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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.**	**RECEIVER'S PROPOSED MODIFIED PLAN OF LIQUIDATION** **Case No.: 2:14-CV-00309-RJS-DBP** **Judge Robert J. Shelby** **Magistrate Judge Dustin B. Pead**

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Diane Thompson, 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"), and all assets of Curtis DeYoung ("DeYoung") (APS and DeYoung shall collectively be referred to as "Receivership Defendants"), by and through her counsel of record Ballard Spahr LLP hereby submits her modified proposed Plan of Liquidation (the "Liquidation Plan").[1]

I. INTRODUCTION

Due to the misappropriation of approximately $25 million of client funds from the APS Master Trust Account by DeYoung, APS is saddled with liabilities that far exceed its current assets rendering it insolvent. In submitting this Liquidation Plan, the Receiver has consulted with professionals experienced in this area, the Securities and Exchange Commission, her counsel of record, her forensic accountants, investment bankers, and an client advisory committee made up of a representative group of APS clients in an effort to establish a fair and equitable plan for all APS clients. The Receiver has also received input from individual clients and their attorneys over the phone, by email and letter. The most common theme in all of the comments is expediency -- that the Receiver should move this case beyond the control of the

[1] Exhibits and Appendices referenced herein were attached to the Receiver's Proposed Plan of Liquidation, submitted on August 22, 2014, and are not being re-attached to this Modified Plan.

Receivership Order so that APS clients may continue to direct their investments without Court intervention.

The Receiver is aware of the need to design a Liquidation Plan focused on expediency and simplicity. For example, in 2000, a third party administrator/custodian, Millennium Trust Company, LLC ("MTC"), acquired 17,000 accounts from the Independent Trust Corporation ("Intrust") receivership estate administered by PricewaterhouseCoopers ("PWC"). The owners of Intrust had misappropriated approximately $68 million out of the cash sweep program. The receiver transferred custody and administration to MTC, and MTC was charged with the task of collecting each individual account's "allocation" to cover the loss and the paid allocation was then replaced with a "receivership certificate." MTC took steps to properly administer the accounts. As in the instant case, the Court placed a freeze on the account assets, which remained in place until the court was satisfied that sufficient money to cover the loss had been collected through the allocation. The period of the freeze was extended for nearly 18 months, partly because of the nature of the assets, and also because the court had to consider many actions and challenges to the details of the Liquidation Plan and allocation. Notably, the receivership remains open thirteen years later. The Receiver does not want a similar outcome.

Instead, the Intrust case has provided insight to the challenges the Receiver faces in designing a plan that is both expedient and simple. Like the Intrust case, the Receiver faces similar challenges: incomplete investment documents, statements and records from an antiquated system, prior directions from APS clients that were either ignored and/or not fulfilled, requests to redirect investments into new investments or liquidation of investment assets, requests to simply move accounts to a new administrator/custodian, and many other tasks to be

attended to by the Receiver. The Intrust court also allowed the receiver to provide for account holders' hardship distributions, which required multi-stepped applications for qualifications. It also allowed Required Minimum Distributions ("RMD") for retirement account holders older than age 70.5. MTC found that addressing these responsibilities, while collecting an allocation to cover the loss, and understanding the Internal Revenue Service ("IRS") reporting requirements associated with the accounts, was an extremely complicated task. MTC further discovered that account valuations were inaccurate, making its task even more difficult. Additionally, MTC commented that there was a possibility that when the freeze lifted, there would be an immediate demand for transfer/distributions by a majority of the accounts not to mention a run on the sweep account in which cash investments were held. The Receiver faces these same challenges.

The Liquidation Plan, therefore, attempts to address the myriad of issues that the Receiver will face in a fair and equitable manner to allow APS clients to free themselves of the constraints of this receivership, while allocating the loss caused by the missing funds. Early on, the Receiver recognized the need to allow APS clients to continue to pursue investment opportunities subject to certain conditions (i.e. a 20% liquidity requirement). She also recognized the need to make certain required or periodic distributions for account holders subject to the liquidity requirement. By this Liquidation Plan, the Receiver will seek the orderly allocation of the loss pro rata among current APS clients regardless of the nature of the investment types held by the client. These objectives seek to preclude clients' losses from becoming larger, while taking into consideration numerous logistical and other complications. With this Liquidation Plan, the Receiver will seek to maximize the return to APS clients while

allowing APS clients to move forward with a new administrator/custodian in a timely fashion without the constraints created by this Receivership.

To date, the Receiver has identified only a limited number of assets held by the Receivership Defendants, which assets will not provide sufficient funds to cover the loss to the APS Master Trust Account caused by DeYoung's misappropriation. Although the Receiver hopes to recover additional assets that may be used to reduce the loss, it is her reasonable belief that there will be insufficient assets to recoup one hundred percent (100%) of the missing funds. Using a valuation of all APS client assets as of the date of her appointment (April 25, 2014), the Receiver has determined (assuming no additional funds are recovered) that the loss allocable to each APS client represents, at the most, only 10 percent (10%) of the total assets being administered by APS.

Determining how to allocate that loss to all APS clients in a fair way becomes the more difficult task. APS client investments are as varied as the clients. Clients generally fall into three separate categories: (i) those whose entire portfolio of investments is cash; (ii) those whose investment portfolio consists of cash and non-cash investments; and (iii) those whose investment portfolio consist solely of non-cash investments.[2] However, many of the assets held by APS clients within their portfolio are non-liquid assets that cannot be easily converted to cash. As

[2] Were all APS clients' investment holdings in cash, then the Receiver's job would be less challenging. If, hypothetically, the total assets held by APS clients is $366 million in cash (as reflected on the books of APS as of April 25, 2014) and there is a cash shortfall of $25 million, the Receiver would simply reduce the distributable estate to all APS clients by $25 million and distribute $341 million on a proportionate basis.

such, the Liquidation Plan seeks to address this issue while permitting APS clients to move beyond this receivership.

II. BACKGROUND AND CURRENT STATUS OF RECEIVERSHIP.

A. History of APS.

APS was founded by DeYoung in 1982 to serve as a third-party administrator for self-directed IRA and 401(k) accounts. A self-directed IRA is an IRA held by a trustee or custodian that permits investment in a broader set of assets than would be permitted by a traditional IRA custodian. IRS regulations generally require that a qualified trustee or custodian hold the IRA assets on behalf of the IRA owner. Thus, beginning in 1992, APS partnered with First Utah Bank (the "Bank"), to serve as custodian/trustee for its customers' self-directed IRAs.

In July of 1992, APS and the Bank entered into an agreement whereby the Bank agreed to serve as custodian of the monetary and non-monetary assets of APS customers, and APS would service the accounts for purposes of recordkeeping and facilitation of the transactions requested by its clients. Each APS customer entered into one or more agreements with the Bank by which he/she liquidated non-cash assets into cash and transferred the cash to the Bank. The Bank then deposited these funds into a commingled master trust account controlled by APS and DeYoung. Among the documents executed by and between customers and the Bank is a document required by the IRS to establish a customer's IRA known as Form 5305-A (the "IRS Form"). The Bank and each APS customer executed an IRS Form in connection with establishing and opening an IRA account.

The IRS Form expressly states that it is the APS client's responsibility to value his/her assets at least annually. "It is the sole responsibility of the Depositor to annually establish the

fair market value of each of the assets in the Custodial Account in accordance with IRS rules." IRS Form at Article VIII(1). The IRS Form sets forth the possible methods of valuation. It then notes that the APS client has a right to revalue assets, to be initiated by written request from "Depositor [the APS client] to Administrator [APS] and shall be accompanied by sufficient documentation for Administrator to be instructed regarding the fair market value of the asset." IRS Form 5305-A, VIII(4).

Beginning in approximately 2002 and continuing through the filing of the SEC Action, DeYoung misappropriated commingled client cash from the APS Master Trust Account, which, due to the commingled nature of the account, cannot be traced or attributed to any single client. Although the Receiver discovered that DeYoung made an accounting entry in APS's records in 2009 to conceal the loss, DeYoung continued to market APS's services to induce customers to deposit money with the Bank to further conceal the loss resulting from his misconduct. These funds were necessary to sustain the operation of APS in the face of the massive loss. (*See* Declaration of Mark Hashimoto, attached to the Plaintiff's Opposition to Motion to Dissolve [Docket No. 110].) Without the infusion of new clients and cash, DeYoung's wrongful conduct would have been exposed, because there would have been insufficient cash to meet the needs of its clients' directions to invest.

Concurrently, and while DeYoung was concealing his misappropriation by raising approximately $30 million per year since 2009, APS clients were depositing, withdrawing, and re-depositing funds into the APS Master Trust Account by either setting up a new account or from liquidation of investments or receiving revenue or profits from their respective investments. APS clients were also redirecting these cash deposits into non-cash investments, many of which

are difficult to accurately value. Yet, APS tracked the stated value of the APS client accounts because the revenue generated from the business was premised upon a fee schedule tied to the value of all APS client accounts. As of the filing of the SEC Action and appointment of the Receiver, APS's records revealed that the total value of all APS client accounts was approximately $366 million. However, this valuation is overstated by approximately $25 million due to the misappropriation of client funds from the master trust account. Additionally, the Receiver has learned that some clients actually sought to have APS adjust their account values only to be rebuffed by APS. There are others who have indicated that their investments have no value, and that their APS account statements are overstated.[3] Clients have asserted they were stymied by Mrs. DeYoung in attempting to revalue assets. The Receiver has considered these issues and addresses them as part of the overall Liquidation Plan.

B. Summary of Client Comments.

The Receiver, her counsel and forensic accountant held two conference calls with a client advisory committee, consisting of a representative class of all APS clients, via telephone conference on July 18 and August 13, 2014. Both meetings were intended to solicit comments from parties affected by the receivership and allowed the Receiver to better understand the views of the various types and levels of account holders. The Receiver presented a framework for the Plan of Liquidation on the call on August 15, 2014. In addition, the Receiver has heard from and

[3] The Receiver also learned that APS insisted on carrying the gross value of an investment (i.e. real estate) even though the APS client's IRA only made a down payment and borrowed the balance to acquire the property. In such instances, the investment would have a net equity value, but APS insisted on carrying the investment at the full market value regardless of the corresponding debt.

spoken to hundreds of individual APS clients and/or their counsel. The comments the Receiver has received are as varied as the list of APS clients and can be summarized as follows.

