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Diane A. Thompson

**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.

**MOTION AND MEMORANDUM FOR
AN ORDER AMENDING THE COURT'S
ORDER CLARIFYING ORDER
APPOINTING RECEIVER, FREEZING
ASSETS, AND OTHER RELIEF
[DKT. # 79]**

Case No.: 2:14-CV-00309-RJS-DBP

**Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead**

Diane Thompson, Court-appointed Receiver for American Pension Services, Inc.,
Curtis DeYoung and related entities, by and through her counsel of record Ballard Spahr LLP,
hereby respectfully moves the Court for entry of an Order amending its Order Clarifying Order
Appointing Receiver, Freezing Assets, and Other Relief [Dkt. 79] (“Clarifying Order”).

MOTION AND MEMORANDUM

By this Motion, the Receiver requests that the Court enter the proposed order attached hereto as Exhibit A, which will amend the Court's Clarifying Order by reducing the ratio of cash to asset value required before certain APS client transactions can be approved from twenty percent (20%) to ten percent (10%) as determined based on the client's account valuation as recorded on the date the Receiver took control of APS, April 25, 2014. Such order is justified because, as discussed at the hearing on the Receiver's proposed Liquidation Plan on December 17, 2014, and as further set forth in the Amended Modified Liquidation Plan filed currently herewith, the Receiver has determined that the loss allocable to each APS client represents, at most, 10% of the total assets being administered by APS.

FACTS AND ARGUMENT

1. On April 24, 2014, this Court entered its Order Appointing Receiver, Freezing Assets, and Other Relief [Dkt. 9] ("Receivership Order"), which appointed Diane Thompson as Receiver for American Pension Services, Inc., Curtis DeYoung and related entities. The Court found that the appointment of the Receiver was necessary to "marshal[] and preserv[e] all assets" of APS and DeYoung (assets of APS and DeYoung, collectively "Receivership Assets") as well as the assets of any other entities that: (a) are attributable to funds derived from investors or clients of the Defendants; (b) are held in constructive trust for the Defendants; (c) were fraudulently transferred by the Defendants; and/or (d) may otherwise be includable as assets of the estates of the Defendants (collectively, the "Recoverable Assets"). Receivership Order at 2.

2. Shortly after taking control of APS on April 25, 2014, the Receiver confirmed that approximately \$25 million was missing from the APS Master Trust Account into which APS clients funds were commingled.

3. Since her appointment, the Receiver's primary goal has been to preserve the assets of the Receivership Estate and of the APS clients, while still permitting all APS clients, to the fullest extent possible, to continue with their investment activities.

4. In furtherance of this goal, on May 15, 2014, the Receiver filed an *ex parte* expedited motion requesting that the Court approve and clarify the Receiver's authority to permit certain self-directed investment transactions and distributions in the ordinary course of the APS clients' requests. *See* Mot. and Mem. Supp. Clarification Re Order Appointing Receiver, Freezing Assets, and Other Relief [Dkt. 54] and Ex Parte Motion re: same [Dkt. 56]. Because the ultimate percentage of loss and subsequent allocation of such loss were unknown at that time, and due to many other complex factors still undetermined, the Receiver suggested to the Court that "a prudent interim approach is to require that account holders maintain or reach a ratio of twenty percent (20%) cash to asset value prior to any reinvestments" [Dkt. 54 at p. 11, ¶ 14.]

5. On May 21, 2014, the Court granted the Receiver's motion and entered its Clarifying Order [Dkt. 79], which clarifies that certain types of transactions are authorized under the Receivership Order, and further provides that in authorizing such transactions:

... the Receiver may further require that [APS] account holders maintain or reach a ratio of 20% cash to asset value following any reinvestments and/or that account holders be permitted to make reallocation investments only after written acknowledgment and agreement of the possible requirement to liquidate some of the self-directed investments to generate cash in the future when a Court approved Plan of Liquidation is implemented.

See Clarifying Order [Dkt. 79] at 3 (emphasis added).

6. Until now, this 20% ratio of cash to asset value, or “liquidity requirement” as it has also been called, has been necessary to protect the APS clients’ assets. *See, e.g.*, Tr. of Hr’g on Receiver’s Proposed Liquidation Plan dated Dec. 17, 2014 at 139:15-20 (the Court explained that the 20% ratio “was based on the motion from the Receiver while we were in the early stages of valuing the loss and figuring out ... how much was going to have to be allocated to account holders and which account holders moving forward.”)

