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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.

**ORDER APPROVING AMENDED
MODIFIED PLAN OF LIQUIDATION**

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

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

On December 17, 2014, the Court heard oral argument regarding the Proposed Plan of Liquidation [Dkt. 186], as modified [Dkt. 360], presented by Diane Thompson, as the Court-appointed Receiver of American Pension Services, Inc. as well as any related entities owned, controlled, and/or under common control by or through American Pension Services, Inc.,

including but not limited to American Pension Services 401(k) Services, Inc. (“APS 401(k)”), LJP, LLC, Interim Funding LLC, First Silverado Properties, LLC, LIC Environmental, and Quicksilver Management, LLC (collectively “APS”). The Court also heard from both counsel and interested parties regarding their objections to the proposed Plan of Liquidation. At the hearing, the Receiver was represented by Mark R. Gaylord and Melanie J. Vartabedian of Ballard Spahr LLP. The United States Securities and Exchange Commission (“SEC”) was represented by Daniel J. Wadley, Cheryl M. Mori and Paul N. Feindt. Curtis L. DeYoung was represented by Paul T. Moxley and Joshua D. Chandler. The Court made findings relating to the Receiver’s efforts to formulate, distribute, and present a proposed Plan of Liquidation. The Receiver has memorialized the Court’s ruling by preparing the following findings of fact and conclusions of law, which the Court now adopts.

FINDINGS OF FACT

1. APS currently has over 5,500 IRA and 401(k) account owners with account assets totaling \$366,225,143.89 as of April 25, 2014.
2. Beginning in 2000 and continuing until appointment of the Receiver on April 25, 2014, APS has suffered a \$24,691,699.00 loss due to the misappropriation of funds from the Master Trust Account maintained at First Utah Bank (the “Bank”) by Curtis L. DeYoung (“DeYoung”), the sole shareholder and President of APS.
3. APS is not viable as a going concern in light of its decreasing revenue and approximately \$25 million shortfall, which represents an account receivable owing to the IRA and 401(k) account owners affected by the misappropriation.

4. Pursuant to the express terms of the Order Appointing Receiver Freezing Assets, and Other Relief [Dkt. 9] (the “Freeze Order”), the Court anticipated and expected the Receiver to submit a proposed plan of liquidation to address the transfer of client accounts and the winding up of APS as a going concern.

5. The Receiver filed a Proposed Plan of Liquidation on August 22, 2014 [Dkt. 186].

6. Pursuant to the Order Setting Deadlines Pertaining to the Receiver’s Proposed Plan of Liquidation [Dkt. 221], the Receiver provided notice of the Proposed Plan of Liquidation on September 19, 2014 by: (i) mailing a copy to all IRA and 401(k) account owners at their last known address; (ii) emailing a copy to all IRA and 401(k) account owners at their last known email address; and (iii) posting the Order Setting Deadlines and the Proposed Plan of Liquidation on the Receiver’s website www.apsreceiver.com.

7. On or about October 20, 2014, approximately 835 IRA and 401(k) account owners and/or creditors responded to the Proposed Plan of Liquidation by delivering responses to the Receiver in accordance with the Order Setting Deadlines.

8. On November 4, 2014, the Receiver submitted to the Court, *in camera*, all 835 responses received by the deadline of October 20, 2014 in unredacted form. The Receiver also submitted a Summary of Responses to Receiver’s Proposed Plan of Liquidation [Dkt. 316]. The submissions provided by the Receiver to the Court consisted of approximately 4,000 pages, which were categorized by subject matter. The Receiver also submitted a short summary of the nature of the responses to the proposed Plan of Liquidation.

9. On December 3, 2014, the Receiver filed her Memorandum in Response to APS Client Responses and Objections to Proposed Plan of Liquidation [Dkt. 356 (“Receiver’s Response”)], wherein the Receiver responded in detail to the over 835 responses.

10. The Court has reviewed the submissions of the 835 respondents, as well as the Receiver’s Response and finds that the Receiver was faced with evaluating a multitude of issues, including but not limited to the following:

- (a) Whether to allocate the approximately \$25 million loss only to current APS clients;
- (b) Whether to allocate the approximately \$25 million loss among current and former APS clients;
- (c) Whether to trace the loss to all current and former APS clients;
- (d) Whether to seek and/or pursue clawback actions against former APS clients who may have benefitted from DeYoung’s wrongful conduct;
- (e) Whether APS clients could borrow money if necessary to recognize and/or realize the loss allocation;
- (f) How best to address and/or facilitate the tax consequences arising as a result of the loss allocation; and
- (g) Whether APS clients holding primarily illiquid assets should contribute to the loss allocation, and, if so, how best to enable those clients to contribute to the loss allocation.

11. The overwhelming majority of APS clients, approximately eighty-six percent (86%), made no objection to the proposed Plan of Liquidation.

12. After careful consideration, the Receiver correctly determined that it was reasonable and fair to not pursue tracing of all current and former account owners due to the costs associated with tracing.

13. The Receiver's forensic accountant attested that it would cost between one and one and a half million dollars (\$1.0 - \$1.5 million) and the better part of nine months to trace losses.

14. Even were the Receiver to undertake the task of tracing, it would require her to pursue clawback actions against former APS clients, a process that would conservatively cost at least \$3,000,000.00 with the potential of recovery uncertain if not unlikely.

15. Requiring the Receiver to trace the losses and pursue clawback actions is inconsistent with the Court-directed goals of the Receiver, to expeditiously allow APS clients to move their accounts to a successor custodian administrator ("Successor") free from the constraints of the receivership.

