceal the loss. A material aspect of this fraudulent scheme included the sale of securities holdings of new APS customers who then transferred their liquid assets to APS. By encouraging new customers to liquidate their current holdings and transfer the proceeds to APS, and by facilitating this transfer through the use of the Transfer Request Form, DeYoung and APS undertook a fraudulent scheme, act, practice, and course of business that operated as a fraud upon his customers.

2. The Scheme Was In, and In Connection With, the Offer, Purchase, and Sale of a Security.

21. Second, the court concludes that DeYoung's and APS's scheme was in, and in connection with, the offer, purchase, or sale of securities, as required by Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

22. To effectuate its remedial purposes, the Supreme Court has held that the Exchange Act "should be construed flexibly, not technically and restrictively. The SEC has consistently adopted a broad reading of 'in connection with the purchase or sale of any security.' .... This interpretation of the statute's ambiguous text in the context of formal adjudication is entitled to deference." *SEC v. Zandford*, 535 U.S. 813 (2002) (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–230 (2001)); *see also Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972). Courts in the Tenth Circuit and other circuits have held that the provisions of Section 17(a) and Section 10(b) and Rule 10b-5, including the "in" requirement from Section 17(a) and "in connection with" requirement from Section 10(b), are essentially coextensive. *See SEC v. Wolfson*, 539 F.3d 1249, 1257 (10th Cir. 2008).

23. To satisfy the "in connection with" requirement, the Supreme Court has held that "it is enough that the scheme to defraud and the sale of securities coincide." *SEC v. Zandford*, 535 U.S. at 821. The Tenth Circuit has held that it is sufficient to show that there is a "a causal connection between the allegedly deceptive act or omission and the alleged injury." *See SEC v. Wolfson*, 539 F.3d at 1262 (citations omitted). These tests are satisfied here.

24. For purposes of the Commission's Motion for Preliminary Injunction, it is undisputed that DeYoung misappropriated millions of dollars of his customers' money. It is also undisputed that, since the loss, DeYoung, in complete control of APS and its operations, has successfully concealed that loss. To do so, DeYoung solicited and obtained funds from new APS customers through APS's facilitation of the sale of retirement assets, including securities, and the transfer of the proceeds to APS. DeYoung marketed APS to customers with securities holdings and encouraged them to liquidate those holdings and to transfer the liquid funds to APS.

He did so without apprising those new customers of the misappropriated cash and the deficiency that he was simultaneously concealing. The transfer was facilitated by APS through the Funds Transfer Forms APS provided to new customers, which completed forms were obtained and mailed by APS to the resigning trustee. The transferred assets from liquidated securities amounted to tens of millions of dollars each year, and dwarfed any other source of funds deposited into APS's Master Trust Account.

25. The Commission has established with this evidence a *prima facie* case that, through this solicitation of new investor funds and APS's facilitation of the sale of securities and the transfer of the proceeds to APS, DeYoung and APS engaged in a scheme, act, practice, and course of business, in, and in connection with, the offer, purchase, and sale of a security, that operated as a fraud upon APS customers.

3. The Scheme was Undertaken through the Means and Instrumentalities of Interstate Commerce or by Use of the Mails.

26. It is undisputed that the actions described above were undertaken in interstate commerce, through the use of the means or instruments of transportation or communication in interstate commerce or by use of the mails.

27. More specifically, DeYoung and APS made direct use of the internet by APS in providing forms to new customers, and through the use of the mails by APS in transferring the completed Funds Transfer Forms to the resigning trustees. APS further utilized the means of interstate commerce through obtaining the transferred funds through wire transfers from the resigning trustees.

4. DeYoung and APS Acted at Least With Reckless Intent in Conducting a Scheme, Practice, or Course of Business to Defraud.

28. In light of the facts described above, the court concludes that DeYoung and APS undertook all of these actions with at least reckless intent. DeYoung was in control of APS. He misappropriated millions of dollars of his clients' funds with knowledge of those massive losses. He concealed the losses from APS employees and customers, and he continued to convince new APS customers to place millions of dollars in new funds each year under APS's care.

29. Because the evidence confirms that DeYoung and APS acted at least recklessly, the court concludes that the Commission has demonstrated a *prima facie* case of a violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder by DeYoung and APS.

B. Unless Restrained, It is Reasonably Likely that DeYoung and APS will Violate the Federal Securities Laws in the Future.

30. The court concludes that the Commission has shown that without an injunction there is a reasonable likelihood that DeYoung and APS will continue to violate the federal securities laws.