- There is a need for expediency.

- When will we be free to direct our investments without the restrictions of the Freeze Order?

- My money was not stolen. I was diligent and can easily trace my deposits with my investments into non-cash assets from the beginning, so I should not have to participate in the loss.

- I did not become an APS client until after 2009, so my money was not stolen.

- I invested in foreign currency so I should not have to participate in the loss.

- The loss should only be spread among those with cash in their accounts.

- The loss should be allocated equally among all APS clients and not on a proportionate basis depending on the value of each APS client's account.

- After making my initial deposit, I immediately invested in a limited liability company that then invested in real estate so I never had cash at APS.

- How can I make by required allocation of loss contribution without cash in my account?

- How long will APS clients have to comply with the Liquidation Plan as proposed by the Receiver to avoid having to conduct a "fire sale" of assets held by the IRA which will return less than fair market value.

- Will I have to liquidate my assets to make my cash contribution?

- Will the Receiver take into account brokerage fees that I will incur in order to sell an asset to cover my contribution?

- Administrative costs should be divided equally among all APS clients since the Receiver represents APS clients equally.

- Will I have to transfer my account to the new administrator or administrators once the accounts are sold or may I move my account to a new administrator of my choosing?

- What plans does the Receiver have to pursue First Utah Bank, fraudulent transfers claims and/or clawback claims against former APS clients and/or third-parties?

- How does the Receiver intend to enforce her Liquidation Plan?

- Will there be a process to appeal valuation assigned to my assets as of April 25, 2014?

- What is the timeline for resolution?

- Does the allocation of loss include administrative fees?

- Everyone should stay with the selected new administrator(s) to maximize APS' enterprise value.

- What are the tax implications of making a required contribution from my IRA to cover my proportionate share of the loss?

- To make my contribution, can I encumber the assets (i.e. real property) held in my self-directed IRA account?

The Receiver addressed many of these issues in her Plan. However, many of the foregoing questions require each individual APS client to consult with their attorney and/or account to make sure that they do not run afoul of IRS regulations or jeopardize the status of their respective IRAs.

Pursuant to this Court's direction, the Receiver provided notice to all current APS clients of the proposed Plan of Liquidation (the "Liquidation Plan") that she filed with the Court on August 22, 2014. On or before October 20, 2014 a total of 835 separate responses and/or objections to the Liquidation Plan were submitted to the Receiver (collectively the "Client Responses"). The 835 Client Responses represent approximately fourteen percent (14%) of all current clients who established individual retirement and 401(k) accounts with First Utah Bank (the "Bank") as custodian and APS as the third-party administrator. On November 4, 2014, the Receiver submitted to the Court (*in camera*) unredacted and unaltered copies of all Client Responses. Accompanying the submission, the Receiver provided: (a) a key to the ten (10) categories and sub-categories the Receiver used in synthesizing the Responses; (b) a spreadsheet listing each individual response and the category or categories the response fell into; and (c) a

Summary of Responses and Objections to Proposed Plan of Liquidation (the "Summary"), which described the Receiver's efforts to review the Responses and categorize them. The Receiver did not respond to the Client Responses in the Summary.

On December 3, 2014, the Receiver filed with the Court an extensive response wherein she sought to synthesize and address the responses, objections and arguments of the Client Reponses. (*See* Receiver's Memorandum in Response to APS Client Responses and Objections to Proposed Plan of Liquidation [Dkt. 356].) In the Receiver's Memo, she identified areas in which the Receiver believes the Liquidation Plan should be modified and sets forth those modifications herein.

C. Procedural History.

On April 24, 2014, the Securities and Exchange Commission ("SEC") filed a complaint against APS and DeYoung, alleging DeYoung misappropriated approximately $24 million of APS client assets from APS's master trust account maintained at First Utah Bank, as custodian. That same day, in *SEC v. American Pension Services, Inc. and Curtis L. DeYoung*, Case No. 2:14cv00309 (the "SEC Action"), the United States District Court for the District of Utah entered a temporary restraining order removing DeYoung of any authority associated with APS.

The same day, the Court appointed Diane Thompson as Receiver of APS and the assets of DeYoung. The Court found that the appointment of the Receiver is 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 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.) Since then, with the assistance of Ballard Spahr LLP (legal counsel), Piercy, Bower, Taylor & Kern (forensic accountants) and forensic IT specialists (Precision Discovery), the Receiver seized control of APS's operations and known Receivership Assets.

On May 12, 2014, the Receiver filed with the Court a Preliminary Report of Receiver, which set forth the current state of affairs at the time. Following the Preliminary Report, the Receiver filed the First Quarterly Report on July 30, 2014. Rather than restate the contents of these reports, the Receiver incorporates by reference both the Preliminary Report and First Quarterly Report as though fully set forth herein.

On July 23, 2014, the Court granted the SEC's motion for preliminary injunction, wherein it found, among other things, that the SEC had established a prima facie case against APS and DeYoung, including that DeYoung violated securities laws and that there was a reasonable likelihood that DeYoung would repeat these offenses if not enjoined.

D. Receiver Activities.

Since July 23, 2014, the Receiver's activities have been focused primarily on six key areas. First, the Receiver and her team developed this proposed Liquidation Plan, wherein she held a follow-up teleconference with the client committee, held follow-up conference calls with APS clients and attorneys who represent APS clients who have offered their assistance or voiced concerns over the status of the Receivership and its impact on their clients (*see* summary above), met with and received proposals from numerous potential third party replacement custodians/administrators, and evaluated the various liquidation options that provide the most fair and equitable resolution to this complicated receivership.

Second, the Receiver continued to operate APS so as to increase its value in the event of sale to a third-party purchaser. The Receiver and her team addressed and corrected operational problems in APS such as the computers and various systems, instituted processes and internal controls to prevent errors, addressed errors asserted by clients, cut operating costs, increased cash, to name a few activities.[4] The Receiver continues to assist and allow APS clients to direct and complete requested transactions in accordance with the Court's Order Clarifying Order Appointing Receiver, Freezing Assets, and Other Relief [Docket No. 79] ("Clarifying Order"). Operating the business in this manner gives APS clients the ability to continue to direct their investments. In operating the business, the Receiver also responds to the daily inquiries of concerned APS clients and their attorneys.

Third, the Receiver continues to demand DeYoung's cooperation in identifying assets of the Receivership Defendants. Although these efforts have fallen on deaf ears, the Receiver has scheduled DeYoung and Michelle DeYoung's depositions for the second week of September with the intention of acquiring a more detailed identification of assets and their whereabouts. In further identifying and marshaling the assets of the Receivership Defendants, the Receiver has demanded that DeYoung supplement his Statement of Assets and Liabilities, a copy of which was attached to the First Quarterly Report. To date, he has refused to do so and continues to be uncooperative in identifying any additional assets. Independently, the Receiver is aware that DeYoung had personal assets (e.g. personal water crafts, piano, jewelry and silver) that are

[4] A more comprehensive list of actions taken by the Receiver and her team to add value to APS is discussed in the Receiver's First Quarterly Report.

missing and/or untraceable. The Receiver will continue to locate and secure these assets as part of her Liquidation Plan.

Fourth, the Receiver has had difficulty scheduling the depositions of Michael Memmott, Sr. and Michael Memmott, Jr. who either individually or through entities they own borrowed millions of dollars either from APS directly or from APS clients. The Memmotts' depositions were originally scheduled for July. When they had difficulty retaining counsel, depositions were continued to mid-August only to have counsel appear and request to delay Mr. Memmott, Sr.'s deposition to the first week of September. Mr. Memmott, Jr.'s deposition was scheduled for August 21, 2014, but Mr. Memmott, Jr. did not appear for his deposition. The Receiver intends to seek sanctions against Mr. Memmott.

Fifth, the Receiver has been evaluating the assets currently under her control, including real property titled in the name of either APS and/or DeYoung. As noted in the First Quarterly Report, DeYoung's residence and a second residence located in Bluffdale, Utah are fully encumbered and do not appear to have any equity. The Receiver is seeking to engage real estate appraisers and, subject to Court approval, will determine whether to abandon these properties and/or turn them over to the lender in satisfaction of the corresponding debt to avoid liquidation costs, including real estate commissions and closing costs. The Receiver has also been approached by First Utah Bank to acquire a commercial building in Sandy, Utah where the Bank maintains a branch office. The Receiver is considering this sale and securing an appraisal to determine the value of the property for purposes of negotiating a possible sale of the property.

Sixth, the Receiver has evaluated potential claims against third parties and financial institutions arising from their business relationships and dealings with APS and DeYoung,

including evaluating claims against First Utah Bank, insurance companies and Michael Memmott, Jr. and his related entities. The nature of these claims vary and include breach of contract, breach of fiduciary duty, negligence, professional negligence, fraudulent transfer and possible clawback claims. Pursuant to the Receivership Order, the Receiver must seek Court approval before commencing an action, which the Receiver will be doing shortly.

III. PLAN OF LIQUIDATION

A. APS Business Is Not Viable as a Continuing Enterprise Due to the Misappropriation.

APS is insolvent because its liabilities exceed its assets and it cannot pay its debts as they come due. As shown in the First Quarterly Report, the assets of the Receivership Defendants are inadequate to cover all of APS's liabilities. To date, the Receivership Assets that have been seized and/or frozen have a gross value of only $3.5 million, which includes about $500,000 in receivables of which collectability is in question. The liabilities associated with those assets and/or outstanding obligations of APS (excluding the approximately $25 million in misappropriated funds) is approximately $2 million, leaving a net value for the Receivership of $1.5 million. When coupled with the approximately $25 million shortfall in the APS Master Trust Account, the assets of the Receivership Defendants are inadequate to cover its liabilities, leaving APS insolvent.