7. However, the Receiver has determined that, based on the last statement approach, i.e., using a valuation of all APS client assets as of the date of the Receiver’s appointment (April 25, 2014), the loss allocable to each APS client represents, at most, 10% of the total assets being administered by APS. *See* Proposed Amended Modified Plan of Liquidation (“Liquidation Plan”) at pp. 4, filed concurrently herewith.¹

8. Specifically, applying the last statement approach, the total value of all assets held by APS clients, as of April 25, 2014, was \$366,225,143.89. *See* Liquidation Plan and Appendix B thereto. Based on the shortfall in the APS Master Trust Account, the total loss suffered by the APS clients is \$24,691,699.00, resulting in a loss of 6.75% of the total asset value of all APS clients. *See id.* The additional 3.25% allocation is to account for various issues that may arise, including but not limited to: (a) to allow for any legitimate revaluation adjustments that may need to be made (b) potential uncollectable accounts; (c) to provide the Receiver with the necessary funds to make up the cash shortfall while she works to sell APS and its assets;

¹ The Liquidation Plan as amended addresses comments by the Court at the hearing on December 17, 2014, issues raised by counsel on behalf of themselves and/or clients, APS clients and APS creditors, and matters that have developed since the original filing of the Receiver’s Plan of Liquidation on August 22, 2014 and Modified Plan of Liquidation on December 5, 2014.

(d) wrap-up the receivership, and distribute the net proceeds recovered from her efforts; and
(e) unpaid administrative fees and costs not otherwise payable from APS's operating account or Settlement Fund.

9. Because the maximum loss allocable to each APS client represents, at most, 10% of the total assets being administered by APS as of April 25, 2014, amending the Clarifying Order to only require APS clients to maintain or reach a ratio of 10% cash to asset value based on APS records as of April 25, 2014, will adequately protect the APS clients' funds as a whole, while still permitting them to invest and otherwise use their funds to the maximum extent possible, alleviating concerns voiced at the December 17, 2014 hearing until the transfer of accounts can be made to the successor. *See, e.g.*, Dec. 17, 2014 Hr'g Tr. at 131:9-133:8.

CONCLUSION

For the foregoing reasons, the Receiver hereby requests that the Court approve and enter the proposed order attached hereto as Exhibit A, which amends the Clarifying Order by reducing the required asset to cash ratio from twenty percent (20%) to ten percent (10%) following any reinvestments based on the client's account valuation as recorded on the date the Receiver took control of APS, April 25, 2014.

DATED this 16th day of January 2015.

/s/ Melanie J. Vartabedian

Mark R. Gaylord, Esq.

Melanie J. Vartabedian, Esq.

Scott S. Humphreys, Esq. (*pro hac vice*)

BALLARD SPAHR LLP

Attorneys for Court-Appointed Receiver,

Diane A. Thompson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION AND MEMORANDUM FOR AN ORDER AMENDING THE COURT'S ORDER CLARIFYING ORDER APPOINTING RECEIVER, FREEZING ASSETS, AND OTHER RELIEF [DKT. # 79]** was served to the following this 16th day of January 2015, in the manner set forth below:

U.S. Mail, postage prepaid:

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Through the CM/ECF System for the U.S. District Court:

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/s/ Lori D. Brown

Exhibit A

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Diane A. Thompson

**IN THE UNITED STATES DISTRICT COURT
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<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p>Plaintiff,</p> <p>v.</p> <p>AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual,</p> <p>Defendants.</p>	<p>AMENDED CLARIFYING ORDER</p> <p>Case No.: 2:14-CV-00309-RJS-DBP</p> <p>Judge Robert J. Shelby Magistrate Judge Dustin B. Pead</p>
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Based on the Receiver's Motion and supporting Memorandum concerning the need to amend this Court's Order Clarifying Order Appointing Receiver, Freezing Assets, and Other Relief entered May 21, 2014 [Dkt. 79] ("Clarifying Order") so as to allow the Receiver to properly execute her duties pursuant to the Court's Order Appointing Receiver, Freezing Assets, and Other Relief entered April 24, 2014 [Dkt. 9], the Court:

DOES HEREBY ORDER, ADJUDGE AND DECREE THAT the last paragraph of the Clarifying Order [Dkt. 79], a copy of which is attached hereto as **Exhibit 1** and incorporated by reference, is hereby amended to read as follows (changes emphasized):

In authorizing the **preceding** types of transactions, the Receiver may further require that account holders maintain or reach a ratio of **10%** cash to asset value following any reinvestments **based on the client's account valuation as recorded on the date the Receiver took over operations of APS, April 25, 2014,** and/or that account holders be permitted to make reallocation investments only after written acknowledgment and agreement of the possible requirement to liquidate some of the self-directed investments to generate cash in the future when a Court approved Plan of Liquidation is implemented.

IT IS SO ORDERED, this ____ day of _____, 2015.

BY THE COURT

Honorable Robert J. Shelby
United States District Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **AMENDED CLARIFYING ORDER** was served to the following this 16th day of January 2015, in the manner set forth below:

U.S. Mail, postage prepaid:

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Through the CM/ECF System for the U.S. District Court:

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/s/ Melanie J. Vartabedian

Exhibit 1

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**AMERICAN PENSION SERVICES, INC.,
a Utah Corporation and CURTIS L.
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DEFENDANTS.

**ORDER CLARIFYING ORDER
APPOINTING RECEIVER, FREEZING
ASSETS, AND OTHER RELIEF**

Case No.: 2:14-CV-00309-RJS-DBP

**Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead**

Based on Receiver's Motion and supporting Memorandum concerning the need to clarify this Court's Order Appointing Receiver, Freezing Assets, and Other Relief entered on April 24, 2014, [Doc. No. 9] ("Receivership Order") so as to allow the Receiver to properly execute her duties pursuant to the Receivership Order, the Court:

DOES HEREBY ORDER, ADJUDGE AND DECREE THAT the Receivership Order is hereby clarified as follows:

To enable the Receiver to effectively manage APS and to allow all individuals who have accounts at APS to perform certain limited business transactions during the pendency of the Receivership so as to avoid loss in the value of those assets, the Court hereby clarifies that if properly requested by APS's clients, if deemed appropriate by the Receiver, and with the Receiver's authorized consent, the Receiver may:

- a. Authorize the payment of ordinary and necessary expenses to maintain and preserve assets i.e. HOA fees, property taxes, utility bills, repairs and maintenance.
- b. Authorize the liquidation of investments and reinvestment into other assets within an APS client's IRA, i.e. liquidation of real estate and reinvestment in stocks, so long as all assets regardless of the value thereof or the nature of how the asset is held, shall continue to remain frozen pursuant to the terms of the Receivership Order.
- c. Authorize the investment of existing cash into other investments within APS i.e. investments of existing cash into real property, so long as all assets regardless of the value thereof or the nature of how the asset is held, shall continue to remain frozen pursuant to the terms of the Receivership Order.
- d. Authorize the investment of existing cash into closely held LLCs, partnerships or corporations with identifiable hard assets such as real estate, so long as all assets regardless of the value thereof or the nature of how the asset is held, shall continue to remain frozen pursuant to the terms of the Receivership Order.

e. Authorize new incoming cash deposited to APS and invested in other investments i.e. new account holder or investment of additional funds to client accounts and directed to be invested, so long as all assets regardless of the value thereof or the nature of how the asset is held, shall continue to remain frozen pursuant to the terms of the Receivership Order.

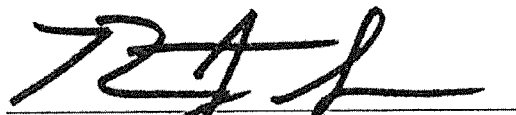
f. Authorize the payment of regularly scheduled monthly, quarterly or semi-annual distributions to clients.

g. Authorize the required minimum distributions to clients over 70.5 years of age to comply with IRS guidelines.

In authorizing the following types of transactions, the Receiver may further require that account holders maintain or reach a ratio of 20% cash to asset value following any reinvestments and/or that account holders be permitted to make reallocation investments only after written acknowledgment and agreement of the possible requirement to liquidate some of the self-directed investments to generate cash in the future when a Court approved Plan of Liquidation is implemented.

IT IS SO ORDERED, this 21st day of May, 2014.

BY THE COURT



Honorable Robert J. Shelby
United States District Court