31. The Tenth Circuit has held that "[d]etermination of the likelihood of future violations requires analysis of several factors, such as the seriousness of the violation, the degree of scienter, whether defendant's occupation will present opportunities for future violations and whether defendant has recognized his wrongful conduct and gives sincere assurances against future violations." *SEC v. Pros International, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993). Further, while no single factor is determinative, the Tenth Circuit has held that the degree of scienter "bears heavily" on the decision. *SEC v. Haswell*, 654 F.2d 698, 699 (10th Cir. 1981). "A

knowing violation of §§10(b) or 17(a)(1) will justify an injunction more readily than a negligent violation of §17(a)(2) or (3). However, if there is a sufficient showing that the violation is likely to recur, an injunction may be justified even for a negligent violation of §17(a)(2) or (3)." *SEC v. Pros International, Inc.*, 994 F.2d at 769 (citations omitted).

32. The uncontroverted facts discussed above lead the court to conclude that unless enjoined, DeYoung and APS are likely to commit further securities violations. The evidence establishes that DeYoung acted with scienter in undertaking a scheme, act, practice, or course of business that operated as a fraud upon APS customers. DeYoung misappropriated millions of dollars of customer funds over the course of many years, made improper accounting entries to conceal this misappropriation in 2009, and then continued to raise new investor funds to sustain APS's operations in the face of this massive shortfall – all without disclosing the illegal activity to new APS customers. Moreover, there is evidence in the record that after the court's asset freeze was in place, DeYoung attempted to circumvent its terms by seeking to transfer thousands of dollars into another account.

33. The court is further concerned that unless enjoined, DeYoung is likely to get involved once again in the type of business that he was running at the time that this case was initiated. DeYoung has been engaged in the administration of customer IRA funds for over 30 years. It is his primary employment and source of income. DeYoung is well known in the community and would have opportunity to undertake additional opportunities to raise and administer customer funds in the same manner he had been doing through APS.

34. Importantly, DeYoung has thus far refused to acknowledge any wrongdoing and has largely failed to cooperate in this case.

35. Taken together, the court concludes that the Commission has satisfactorily demonstrated that, unless restrained during the pendency of this action, there is a reasonable likelihood that DeYoung and APS will continue to violate the federal securities laws.

36. Because the Commission has satisfied its burden of demonstrating a *prima facie* violation of the federal securities laws by DeYoung and APS, and because unless they are restrained there is a reasonable likelihood of future violations, this court enjoins DeYoung and APS from violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR THE COMMISSION'S CASE.

37. The court has concluded that the DeYoung has failed to identify any applicable statute of limitation barring the Commission's action against DeYoung and APS.

38. DeYoung argues that the Commission's action is barred by the five year statute of limitations set forth in 28 U.S.C. § 2462. The court rejects this argument at least as it pertains to the present motion for injunctive relief. The terms of Section 2462 do not apply to the Commission's present claims for equitable injunctive relief, which is remedial in nature. But even if Section 2462 was found to apply, the court concludes that the Commission has alleged facts showing the existence of a fraudulent scheme in connection with the purchase or sale of securities occurring after April 23, 2009, and for that reason the statute of limitations is not applicable.

A. Section 2462 Does Not Apply to the Commission's Claims for Injunctive Relief.

39. Section 2462 provides, in relevant part: "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or

forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years for the date when the claim first accrued . . . ." 28 U.S.C. § 2462 (emphasis added).

40. Courts have held that Section 2462 does not apply to the Commission's claims for injunctive relief, stating that "[n]o statute of limitations applies to the SEC's claims for equitable remedies, and thus [any defense based on this argument] fails as a matter of law and fact." *SEC v. McCaskey*, 56 F.Supp.2d 323, 326 (S.D.N.Y. 1999).

41. The Supreme Court's decision in *Gabelli v. SEC* does not instruct differently. 133 S.Ct. 1216 (2013). The Court ruled that the five year statute of limitation applies to "any penalty or sanction sought by the SEC related to the Security Act of 1933 and the Exchange Act of 1934." *Id.* at 1219-20. The *Gabelli* decision did not extend to disgorgement or injunctive relief because the District Court found those claims to be timely and the petitioner did not raise them as issues before the Supreme Court. *See id.* at 1220, n. 1.

42. In decisions after *Gabelli*, courts addressing this statute of limitations issue have likewise distinguished between civil penalties subject to the five year statute of limitations and equitable relief, which is not. For instance, in *SEC v. Geswein*, 2014 WL 861317 (N.D. Ohio March 5, 2014), the defendants moved to dismiss the Commission's entire case on the argument that it was untimely under *Gabelli*. The court rejected the argument, concluding that "[a]fter a careful reading of *Gabelli*, and upon consideration of Defendants' thoughtful arguments, the court refuses to read more into the Supreme Court's decision than it says on its face. . . . The Court finds that *Gabelli* announces only the narrow holding that the discovery rule is inapplicable to actions for civil penalties brought by the SEC." *Id.* at *8. Likewise, the court in *SEC v. Wyly*, 950 F.Supp.2d 547, 558 (S.D.N.Y. 2013), also concluded that because equitable

relief sought by the Commission is remedial in nature, "*i.e.* seeks to undo prior damage or protect the public from future harm," it would not be subject to the five year statute of limitations. The court is persuaded by this reasoning.