Insolvency may additionally be evaluated from the standpoint of whether the entity can pay its debts as they become due. *See* 11 U.S.C. 101(32); *In re Schick Oil & Gas, Inc.* 35 B.R. 282 (Bankr. W.D. Okla. 1983). Section 101(32) of the Bankruptcy Code defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation," which is traditionally known as the "balance sheet" test. *Id.* The

Receiver has taken steps to reduce APS's costs in a manner that under certain circumstances would allow it to pay its debts as they become due, except for the approximately $25 million obligation now owing to APS clients. The Receiver has substantially cut APS's overhead costs by approximately seventy percent (70%), excluding the administrative costs of the Receivership and the approximately $25 million shortfall. She has done so in order to maintain the status quo and ready the business for possible sale to a successor administrator/custodian while a Liquidation Plan is developed and adopted by the Court. However, it is the approximately $25 million loss that alone renders the APS business not viable from a long-term perspective.

This conclusion is supported not only by the lack of recovery and sale of assets of the Receivership Estate to date, but is evidenced by the decreasing revenue generated from APS's operations. Prior to the appointment of the Receiver, APS's annual net income at the end of 2012 and 2013 was $299,542 and $254,700 respectively. Assuming APS remained in business with similar net income, even if adjusted for inflation, it would take APS nearly one-hundred (100) years to pay off the approximately $25 million shortfall without an accrual of interest. In other words, APS is simply not a viable long-term business that should continue to operate. However, the Receiver believes and has validated that the business can be effectively sold to generate an "enterprise value" for the APS client accounts which allows her to meet the primary goal of the Liquidation Plan—to expeditiously transition the clients back to the ability to fully manage their investments.

B. Interim and Limited Operation of APS Included in Receivership Estate.

The Receiver has chosen to continue the operations of APS for the limited purpose of identifying, marshaling, and selling all assets of the Receivership Estate. She further has been

working to capitalize on any enterprise value for the APS business that could be marketed for sale to a viable third-party administrator or custodian, which would provide similar services to the over 5,500 APS customers. The Receiver has retained five (5) of the fourteen (14) APS employees to ensure day-to-day management of APS client accounts remain current while she pursues potential purchasers. In operating the business, the Receiver hopes to maximize the value of existing assets while also minimizing the expenses being incurred so as to make the largest possible distribution to APS clients.

C. Liquidation Plan.

In establishing the Liquidation Plan, the Receiver was faced with a number of questions. First, what is the total loss to the APS clients caused by the wrongful conduct of DeYoung? Second, can the loss be traced to specified client accounts? How should this loss be allocated? Should it be allocated among all former and current APS clients or just current APS clients? Should it be allocated only to certain APS clients who held cash in the APS Master Trust Account? Should the loss be allocated equally or pro rata among the current APS clients? Once an allocation method is adopted, how does the Receiver implement the loss allocation to assure that all APS clients share equitably in the loss (and corresponding recovery, if any)? These and many more questions, suggestions and objections to the means and manner of liquidating APS and transferring all IRA and 401(k) accounts to a new third-party custodian are set forth in the Summary and the Receiver's Memo, which the Receiver will not repeat here, but incorporates by this reference. [Dkt. 316, 356.] As noted above, this aspect of the Liquidation Plan is made more difficult because of the varying manner in which APS clients hold investments within their respective IRAs. Finally, assuming the Receiver (and Court) can negotiate these hurdles, how

does the Receiver get the more than 5,500 APS clients to comply with a Liquidation Plan designed to allow each client the opportunity to move their accounts to a new third-party administrator and/or custodian so as to free themselves from the constraints of this receivership? The following proposed Liquidation Plan attempts to answer these questions and more.

As an initial matter, it is important to recognize that Federal courts have broad discretion when crafting relief in a receivership because receivership proceedings are equitable in nature. *SEC v. Basic Energy & Affiliated Res., Inc*., 273 F.3d 657, 668 (6th Cir. 2001); *see also Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 298-301 (6th Cir. 2009) ("In a receivership proceeding, the district court has 'broad powers and wide discretion' in crafting relief.... Ultimately, the district court has wide discretion in distributing receivership assets"). Any plan may be adopted that is reasonable. *SEC v. Wang*, 944 F.2d 80, 83-84 (2nd Cir. 1991). Because the receivership proceeding is in equity, a federal court is not required to apply principles of tracing, such as the lowest intermediate balance rule or the first in first out rule. *See, e.g., United States v. Durham*, 86 F.3d 70 (5th Cir. 1996); *Commodity Futures Trading Comm'n v. Eustace*, 2008 WL 471574 (E.D. Pa. Feb. 19, 2008). Instead, courts typically favor a pro rata distribution scheme in federal receiverships on the basis that equally injured clients should be treated alike. *See, e.g., Trade Partners*, 572 F.3d at 298; *SEC v. Credit Bancorp, Ltd*., 290 F.3d 80 (2d Cir. 2002); *Commodity Futures Trading Comm'n v. Wilson*, 2013 WL 3776902 (S.D. Cal. July 17, 2013).

As discussed in greater detail below, there are a number of methods that may be applied in determining the loss allocation. Each method results in different treatment of claimants. A liquidation plan may provide recovery to certain claimants, while excluding or placing others in a different class. *SEC v. Levine* 881 F.2d 1165, 1173 and 1183 (2nd Cir. 1989), cited with

approval in *Wang*, 944 F.2d at 84; *see also SEC v. Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe Int'l Corp.*, 817 F.2d 1018, 1020-21 (2d Cir.1987). Providing such differing treatment is particularly applicable when the aggregate losses suffered as a result of the scheme cannot be fully compensated from available proceeds, as is the case here. *Wang*, 944 F.2d at 86, 87; *Santa Fe*, 817 F.2d at 1021. Applying a pro rata allocation to all clients in several related funds has been approved based upon subsequently-discovered evidence of commingling, even when an earlier allocation had utilized a "tracing" approach. *Commodity Futures Trading Comm'n v. Eustace*, CIV.A. 05-2973, 2008 WL 471574 (E.D. Pa. 2008). In developing a pro rata scheme, the receiver need not adjust the plan to account for inflation which would award class members with longer investments differently than those with shorter, nor other variables. *Commodity Futures Trading Comm'n v. Walsh*, 712 F.3d 735, 750 (2d Cir. 2013). As one court noted in drawing distinctions between different classes of claimants/clients,"[t]his kind of line-drawing—which inevitably leaves out some potential claimants—is, …, appropriately left to the experience and expertise of the SEC in the first instance.... The district court's task is to decide whether, in the aggregate, the plan is equitable and reasonable." *Wang*, at 88. Because the Receiver is a fiduciary and officer of the Court, it "may and does give some weight to the Receiver's judgment of the most fair and equitable method of distribution." *Eustace*, 2008 WL 471574, at *5.

Based on the Client Responses, the primary challenges in adopting a Liquidation Plan centered on: (a) the value of the IRA and 401(k) accounts; (b) whether the Receiver should trace the losses to specific clients; (c) the timing of a client's establishment of an IRA and 401(k) account vis-à-vis the misappropriation of funds from the Master Trust Account; and (d) the

determination of the Loss Allocation and its application to different accounts and assets. The Receiver attempted to address these issues in the Receiver Memo. filed on December 3, 2014.

With this framework in mind, the Receiver sets forth below the background and history of the APS client accounts, how she proposes to determine the value of each client account, how she proposes to allocate the loss to each APS client, the negotiations with potential third party administrators interested in purchasing the APS IRA and 401(k) business, the terms and conditions upon which APS clients will be allowed to move their accounts, and how the Settlement Fund, if any will be distributed upon conclusion of the Receivership to offset the loss.

1. **Background Analysis of APS Client Accounts.**

Most SEC receiverships involve the relatively straightforward process of marshaling the assets of the company under receivership and then distributing pro rata all cash proceeds to similarly situated clients and claimants, if recovery is adequate. By contrast, this receivership poses a unique circumstance because of the interplay between allocating the loss and seeking cash contributions from all APS clients.

Although the Receiver is still in the process of uncovering and identifying assets of the Receivership Defendants, she has previously noted that the Receivership Estate generally consists of two separate and distinct categories of assets:

> First, there are the assets held by the Receivership Defendants. These assets consist of real estate, stock of private corporations and limited liability companies, cash, business furniture and equipment, personal belongs, automobiles, watercraft, antique

automobiles and collectibles, short and long-term notes, and retirement accounts.[5] (*See* Exhibit B to the First Quarterly Report.) These assets are separate and apart from the assets held by the more than 5,500 APS clients. The Receivership Defendants' assets will be liquidated as part of the Liquidation Plan, which proceeds will be included in the Settlement Fund described below.

Second, there are the assets managed by APS held in custody by First Utah Bank for the more than 5,500 separate APS clients ("Client Assets"). These assets, many of which are not easily valued, likewise take many forms, including cash, entity interests, real estate holdings, secured and unsecured notes receivable, stocks, foreign currency, precious metals, bonds, oil and gas ventures, and viaticals, among others. (*See* Exhibit C to the First Quarterly Report.) The Receiver is treating these Client Assets separate and apart from the Receivership Defendants' assets for obvious reasons, primarily because these assets are held by the IRA and 401(k) accounts in which the Bank and APS act as the custodian and third-party administrator, respectively. Significantly, the investment portfolios of the APS clients vary from client to client. There are APS clients whose sole investment consists of cash on deposit with First Utah Bank (759).[6] There are also APS

[5] According to the records of the Utah Division of Corporations, DeYoung alone was listed as an owner, member, trustee, director and/or president of at least twenty-two separate entities and/or trusts. Although many of these entities are no longer active, over half remain active entities. The Receiver is in the process of determining the extent of ownership by DeYoung and the assets held by each, if any.