16. Having to trace and pursue clawback actions would significantly extend the receivership and delay account transfers and the winding up of the affairs of APS, which would cause great harm to the APS clients, who seek an expeditious resolution of this matter so they may quickly regain control over their IRA and 401(k) accounts.

17. The total value of assets under the Bank's custodianship and APS administration of the approximately 5,500 IRA and 401(k) account owners is \$366,225,143.89.

18. Based on the \$366,225,143.89 asset value, the Court finds that the ten percent (10%) loss allocation proposed by the Receiver is appropriate and warranted, subject to certain potential adjustments as set forth more fully in the Amended Modified Plan of Liquidation. The

ten percent loss allocation consists of a 6.75% cash shortfall due to the misappropriation of approximately \$25 million, plus an additional 3.25% intended to cover unknown contingencies.

19. Specifically, the additional 3.25% in loss allocation is necessary because of, among other things; any legitimate revaluation adjustments to client accounts as of April 25, 2014 that are made; potential uncollectible accounts; APS account owners refused to or failure to comply with the Plan of Liquidation; accounts consisting of only “in-kind” transfers; cash shortfall the Receiver experiences as she completes the transfer of client accounts to the Successor, pursues culpable third-parties; distributes the net proceeds recovered from her efforts; completes the receivership and any unpaid administrative fees and costs not otherwise payable from APS’s operating account or loss allocation account.

CONCLUSIONS OF LAW

20. The most fair and equitable manner of allocating the loss is to apply the loss on a pro-rata basis upon all current APS clients regardless of the form of the asset(s) held by each APS client.

21. It would not be fair or equitable for APS clients holding only cash to shoulder the financial burden of the loss allocation caused by the misappropriation because all account owners were victims of DeYoung’s fraudulent activities.

22. The only fair and equitable way to recognize and/or realize the loss caused by DeYoung’s wrongful conduct is to apply the loss equally among all classes of APS clients regardless of how the client’s asset is held, whether in cash, stocks, bonds, real estate, limited partnerships, limited liability companies, promissory notes, and/or other asset forms.

23. The Court, in managing this Receivership and approving the Receiver's Amended Modified Plan of Liquidation, is exercising broad powers and wide discretion, as permitted by controlling case law, to determine the proper and appropriate relief.

24. The Court finds that the Amended Modified Plan of Liquidation is equitable and fair. *See SEC v. Vescor Capital Corp.*, 599 F.3d 1189 (10th Cir. 2010).

25. The primary purpose of equity receiverships is to promote orderly and efficient administration of the receivership estate by this Court for the benefit of creditors, including the adoption of a liquidation plan.

26. The Court's primary objective is to achieve an expedient and equitable resolution so that APS clients may continue to direct their investments without Court interference or intervention.

27. The Court concludes that: (i) the total value of all assets held in the APS IRA and 401(k) accounts as of April 25, 2014 was \$366,225,143.89; (ii) the loss caused by DeYoung's misappropriation was \$24,691,699.00, which represents 6.75% of the total client assets held by APS as of April 25, 2014; and (iii) the Receiver shall allocate the loss pro rata to all current APS clients by creating a loss allocation of ten percent (10%), with the additional three percent (3.25%) to allow for legitimate client valuation adjustments, potential uncollectible accounts, administration of the Receivership Estate, unpaid administrative fees and costs not otherwise payable from APS's operating account or loss allocation account, and concluding the receivership.

28. Accordingly, the Court concludes the Amended Modified Plan of Liquidation proposed by the Receiver to be fair and reasonable and shall be and is hereby adopted.

ORDER

Based on the Court's review of the proposed Plan of Liquidation, as modified and amended, the more than 835 responses of the APS clients and creditors, the Receiver's Response to the APS client responses, the foregoing findings, and the arguments and comments raised and heard at oral argument, and good cause appearing therefore, IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

- A. The Receiver's Amended Modified Plan of Liquidation, with amendments discussed during the December 17, 2014 Hearing, is approved. A copy of the Amended Modified Plan of Liquidation is attached hereto as Exhibit "A."
- B. The Receiver's decision to apply the loss caused by DeYoung's misappropriation to all current APS clients is fair, reasonable and approved.
- C. The Receiver's use of the "pro rata" approach to establish the loss allocation and any distribution is approved.
- D. The total value of assets held in the IRA and 401(k) accounts administered by APS is determined to be \$366,225,143.89.
- E. The Receiver's determination that the loss allocation of 6.75% plus an additional 3.25% for a total loss allocation of ten percent (10%) (the "Loss Allocation") is hereby approved.
- F. The Receiver is directed to implement the Amended Modified Plan of Liquidation upon this Court's approval of the Successor, which the Receiver has sought approval of by Motion. [Dkt. ____.]

- G. The Court reserves for later determination the means, method and final distribution of any monies recovered by the Receiver and/or SEC for the benefit of APS clients and/or creditors.
- H. The Receiver shall provide notice of the approval of the Amended Modified Plan of Liquidation by: (a) mailing a copy of this Order to all APS clients and creditors at their last known address; (b) e-mailing a copy of this Order to all APS clients and creditors at their last known e-mail address; and (c) posting a copy of this Order on the Receiver's website (www.apsreceiver.com).

DATED this ____ day of _____, 2015.

BY THE COURT

Honorable Robert J. Shelby
U.S. District Court Judge

CERTIFICATE OF SERVICE

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

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