43. The rationale for not applying the statute of limitations on the Commission's equitable claims for relief is straightforward. Civil penalties are different in nature from equitable relief in that civil penalties are punitive in nature, whereas disgorgement and injunctive relief are remedial in nature. *SEC v. Wyly*, 950 F.Supp.2d at 558-59 (holding that the defendant who allegedly profited from insider trading could not assert a statute of limitations defense because equitable remedies act as reparations and deterrence, and not punishment). Congress has charged the Commission with upholding public rights and protecting public interest, and as part of that charge the Commission must be able to prevent violators from profiting from past and future wrongs. As stated by the Ninth Circuit: "[t]he Commission seeks disgorgement in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws. The theory behind the remedy is deterrence, and not compensation." *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993).

44. For all of these reasons, the court concludes that the plain language of Section 2462 does not apply to claims for injunctive relief. The court's conclusion aligns with the decisions of the other courts, cited above, which have considered the issue both before and after *Gabelli*, and which have found similarly that the statute does not apply to claims for equitable relief, including injunctions and disgorgement.

B. DeYoung's and APS's Fraudulent Activity was Ongoing Up Until the Filing of this Action, and Therefore No Statute of Limitations Precludes this Case.

45. Even if Section 2462 did apply to the Commission's claims for injunctive relief, the court concludes that the Commission has made a *prima facie* showing that DeYoung and APS continued to engage in a scheme to defraud in connection with the purchase or sale of securities, a scheme designed to conceal his prior misappropriation of millions of dollars, in the five years leading up to the filing of this action in April 2014. As a result of the ongoing nature of DeYoung's fraudulent scheme, the court finds that the Commission's action is not time-barred.

46. As discussed above, the Commission has brought this action against DeYoung and APS alleging that through his inducement and efforts customers liquidated their IRA and 401(k) holdings and rolled over the proceeds to APS, all in an effort to conceal DeYoung's misappropriation of customer funds. In so doing, he engaged in a scheme, act, practice, and course of business that operated as a fraud upon his customers in connection with the offer, sale, or purchase of a security. DeYoung's fraudulent activity was ongoing from 2009 forward and persisted all the way up to the filing of this action. *See* Opposition to Motion to Dissolve (Dkt. No. 110) at Ex. 4, Curtis DeYoung Dep. p. 71.

47. APS and DeYoung marketed APS and persuaded customers to liquidate and transfer their IRA holdings to APS in each of the five years leading up to the Commission's filing of this action in April 2014. Since 2009, DeYoung has brought in over $146 million in funds rolled over from the proceeds of sales in customers' previous IRA and 401(k) plans – including $8.5 million in 2014 alone. APS facilitated those rollovers by providing forms for

customers to fill out and then working with the securities institutions to liquidate those securities accounts and transfer those customer funds to APS.

48. The Commission has alleged, and it remains uncontroverted, that this was accomplished in furtherance of DeYoung's scheme to conceal his misappropriation of millions of dollars in APS customer funds. Those rolled over funds were by far and away the largest source of funds for APS, and the newly rolled over funds helped to sustain APS operations despite the massive deficiencies in the accounts.

49. Each new rollover of customer cash had the purpose and effect of extending and concealing DeYoung's massive misappropriation, and each sale constituted a new and continuing violation of the federal securities laws. *See SEC v. Zandford*, 535 U.S. at 820 (noting that "each sale was made to further [the defendant's] fraudulent scheme"). Each new investor, whose rollover cash would be used to further perpetuate DeYoung's failing operation, was another victim of DeYoung's fraudulent activity.

50. In light of the clear and ongoing nature of DeYoung's fraudulent operation, DeYoung's assertion that all of his alleged misdeeds were committed more than five years ago, and therefore are beyond any applicable statute of limitations, is simply incorrect. DeYoung's fraudulent activities were not isolated incidents that occurred many years ago, but ongoing misbehavior which lasted until the Commission filed its complaint. Because DeYoung's marketing efforts were ongoing, and because his fraudulent operation was continually bringing in the proceeds of new APS customers' liquidation of securities in prior IRA and 401(k) accounts, this court concludes that the Commission's allegations against DeYoung are not barred by any relevant statute of limitations.

CONCLUSION

For the foregoing reasons, the court grants the Commission's Motion for Preliminary Injunction and Denies DeYoung's Motion to Dissolve Temporary Restraining Order and Suspend or Dissolve Order Appointing Receiver.

Dated this 15th day of December, 2014.

Honorable Robert J. Shelby
U.S. District Court, District of Utah