[6] This may be the result of a recent liquidation of assets, payment of a note, and/or deposit of funds by the APS client to be invested only then to have the Freeze Order entered. It also may include APS clients who engaged APS shortly before the Freeze Order was issued.

clients whose investments consist of cash and non-cash assets, many of which are difficult to value and are not readily able to be liquidated (2,941). Finally, there are APS clients whose investments are solely non-cash assets that are also difficult to value and illiquid (1,711).

The Liquidation Plan separates these two sets of categories/classes of assets whereby the Receiver will only look to the assets of the Receivership Defendants and recovery related to third-party lawsuits or claims the Receiver plans to file to cover the loss caused by the misappropriation.

In crafting a fair and equitable plan, the Receiver has considered the complex Internal Revenue Code restrictions on IRA and 401(k) accounts which control the means and manner that APS clients manage their IRAs or 401(k)s. APS services many different types of IRA accounts, including traditional IRAs and Roth IRAs, education IRAs, spousal IRAs and inherited IRAs. Each type of account is governed by special rules related to contributions, permissible/non-prohibited investments, distributions and tax reporting. Significant tax penalties can be imposed if there is a violation of these provisions. The 401(k) plans are subject to an entirely different set of governing tax rules and requirements related to Employment Retirement Income Security Act ("ERISA"). Appropriate consideration of the tax consequences of a contribution, loss allocation, and unfavorable tax or penalties must regularly be evaluated by APS clients and will need to be evaluated prior to completion of the Liquidation Plan. Due to the diversity of clients, and the diversity of assets in each APS client account, the analysis of each component of a liquidation plan, loss allocation and business sale or transition to a new administrator has potentially different impacts on each APS client. In developing this proposed Liquidation Plan, the

Receiver has made best efforts to evaluate each potential impact with an eye toward fairness, equity and a cost benefit analysis.

Finally, the Receiver has learned that APS has provided third-party administrative services to more than 14,000 clients. As of April 25, 2014 it was only servicing approximately 5,500 clients. Some of APS's former clients may have benefited from DeYoung's wrongful conduct, or, even been involved in such conduct, which the Receiver is evaluating to determine if clawback or fraudulent transfer claims are viable and worthy of pursuing. To the extent that the Receiver uncovers evidence that third-parties were the recipient of DeYoung's wrongful conduct, the Receiver will pursue those parties on a case-by-case basis, subject to the Court's approval. At the present time, the Receiver has commenced an action against Curtis and Michelle DeYoung and is pursuing others in an effort to recover some or all of the misappropriated funds.

However, the Receiver has determined pursuing clawback actions against former and current clients would not be beneficial to the Receivership Estate because the economic benefits are outweighed by the cost. The Receiver explains the difficulty and problems with pursuing clawback actions in the Receiver's Memo. [Dkt. 356, at 80-82.]

2. **Valuing APS Client Accounts.**

Although over the thirty-two (32) year history of APS it had over 14,000 clients, the Receiver proposes to allocate the loss only among the APS clients who held accounts at APS on April 25, 2014. The reason is because it is virtually impossible and cost prohibitive for the Receiver to undertake the task of allocating the loss among current and former APS clients. To do so would require her and the forensic accountants to examine more than 14,000 APS client

accounts, involving hundreds of thousands of banking and investment transactions dating back over twenty (20) years to decipher each APS client's deposits, investments, profits, losses and withdrawals. Poor recordkeeping, inadequate documentation, and an antiquated accounting system make such a task even more problematic. Since 2001, APS clients deposited into and withdrew from First Utah Bank over $900 million consisting of over 80,000 separate deposits and withdrawals. The banking transactions relate to corresponding investment transactions that would also need to be reviewed and analyzed. To allocate losses on such a broad scale simply is not cost effective and would substantially increase administrative and legal costs to the detriment of the current APS clients. Therefore, the Receiver has determined it is in everyone's best interest to allocate the loss solely on client accounts administered by APS as of April 25, 2014.

Many of the Client Responses urged the Receiver to undertake the task of tracing the losses to specific clients. However, the obligation to trace rests with the individual IRA and 401(k) account owners, not the Receiver. To compel the Receiver to undertake the task of tracing the losses would have a number of negative impacts on this receivership. The cost of tracing by the Receiver would be extensive and take her forensic account a minimum of six to nine months to complete at a cost of $1.0 to $1.5 million. Even if she was able to trace the losses to specific clients, the Receiver would be required to commence separate lawsuits against any former client to participate in the loss. This too would be cost prohibitive because it would require the drafting of complaints and filing of actions against the former clients. Even if the Receiver was conservative and filed an action against only a quarter of the 8,000 former account holders, it would cost the Receivership Estate more than $3.0 million in attorney's fees and filing

costs, not to mention the costs of prosecuting these cases once they are filed. Hence, the Receiver believes that tracing is not a viable option in this case,

Unfortunately, that is only part of the equation. The Receiver must adopt an approach to valuing the assets of the more than 5,500 APS client accounts. The Receiver proposed to utilize the value as of the same date – April 25, 2014. Valuing assets is difficult as of any specified date, because the majority of the assets held by the clients are unique and inherently difficult to value. Although, it is easy to value the cash held by APS clients, it is neither easy nor expeditious for the Receiver to value assets such as closely-held businesses, real estate holdings, interests in limited partnerships, notes receivable, stocks, foreign currency, precious metals, bonds, oil and gas ventures, judgments, land trusts, mobile homes, stock options, water shares, rescission offers, disgorgement rights, non-recourse loans, warrants, and tax liens. Valuing many of these assets would require specialized knowledge and likely require third-party appraisals. Moreover, the time it would take the more than 5,500 APS clients to provide evidence of value would significantly delay approval of the Liquidation Plan. Even if the Court required a re-valuation of the APS clients' assets before allocating the losses, there is a risk of manipulation unless there is a mechanism to verify the truthfulness of the valuations provided. In many cases the value can be subjective. Some APS clients report the value of investments in their IRAs or 401(k)s are overstated, while others have reported that their investments are understated. If each APS client is given the opportunity to re-determine the value of their investments, there is an inherent risk that APS clients may either overstate the value of their investments in an effort to secure a larger portion of the return, if any, or reduce the value of

their investments in an effort to minimize the amount a client may have to recognize as a loss or contribute to make up the cash shortfall.

Hence, the Receiver continues to believe that the most fair and equitable approach to determining the value of the APS client accounts is to utilize the values as reflected on the closest empirical data available as of April 25, 2014, since each APS client was charged with updating APS as to the value of their investments on a regular basis. Thus, the Receiver proposes that APS clients be held to their valuation as documented at the time the Receiver was appointed. This approach will allow the Receiver to use the most recent statement of value provided by each APS client prior to the Receivership. It may also require the Receiver to utilize month-end documentation produced by third parties such as brokerage firms—to April 30, 2014—a date in which brokerage firms may have provided monthly statements of securities owned by a particular APS client. In settling upon this approach, the Receiver considered a multitude of alternative methods. For example, there is the net investment method, last statement method, rising tide method, gross investment method, and modified net-investment method. The Receiver could also have used a December 2013 date based on IRS filing data or a date of loss allocation in 2014.

The Receiver ultimately determined that the most reasonable approach to apply in this circumstance is the last statement method. Under the last statement method, each APS client's account will be valued as recorded on the date the Receiver was appointed—April 25, 2014. This method removes any opportunity for manipulation of value by APS clients to limit their proportionate share of the loss and/or improve their right to distribution. Re-opening the valuation process to current APS clients would seriously and unnecessarily delay implementation

of the Liquidation Plan. In addition, because it was the APS client's duty to update the value of their investment portfolio, it is reasonable for the Receiver to rely on the values reflected in the APS recordkeeping system upon her appointment. For these reasons, the Receiver proposes that the Court employ the last statement method.[7]

Another issue regarding value focused on the fact that the Receiver should only look at the initial transfer of funds to the Master Trust Account when a client established an IRA or 401(k) account, not the appreciation of value based on a client's investment decision. Similarly, valuing a particular client's account was questioned in situations where the client made an "in-kind" contribution to the plan as opposed to transferring cash in through the Master Trust Account.

The Receiver is mindful of these points and the allegations in the SEC's complaint and expressed by APS clients that DeYoung "inflated" the cash balances on the customer account statements, and carried assets at their full face value. (Complaint, ¶¶ 4, 97-98.) In both instances, the Receiver is not equipped to or capable of undertaking the task of revaluing the assets/investments of the more than 5,500 APS client accounts. Each APS client had the responsibility of valuing his/her assets annually, if not more regularly. (*See* Traditional Individual Retirement Custodial Account Agreement, Form 5305-A, ¶ 8.03.) APS clients' administrative fees were premised on the value of their accounts at any given time. APS clients,

[7] Other methods of allocation considered by courts and the Receiver are discussed in Appendix A. The Receiver elected not to apply these other methods for simplicity reasons. Virtually all other methods required extensive analysis of each individual account/investment. Here, there are hundreds of thousands of transactions that would have to be analyzed making these approaches cost prohibitive, not to mention they often benefit some investors to the detriment of others.

therefore, had an incentive to accurately reflect the value of their investment holdings at all times. The Receiver, however, is prepared to allow "in-kind" transfers to be excluded from the Loss Allocation provided the client can demonstrate that the asset remained "in-kind" throughout the period of time APS held the asset on behalf of the client and that no funds were ever deposited into the Master Trust Account.

Yet, another hurdle exists to the extent that some APS clients may have requested that APS adjust the value of the investments before the appointment of the Receiver only to be rebuffed by APS, namely by Michelle DeYoung or others instructed to do so by the DeYoungs. In order to address these situations, the Receiver proposes providing APS clients with the ability to provide sufficient documentation demonstrating their previous efforts to revalue their investments as well as a methodology to adjudicate those claims.

For the following limited exceptions; (1) non-recourse debt[8] or other valuation requests refused by APS; (2) unauthorized investment not written down for some but written down for others[9] or (3) National Note investment not written down previously, the Receiver proposes the following valuation appeals procedure:

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[8] "Non-Recourse" is a phrase used to APS to describe loans that were valued based on the equity plus debt. The Receiver believes this method of valuation is incorrect and that these types of loans should be valued only at equity.

[9] Some APS clients' cash was invested in an investment of Curtis DeYoung's choice (often with one of the Memmotts or their entities) involving forgery or without the clients' knowledge or consent. These investments are worthless because they were made with companies and/or individuals who either will not or cannot pay back the loans Curtis unilaterally made on the clients' behalf. Yet, the full value of the investment shows on APS' records when it should have been written down to 0. APS wrote down some of these investments (often for family members) but not others. Therefore, if these unauthorized and worthless investments are properly established and verified as described herein, the account values should be corrected.

(a) No later than 60 days following receipt of notice of the Court's approval of the Liquidation Plan, APS clients fitting in the above three categories may submit a form similar to one attached to the Receiver's Memo [Dkt. 356] indicating their total account value as of April 25, 2014 and documentation supporting their request.

(b) Acceptable documentation must show (1) nature of non-recourse debt (2) attempts made by the APS client to have their account revalued prior to April 25, 2014, which were rejected by APS; (3) an administrative error as to account valuation prior to April 25, 2014; (4) Statement that an investment was not authorized or a direction letter was forged and the investment is worthless.

(c) The Receiver will evaluate the client's file and investment to verify the investment appears to have been unauthorized and that it is an investment APS wrote off for some but not others.

(d) The Receiver will review the form and documentation and determine whether each request for a revaluation should be granted.

(e) The Receiver proposes to charge each such client making a valuation request a flat fee of $500, which fee must accompany the valuation request. This fee will both help to defray the costs of evaluating and adjudicating the requests, but it will also dissuade those with no legitimate valuation claim from making such a request.

3. **Initial Loss Allocation.**

Applying the last statement approach, the Receiver and her forensic accountants must still determine the final value of all affected APS client accounts as of April 25, 2014. According to the last statement of the more than 5,500 APS clients, the total value of all assets

held by APS clients was $366,225,143.89. (A copy of all APS client accounts as of April 25, 2014 is attached hereto as Appendix B, which identifies all APS client IRA accounts and their listed asset value (including cash and non-cash investments) balance as of that date.) The Receiver has determined that the amount of loss suffered by the APS clients is $24,691,699.00 based on the shortfall in the APS Master Trust Account. By dividing the $24,691,699.00 into the total value of assets of all APS clients, the Receiver estimates that the loss represents 6.75% of the total asset value of all APS clients. Subject to adjustments to value as proposed in this Liquidation Plan, the Receiver requests the Court to make three findings:

First, the Receiver requests the Court to declare that the total value of the APS client accounts is $366,225,143.89 as of April 25, 2014, subject to certain adjustments as discussed below. This number is subject to change, as discussed herein.

Second, the Receiver requests the Court to declare that the estimated loss caused by the misappropriation of approximately $25 million is 6.75% of the total value of the APS client accounts.

Third, the Receiver requests the Court to permit her to allocate the loss pro rata to all current APS clients and allow the Receiver to create an initial loss allocation of ten percent (10%) of the total value of the APS client's account. The additional three percent allocation is being sought to safeguard against various issues that may arise, including: (a) allow for any legitimate revaluation adjustments that may need to be made;[10]

[10] For example, if an APS client demonstrates to the Receiver's satisfaction that they attempted to revalue their assets and were stymied by APS, the value of their assets is lower than that carried by APS as of April 25, 2014, and it will have a corresponding reduction in the value

(continued...)

(b) potential uncollectable accounts; (c) provide the Receiver with the necessary funds to make up the cash shortfall while she works to sell APS and its assets; (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. This initial loss allocation of 10% may be adjusted downward later, as described in more detail below.

With these findings, the Receiver will be in a position to allocate the loss equitably to all APS clients and to allow APS clients to begin moving their IRAs and 401(k)s to a new administrator/custodian free of the constraints imposed by this Receivership.

4. **How the Receiver Proposes to Allocate the Loss Among the APS Clients.**

Upon determining the value of each APS client's account, the Receiver will allocate the loss of about $25 million to each account. As noted above, courts typically favor a pro rata approach in federal receiverships on the basis that equally injured clients should be treated alike. *See, e.g., Trade Partners*, 572 F.3d at 298. This approach is appropriate in this case because of the commingled APS Master Trust Account. As a general rule, where money held in trust on behalf of more than one beneficiary is commingled into a single account, that beneficiary's interest in the commingled fund is in proportion to his contribution. 5 Scott on Trusts § 519 at 641. The mere commingling of trust funds may not necessarily impede identification of the trust funds if the individual is able to trace his funds to the commingled account. However, when

(...continued)
of all APS client assets, which will increase the percentage of loss allocation to each APS client. The additional allocation will safeguard against these adjustments.

there are several beneficiaries, the general rule is that there is no reason to prefer one claimant over another claimant. *Id*.; *see also Cunningham v. Brown*, 265 U.S. 1 (1924); *Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980); *Reichert v. Fidelity Bank & Trust Co.*, 261 Mich. 107, 112, 245 N.W. 808, 810 (1932) (stating that "more equitable distribution of the assets of an insolvent bank or trust company will be accomplished if preferences and priorities are avoided). Here, the Receiver has over 5,500 so called beneficiaries who at one time or another deposited and withdrew funds from the APS Master Trust Account. Moreover, a claimant seeking preference over other claimants is required to show a sufficient ground for doing so and the principle of "equality is equity" generally controls. 5 Scott on Trusts § 521.3, at 667. Such is the case here. Virtually all account holders, be they cash accounts or noncash accounts, are similarly situated from an equitable perspective. APS and DeYoung perpetrated a fraud against all of them. As such, the Court should decline to prefer one class of account holder over another.

It is the Receiver's belief that each APS client should be dealt with the same and no preference should be given based on asset type at an arbitrary point in time. Almost all APS clients at one time either entered APS with cash which was reinvested or liquidated and reinvested assets over the course of time. Virtually all APS clients (cash accounts or non-cash accounts) are similarly situated because DeYoung perpetrated a fraud against all APS clients, which continued unabated for years. All APS clients have been defrauded and possess competing and overlapping claims. Therefore, APS clients should share in the shortage of the APS Master Trust Accounts on a pro rata basis. *See In re Michigan Boiler & Engineering*, 171 B.R 565 (E.D. Mich. 1993); *United States v. Doyle* 486 F.Supp. 1214 (D. Minn. 1980); *First State Trust & Savings Bank of Springfield v. Therrell,* 103 Fla. 1136, 138 So. 733 (1932). Pro

rata distribution, as opposed to tracing the complex history and valuation of each and every asset held by APS clients, is the most fair and equitable method of distribution because nearly all funds deposited with APS were commingled in the Master Trust Account. [11]

Also, whether an APS client has only cash assets, non-cash assets or both, they are similarly and equally situated. All money deposited with APS was done so with the purpose to reinvest (at some point) at the direction of the APS client. Because the fraud was perpetrated on all clients equally over a significant period of time, the Receiver is of the view that she cannot prefer one class of APS client over another. This means that a fair and equitable Liquidation Plan may require an APS client whose investments are solely non-cash to nonetheless liquidate those non-cash investments or otherwise contribute cash to cover the proportionate share of the shortfall. This unfortunate circumstance is driven by the $25 million loss, which the Receiver needs to account for the benefit of all APS clients. Because the APS Master Trust Account at First Utah Bank should reflect deposits totaling approximately $50,653,871.85, and instead had only approximately $25,962,173.00, the Liquidation Plan must include provisions that effectively account for or return the misappropriated cash to the APS Master Trust Account. Because of the commingling, it would be unfair for just those whose cash deposits are missing to

[11] Once commingled, it became impossible to determine whose funds were used to purchase the non-cash investments. Thus, even if a client placed, for example, $100,000 in the Master Trust Account on day 1, and then withdrew $100,000 then next day to purchase real property, it is not correct to say that the $100,000 withdrawn on day 2 was untainted by the theft. To the contrary, once the $100,000 was deposited into the Master Trust Account, it was instantly commingled with and became part of the fraud perpetrated to prevent discovery of the stolen funds. The APS client was only able to withdraw the full $100,000 from the account because not all APS clients chose to withdraw their funds on that same day. Had all APS clients elected to withdraw their cash simultaneously, the account would have come up short (with only about 50% of the cash needed to satisfy all of the withdrawals).

shoulder the entire loss. If that were the case, those who had cash deposits as of April 25th would shoulder a disproportionate share of the loss—that is a fifty percent (50%) loss—as opposed to ten percent loss if shared pro rata among all APS clients. It is only happenstance that these particular clients had cash on April 25, 2014. Had the Receiver been appointed May 1, or April 12, the results would be similarly happenstance. The only way the Receiver can make up the cash shortfall is for all APS clients to contribute—in cash—ten percent (10%) of the value of their total investments, whether investments are held solely in cash, as cash and non-cash, or only non-cash.

Based on comments made by the client advisory committee and the Client Responses, the Receiver understands that certain APS clients do not have sufficient cash to cover the ten percent (10%) allocation, and may need to liquidate or borrow against assets within their IRA and/or 401(k). She further recognizes this may have significant tax consequences and has been inquiring if the Internal Revenue Service will address the ramifications arising from this case. Specifically, the Receiver is seeking to determine if the IRS will permit APS clients to borrow monies secured by assets held by the IRA, make a cash contribution to their IRA, [12] or allow clients to contribute funds to their IRA in accordance with a Private Letter Ruling ("PLR") that

[12] Internal Revenue Code ("IRC") restrictions may impact whether an APS client can make such a contribution. Individuals may contribute the lesser of $5,500 ($6,500 if the individual is at least age 50, and both numbers are annually adjusted for inflation) and the amount of compensation included in the individual's gross income for the taxable year under section 219 of the Internal Revenue Code of 1986, as amended (the "Code"). Code restrictions also impact whether an APS client can deduct such a contribution on his or her tax return. All APS clients affected by this provision should consult with their counsel to determine if they are eligible for a contribution, the limits on the contribution, and the deductibility of the contribution.

the Receiver has requested, and is hopeful that the IRS will issue, to cover the ten percent (10%) loss allocation without adverse tax consequences. The Receiver would advise APS clients whose assets are primarily in non-cash investments to consult with legal counsel and/or their accountants to fully understand the implications the proposed Liquidation Plan will have on their IRA and 401(k). The Receiver will continue to provide updates on conversations with the IRS.

5. **Steps Taken by Receiver with Potential Third-Party Administrators to Purchase APS Client Accounts.**

The next step in the liquidation process relates to securing approval of a third-party administrator/custodian to assume custody and to provide administrative services which APS provides to its 5,500 clients. The primary desire of virtually all APS clients is to free themselves of the restrictions of the Receivership Order. To do so, the APS clients must be given the opportunity to move their accounts to either a third-party administrator registered with the IRS and/or a bank that has the ability to take on the custodial and administrative duties undertaken by APS and First Utah Bank. The benefit of the Receiver securing such a party is twofold: First, it allows the Receivership Estate to recover enterprise value from the future revenue stream related to transfer of over 5, 500 individual client accounts. This is a value that can be used to offset a portion, albeit limited, of the loss caused by DeYoung's misappropriation. Second, it provides APS clients with the ability to move their accounts and become free of the constraints of the receivership. The Receiver understands there will be those who wish to select their own third-party administrator. However, to expedite the process and maximize the enterprise value, the Receiver is of the belief that allowing clients to select an administrator of their choice will escalate the costs to the Receivership Estate because of the logistics of transferring accounts to

multiple administrators rather than a single administrator.[13] It would also negatively impact the amount the Receivership Estate would receive from a third party purchaser. By initially selecting one or two successor administrators, the Receiver will substantially reduce the costs and time to transfer the accounts. Future transfers can be addressed by the successor(s).

To that end, beginning the week of July 21, 2014, the Receiver met with fourteen administrators or custodians who had expressed an interest to purchase the APS accounts. The Receiver also contacted six administrators/custodians who are members of the Retirement Industry Trust Association to inquire whether any had an interest in learning about the opportunity to purchase the APS accounts. The Receiver received ten proposals to purchase the APS accounts. Six companies declined to submit a proposal after meeting with the Receiver and four did not respond.

During the week of August 4, 2014, the Receiver and her team evaluated the proposals based on the following criteria: purchase price, transition time, timing of payment, contingencies to payment, experience in take-overs, whether the administrator/custodian is regulated, whether the company is a trust company, and complaints/due diligence. The Receiver also considered how the buyer would handle 401(k) plans, whether the potential buyer could or would contract with ExpertPlan who currently provides certain 401(k) services to APS clients.

[13] To complete any transfer of such accounts requires the re-registration of assets with the new custodian. It is logistically simpler and more cost effective if the Receiver is dealing with a single administrator.

The Receiver received input from the forensic accountants, her litigation counsel, and the Securities and Exchange Commission, as well as the client advisory committee with regards to the veracity of this approach and the potential third party administrators.

Based on the criteria and input provided, the Receiver narrowed the list of potential purchasers to four candidates with the strongest resumes and proposals, both in terms of purchase price and the ability to expeditiously transfer and service accounts.

The Receiver is prepared to make a recommendation to the Court that it approve moving forward with a successor custodian/administrator. This recommendation is based on evaluation of all offers, the expertise and experience of Successor Custodian, the benefits it will provide to the APS clients and the economic benefit to the Receivership Estate. Due to the confidential nature of the terms and conditions of the proposal, the Receiver will submit the final proposal which the Receiver is in the process of reducing to written form. In the meantime, however, and without revealing the name of the proposed successor, she can set forth the terms in generic form:

1) The Successor Custodian will make an up-front cash payment to the Receiver for all the accounts, due at closing with no contingencies. The Successor Custodian offered one of the highest purchase prices out of the final offers with no contingencies to the payment upon closing.

2) The Successor Custodian will waive account holder fees for a certain period of time post-closing. The Successor Custodian provided the most generous waiver of accountholder fees post-closing out of the final offers. Upon transferring their account, clients will not be charged administration fees for their accounts for one (1) year. This

will defray clients' account costs and allow them to test the services of the Successor Custodian with little to no cost or expense to the clients. The benefit of this term alone is a savings to all clients of approximately $2.3 million.

3) The Successor Custodian will waive termination fees for nine (9) months post-closing. Again, this represented the most generous termination fee waiver out of all of the final offers. Based on the comments received, the Receiver understands that such a termination fee waiver is important to the clients and will give them sufficient freedom to move their accounts if they are not satisfied with the service provided by the Successor Custodian. This term also eliminates the need to provide a second custodian and will facilitate a transition of data and accounts.

4) Timing of transition and ability and experience to execute. The Successor Custodian provided a detailed transition plan and timeline. Moreover, it has conducted more than a half-dozen portfolio acquisitions, including a 2010 acquisition in which it became successor custodian to a division of a failed bank, which had over 8,000 clients and approximately $1 billion in assets. The Receiver believes that the Successor Custodian's track record of successful acquisitions will aid it in performing a smooth and efficient transition of the clients' accounts.

5) Safety and soundness and regulated trust company status. Successor Custodian is a leader in the self-directed industry. It has operated as a qualified IRA custodian since 1983, has over 130,000 clients in all 50 states and currently has over $12 billion of assets under custody. The Successor Custodian meets all trust company capital requirements and is audited by its regulator every 18 months. The Receiver believes that the Successor

Custodian's size, experience, regulation and experience with transitions make it the lowest-risk option as Successor Custodian/Administrator.

6) Ability to service all APS asset types, including 401(k) Plans. The Successor Custodian has experience with all assets types held by APS accountholders. With respect to IRAs, it has accounts with assets in real estate, metals, private equity, private debt and other alternative asset types that line up with the assets help in APS IRAs. Additionally, it currently administers 2,000 multi-participant and Solo 401(k) plans and has over 20 years' experience servicing qualified plans, including through Expert Plan, which is the qualified plan record keeper currently used by APS. The Successor Custodian's ability to service all APS asset types will facilitate a smooth transition of APS account holders' accounts to the new custodian.

7) Insurance/audit safeguards. The Successor Custodian's qualified plans are regulated by the Department of Labor. Internally, it has an independent internal auditor that reports directly to the audit committee of the board of directors and its financials are audited on an annual basis by certified public accountants, which report their findings to the audit committee. The audit committee oversees the activities of the Successor Custodian's internal and external auditors. All account holders' un-invested cash is placed in FDIC-insured institutions where it is federally insured up to $250,000. The Successor Custodian also carries insurance for Banker Blanket Bond and Professional Liability Insurance.

Given the cash purchase price, the waiver of administration and termination fees, Successor Custodian's experience in acquiring, transitioning and servicing accounts similar to the APS accounts, its size and leadership in the industry, and its safety and soundness, the

Receiver and her attorneys and accountants believe that the Successor Custodian provides the lowest risk solution to achieve the Receiver's goals of recovering the enterprise value of APS and finding a successor custodian to efficiently serve the APS clients and minimize their losses going forward. In addition, as discussed above, because the Successor Custodian will waive administrative and termination fees for a certain period of time, the Receiver believes the choice of a single Successor Custodian will not constrain the choice of the APS clients to use the custodian/ administrator that they prefer.

While the Receiver believes that the Successor Custodian should be the single successor custodian of the APS accounts, due to client comments the Receiver did consider offering a choice of two new custodians, and even asked the final potential successors to provide proposals for both a one-custodian and a two-custodian scenario. However, based on advice from the various parties involved and a review of the one-custodian versus two-custodian proposals provided by the three finalists, the Receiver determined that adding choice prior to the transition would increase cost, dilute the revenue the transaction could provide, create data transfer errors and delay, and increase confusion and the likelihood of client service problems.

A single-successor scenario will still provide the clients with the freedom to choose where their account will remain. The Receiver will not ask for Court approval to enter into a contract binding the client for any specified period of time after the initial transition to the Successor Custodian which effectively provides clients with a choice. Given the fee concessions that the Successor Custodian is willing to provide after the transfer and the clients' general freedom to move their accounts from the Successor Custodian after the closing of the transaction (subject to any restriction on movement prior to an APS client paying its Loss Allocation or

fees), the Receiver believes that choosing one Custodian/Administrator will not constrain client choice.

In addition, a sale of the APS accounts to a single custodian will result in the most expedient and most efficient transition, and the earliest and most efficient transition will serve to give back investment control and choice to the clients. The challenges and cost of transferring data from the antiquated APS software system is daunting. Moreover, there are approximately 500 boxes of paper files in storage or in active use that were generated before APS processes were set up for electronic storage. Not only would having two successor custodians be an administrative nightmare with respect to the two successor custodians coordinating record transfers between themselves, but the Receiver must still set up a process for housing and sharing the multiple APS data sources for the foreseeable future during the continuation of the Receivership and the migration to a new custodian. This task will be difficult enough with only one successor. A transition to two custodians would overcomplicate the process and also increase cost.

Ultimately, the Receiver and her attorneys and accountants believe that a purchase by a the Successor Custodian will result in the best outcome for the clients, more revenue for the enterprise value of APS, and a clear and efficient transition of the accounts.

6. **Proposed Implementation of Plan.**

As noted above, the Receiver's proposed Liquidation Plan allocates the loss proportionately among all APS clients. She has tentatively determined each APS client's proportionate share of the approximately $25 million shortfall is approximately 6.8% of the value of each APS client account ($25 million ÷ $366 million). The Receiver acknowledges that

this amount is less than the ten percent initial loss allocation she is proposing in this Liquidation Plan. This is due to the fact that it remains unknown what the actual loss allocation will be if the Court allows for adjustments due to (a) non-recourse debt or other valuation requests refused by APS; (b) unauthorized investment not written down for some but written down for others; (c) National Note investment not written down previously; (d)late coming APS clients who deposited funds after the appointment of the Receiver; (e) clients who solely made "in-kind" contributions and no monies were ever deposited into the Master Trust Account; (f) other unforeseen circumstances; and (g) unpaid administrative fees. To the extent the Receiver recovers funds from her efforts to identify, marshal and sell assets, the Receiver will use the same pro-rata allocation to distribute net recovered funds to APS clients.

In providing APS clients the opportunity to move their accounts, after satisfying their pro-rata share of the Loss Allocation, the Receiver will have many challenges in transitioning the accounts to the Successor Custodian. Front and center is the challenge faced by the approximately $25 million shortfall and the Receiver's need to shore up this shortfall so that the loss allocation is distributed equally across all APS clients. As noted, APS's records reveal that the APS Master Trust Account should have deposits of $50,653,871.85, and instead had only approximately $25,962,173.00. The purpose of making the 10% loss allocation is to convert all APS clients proportionate share of the loss into cash so that the Receiver has sufficient cash in the APS Master Trust Account to distribute to APS clients whose portfolio included cash only or cash and non-cash assets. If the APS clients comply with the Plan, and assuming the value of all APS client assets is $366 million, the 10% loss allocation will have the effect of collecting $36.6 million. However, as described below, once an APS client contributes his/her 10% loss

allocation, the client will be permitted to take the balance of the asset portfolio, which may consist of some cash, and move it to the new third-party administrator. Ergo, there will be a corresponding deduction from the APS Master Trust Account for that APS client. If the Receiver is able to get full compliance to the Liquidation Plan, the net effect should be to have sufficient funds to distribute the necessary cash leaving each APS client with an actual loss allocation of less than ten percent from which the Receiver hopes to reduce further if she is successful in selling assets of the Receivership Defendants, recovering insurance claims, and pursuing third-party claims.

In addition to the foregoing, the Receiver has the following challenges:

- A majority of assets are illiquid, increasing the challenge with collecting the allocation.
- Other assets may be in default, and therefore potentially subject to a receivership/ bankruptcy proceeding of their own.
- Valuations are less accurate over the life of the investment; Many APS clients may not have annually valued their assets; Assets may have been assigned inflated values
- Multiple potential issues with the trust accounting system and controls.
- A substantial amount of the assets are in real estate. However, difficulties associated with administering real estate while in receivership and distributing or transferring it to a new administrator/custodian, include:
    - The registration of the property to the IRA will need to be confirmed and any necessary action taken to re-register the property in the name of the new custodian.

- An updated appraisal will be warranted and required if a sale, distribution or Required Minimum Distribution is to take place.
- Tax payments and assessments due or over-due and any liens or security interests must be recorded internally for each account, and satisfied with communication and direction from the account owner.
- If the property is not to be sold at the direction of the account owner, the Receiver may be required to effectuate sale.
- If the property is improved, is there adequate insurance, a property manager, and proper controls over collection of rent?
- Regardless of the property being potentially ready to be transferred or distributed, should the distribution or transfer of an account be given priority over other accounts due to the type of asset held?

- Other asset types have similar complex requirements and unique considerations including the need for re-registration, a need to review the investment's operational documents, meet capital calls, review transactional history, obtain valuation, and especially here, the need to determine the validity of the asset, or dealing with the receivership or bankruptcy of the asset as a creditor.

Despite these challenges, the Receiver proposes allowing APS clients to move their accounts to the Successor Custodian on the following terms and conditions:

1. No APS client will be permitted to move their APS client account until all APS management fees have been paid that are due and owing.

2. APS clients whose investments consist solely of cash as of the allocation date may immediately move their accounts by reducing their account balance by ten percent (10%) of the amount of cash on deposit. Once the initial 10% adjustment is made, the APS client will be permitted to move the remaining 90% of their cash balance to the Successor Custodian with a 10% accounts receivable from APS.

3. APS clients whose distribution of investments consist of cash **and** non-cash investments (and assuming there is sufficient cash available), may reduce their cash balance by the necessary amount to cover the initial 10% allocation of loss, which will entitle the APS client to move all of the remaining 90% of their assets within the IRA account to the Successor Custodian. In the event that the APS client does not have sufficient cash to cover the initial 10% allocation of loss, the client may elect to either liquidate sufficient assets (when coupled with their existing cash balance) to pay the initial 10% loss allocation, make a contribution (if eligible) to cover the initial 10% allocation, or contribute funds to their IRA in accordance with a PLR the Receiver has requested from the IRS, Upon making the contribution, the APS client will be permitted to move the balance of their assets to the new third-party administrator/ custodian with a 10% accounts receivable from APS.

4. APS clients whose investments are held in non-cash assets will have the same three options identified in the paragraph 3 above to generate cash sufficient to cover the initial 10% loss allocation. Upon satisfying the initial 10% loss allocation, the APS

client will be permitted to move the balance of their assets to the Successor Custodian with a 10% accounts receivable from APS.[14]

5. Upon making the 10% contribution and moving their accounts to Successor Custodian, APS will show an account payable equal to each client's contribution and each APS client will be entitled to show an account receivable due and owing from APS in the amount of the contribution as part of the assets transferred to the new third-party administrator/custodian. This receivable will have the effect of each APS client transferring one hundred percent (100%) of their APS assets, with ten percent (10%) of the value of the client's assets treated as a payable from APS. [15] Depending on the success of the Receiver in identifying, seizing and selling assets of the Receivership Defendants and pursuing other third-parties, the Receiver would distribute the Settlement Fund which will reduce the APS clients' loss.

6. The Receiver filed a PLR request with the IRS on October 3, 2014 to address the many tax questions posed by the clients. Various approaches and questions were raised on how the Loss Allocation, possible contributions or restoration payments

[14] Members of the investor advisory committee with real estate holdings requested that they be provided with a reasonable period of time to liquidate real estate holdings so as to maximize sales prices. The Receiver agrees and believes an adequate period of time should be given to those investors.

[15] Assuming Court approval, clients who fall within this category may consider determining whether liquidation is necessary and/or whether they will be able to cover their proportionate share of the loss by either making a cash contribution to their IRA and/or finding some other means to cover the loss without having to liquidate their investment. If they do so, then the 90 day deadline should be able to be met without forcing clients to liquidate assets on a "fire sale" basis.

made to fund the Loss Allocation, and reimbursement of recovery would be treated for income and excise tax purposes. Many clients with illiquid assets want a way to convert their proportionate share of Loss Allocation without adverse tax consequences. The Receiver strove to promptly file the IRS request after the Liquidation Plan was submitted to the Court. Expedited processing was requested. The IRS responded in a letter dated November 12, 2014, indicating that due to their internal reorganization and processing timing, the request for a conference to discuss their views, and the time needed to evaluate the ruling will not be possible until six months from the date of assignment of the request. Although the request has been assigned, the IRS may need to reassign due to an internal reorganization that is in process. On December 2, 2014, the IRS informed the Receiver that it is working the case, is coordinating with Counsel to schedule a conference call to discuss and they will notify us of a conference date as soon as they are able. The Receiver will continue to vigorously pursue obtaining an expedited Letter Ruling from the IRS.

The tax treatment of the steps outlined in the Liquidation Plan is critical to its acceptability and execution. The Receiver believes it is in the best interest of all clients to have the Court approve the Liquidation Plan as amended, conditioned on certain events occurring. By doing so, those clients not directly impacted by receipt of the PLR can move forward with transferring their account to the new custodian. The Receiver recognizes that she has been emphasizing expediency for cost reasons and based on client input. However, the Receiver believes delay to procure certainty on this aspect of the Plan is warranted and prudent. In order not to impede progress, other aspects of the

Proposed Plan could be approved by the Court so that the Receiver can continue to finalize the Plan during the delay. Unless and until the IRS issues a PLR, and the APS client refuses to contribute to the Loss Allocation as approved by the Court, such refusal may result in either a prohibited transaction or distribution, which will require the Receiver to issue a 1099 IRS tax notice based on the APS recorded value of their assets as of the date of allocation (April 25, 2014). Alternatively, the Receiver will be entitled to impose a lien upon all APS client accounts who refuse to cooperate with this Plan and, if necessary, liquidate the assets and deposit the net proceeds in the Settlement Fund to be disbursed to the participating APS clients on an adjusted *pro rata* basis.

8. If and when the Receiver begins making distributions the distributions will reduce each APS client's accounts receivable in the same proportionate amount determined above.

9. Finally, any and all distributions made by the Receiver will be undertaken in the following priority:

(a) to cover all administrative fees and costs incurred for the benefit of the Receivership Estate.[16]

(b) to all APS clients (who contributed their share of the 10% loss allocation) the difference between their proportionate share of the 10% loss allocation and the "actual loss allocation," which shall be determined with

[16] It remains the Receiver's hope that administration costs will be covered primarily from revenue generated from operations and the sale of APS assets only.

certainty once adjustments, if any, are made to the combined value of all APS assets.[17]

(c) to the extent the Receiver is successful in recovering from third parties who contributed to the loss, benefitted from the wrongful conduct of DeYoung, or had some responsibility to cover the loss (i.e. insurance), such proceeds shall be distributed to the APS clients on a pro-rata basis since such funds reflect recovery associated to the loss incurred by APS clients.

(d) to the extent monies are recovered by the Receiver from the sale of assets of the Receivership Defendants, including accounts receivable maintained on the books and records of APS, then the Receiver shall distribute said proceeds to all creditors (including APS clients) on a pro-rata basis.

(Attached hereto as Appendix C is a Flow Chart which illustrates the manner in which the Liquidation Plan will be implemented and completed.) The benefit of the foregoing procedure is that it will allow APS clients to immediately take steps to extract themselves from the Receivership Order and the constraints of the Clarifying Order.

7. **American Pension Services 401(k).**

The Receiver has determined that sixty-four (64) 401(k) accounts out of the approximately two hundred sixty (260) APS 401(k) plans were in existence prior to July 12, 2009, when separate trust accounts were opened and funds were segregated and transferred from the Master Trust Account to a separate 401(k) master trust account. In addition, twenty-four (24)

[17] Assuming the court determines the "actual loss allocation" remains at 6.75%, the APS clients should be entitled to the return of 3.25% of the initial 10% loss allocation.

accounts had assets which were originally in an IRA account participating, which were in the Master Trust Account and then transferred to a 401(k) account after 2009. Due to the commingling of 401(k) accounts with all other IRA accounts prior to July 12, 2009, the Receiver has determined that it is appropriate to include those 401(k) client accounts that were in existence prior to the establishment of separate accounts in the Loss Allocation and the Liquidation Plan– that is July 12, 2009.[18] Likewise, the twenty-four (24) accounts which had funds in IRA accounts which were transferred to 401(k)s after 2009 should also be included in the Loss Allocation since their funds were originally commingled in the Master Trust Account.

With regards to any APS 401(k) account that was established **after July 12, 2009**, the Receiver will recommend that these accounts **not be subject to** the Loss Allocation since these funds were not deposited into the commingled Master Trust Account. The Receiver, however, proposes that these post-2009 401(k) accounts be transferred to the new custodian/ administrator along with all other accounts. Because the post-2009 401(k) accounts were not involved in the commingled Master Trust Account, the Receiver does not believe they should bear any portion of the Loss Allocation. The net impact of this recommendation is that the overall value of the assets in the denominator of the Loss Allocation will be adjusted downward to reflect the exclusion of the post-2009 401(k) accounts.

[18] To the extent monies were contributed and/or value added after July 12, 2009, such contributions will not be included. The Receiver will only apply 401k account values as of July 12, 2009 when the accounts were transferred to the new entity.

8. **"In-Kind" Transfers Proposed to be Excepted from Loss Allocation.**

To the extent an APS client can show (i) respondent's assets were transferred "in-kind"[19] to APS, **and** (ii) that at no time since establishing his/her IRA account, respondent either deposited or withdrew monies from the Master Trust Account, (in other words the IRA account remained in that specific asset over the life of the account), then the IRA account should be excluded from the Loss Allocation and the APS client could move one hundred percent of their assets to the new administrator. This would include any clients who deposited foreign currency into the IRA accounts, and the deposited currency was always held in the First Utah Bank safe deposit boxes. In these cases, to the extent that no cash ever went into or out of the Master Trust Account, the clients could not have been affected by the misappropriation of funds. In this instance, however, the Receiver will propose that a flat administrative fee of $500 be paid by these account holders so the Receiver may verify the "in-kind" transfer, enabling the client to complete the transfer of their accounts to the proposed new administrator/custodian. The Loss Allocation calculation will need to be adjusted downward to account for these exemptions. These exempted accounts will also be excluded from any loss recovery/recoupment payment in the future.

[19] "In-kind" means a client who did not liquidate their assets and only transferred assets to APS in-kind. An "in-kind" client never made any deposits or withdrawals from the commingled Master Trust Account (and did not later liquidate any assets to reinvest or take a distribution).

However, accounts where the in-kind assets later generated cash income, were partially or fully sold, liquidated, and reinvested or distributed, or where cash contributions were made to maintain or pay expenses related to the in-kind asset should not be excluded.

9. Account Opened Pre-Receivership But Funded After Receivership Excepted from Loss Allocation Per Order October 21, 2014 [Dkt. 255].

Based on the Court's Order [Dkt. 255], clients whose cash deposits came in after the appointment of the Receiver, have been notified that their accounts will be excluded from the Loss Allocation and freeze order and may direct the Receiver regarding disposition of their account. The impact of this action is that it may have a corresponding reduction in the total value of all assets, albeit minor.

IV. ASSET RECOVERY EFFORTS.

As noted above, this Receivership can be broken down into two parts: the APS client/business operations and the APS asset recovery. In an effort to maximize the amount of recovery for the benefit of the defrauded APS clients, the Receiver plans to: (a) liquidate all of the Receivership Defendants assets; (b) abandon any assets whose value is less than the amount of the debt encumbering the asset and either turn the asset over to the lender (via a deed in lieu of foreclosure) or let the lender to foreclose or sell the asset at auction; (c) pursue various fraudulent transfer claims against parties who received assets without paying fair consideration or may have participated in the fraud; (d) pursue borrowers who are indebted to APS based on loans made to them by APS that have not been repaid; (e) pursue financial institutions for breaching their fiduciary duties by failing to protect the APS clients from suffering a loss at the hands of its third-party administrator; and (f) pursue insurance claims.

V. APS CREDITOR (NON-APS CLIENTS) CLAIMS PROCEDURE.

In addition to the APS clients who will have an approximately $25 million loss allocated to them, the Receiver has considered and heard from other creditors of APS. The Receiver has determined that creditors of APS should be classified differently than APS clients. Upon her appointment as Receiver, she has learned that the company had both secured and unsecured creditors. The Receiver proposes that all creditors of APS (excluding APS clients) submit a Proof of Claim setting forth (a) the date the claim arose; (b) the nature of the claim; (c) the amount of the claim, (d) whether the claim is secured; and (e) when the creditor contends the claim became due and owing. The creditor should attach all necessary documentation to support the claim.

The Receiver will consider the Proof of Claim, and to the extent she has an objection to the claim, shall notify the creditor, in writing, of the basis for her objection (the "Objection"). The creditor shall have the right to respond to the objection by submitting a written reply (the "Reply"). If the parties cannot agree on the amount of the claim, the Receiver and/or creditor shall be allowed to request the Magistrate Judge Dustin B. Pead to determine the amount of claim, by submitting the Proof of Claim, Objection and Reply to the Court for consideration.

Creditors with unsecured claims shall be entitled to receive proportionate share of available funds as outlined above in Section 6 above, paragraph 9(d). a.

VI. NEXT STEPS.

In presenting the foregoing Liquidation Plan, it is the Receiver's intention to move forward as quickly as reasonably possible while providing parties with an opportunity to be heard both in support and opposition to the Liquidation Plan. To that end, the Receiver is filing

concurrently herewith a Request for Scheduling Conference Regarding Proposed Plan of Liquidation (the "Request"). The Request asks the Court to set a scheduling conference for the purpose of (a) setting a deadline for allowing parties an opportunity to submit written responses to the Receiver is support or opposition to the Liquidation Plan; (b) a deadline for the Receiver to collect and categorize the comments of those who have submitted a written response and present a Report of Written Responses to the Court for consideration; and (c) setting a deadline for the Receiver to submit a response to the written responses and (d) setting a hearing date for the Court to consider adoption of the Plan of Liquidation and/or any amendments thereto. It is the Receiver's desire to have the Court approve the Plan of Liquidation before the end of the year. This is critical as it will allow APS clients the opportunity to make a contribution to their respective investment retirement accounts by year end, if they have not already done so in order to meet the ten percent (10%) loss allocation.

In addition, the Receiver will use the Scheduling Conference to outline the time frame in which she intends to identify and negotiate with potential third-party administrators to acquire all APS client accounts. As noted above, the Receiver is in discussions with several prospective candidates and is hopeful to present one or two viable candidates to the Court as part of the approval of the Liquidation Plan.

In the meantime, the Receiver intends to administer the receivership estate efficiently and in a manner that will allow APS clients to begin moving their accounts and allow her the opportunity to pursue collection efforts in the hope of making a distribution to clients as soon as reasonably possible. At this time, the Receiver anticipates that her administration of the estate, assuming approval of the Liquidation Plan by year end, will take between nine to twelve months

after approval. This time frame will be dependent on the cooperation of the APS clients and creditors of APS and how quickly and efficiently APS clients can be transitioned to a new third-party administrator. It will also be conditioned on compliance of all APS clients to the Liquidation Plan. The size and complexity of the APS relationship with its clients, and the significant number of assets that will need to be placed in the control and name of the new administrator will take time. The condition and unreliability of the APS's records; the extent of property held by the APS clients; the condition and marketability of the assets that may need to be liquidated to meet the ten percent (10%) allocation all will impact the time necessary to bring this receivership to a close.

At the present time, the Receiver cannot estimate the amount of money, if any, that will be distributed to APS clients and creditors. She will continue to administer the receivership in such a way as to maximize any distribution, but the amount will be dependent on a number of factors, including (a) the value of the Receivership Estate; (b) the time spent addressing APS objections; (c) the cooperation of APS clients in advancing the necessary 10% loss allocation; and (d) the claims that the Receiver ultimately determines should be filed because it makes economic and legal sense to do so.

VII. CONCLUSION

With input from many different sources, the Receiver has presented a proposed Liquidation Plan geared toward expediency and simplicity that allows APS clients to free themselves from the constraints of this Receivership provided they comply with the terms set forth herein. The Receiver submits this Plan with the hope it may be approved before the end of

the year to give all participants an opportunity to take steps that will benefit them in the overall administration of their IRA and 401(k) plans.

DATED this 5th day of December 2014.

/s/ Mark R. Gaylord
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **RECEIVER'S MODIFIED PROPOSED PLAN OF LIQUIDATION** was served to the following this 5th day of December 2014, in the manner set forth below:

[X] Through the CM/ECF System for the U.S. District Court

[ ] Hand Delivery

[ ] U.S. Mail, postage prepaid

[ ] E-mail: ahardenbrook@swlaw.com; docket_slc@swlaw.com; jpollard@swlaw.com; moric@sec.gov; wadleyd@sec.gov; #SLRO-Docket@sec.gov; dleta@swlaw.com; docket_slc@swlaw.com; wsmart@swlaw.com; gbh@pkhlawyers.com; dh@pkhlawyers.com; jt@pkhlawyers.com; john@johnbagleylaw.com; jchandler@djplaw.com; cfrandsen@djplaw.com; judsonpitts@hotmail.com; judson@wimmerpitts.com; krw@scmlaw.com; ec@scmlaw.com; intakeclerk@scmlaw.com; markjgregersen@hotmail.com; feindtp@sec.gov; pmoxley@djplaw.com; cwatters@djplaw.com; tburns@djplaw.com; ajackson@djplaw.com; rpahnke@djplaw.com; utfedcourt@djplaw.com; steve@skclawfirm.com; saltlakedocketclerk@ballardspahr.com

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