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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.

**MOTION FOR CIVIL MONETARY  
PENALTIES AGAINST CURTIS L.  
DeYOUNG**

Case No.: 2:14-cv-00309

Judge Robert J. Shelby

Magistrate Judge Dustin B. Pead

Plaintiff Securities and Exchange Commission (the “Commission”) hereby files this  
Motion for Civil Monetary Penalties Against Curtis L. DeYoung.

**INTRODUCTION**

On April 24, 2014, the Commission filed a Complaint against Curtis L. DeYoung (“DeYoung”) and his entity, American Pension Services (“APS”)<sup>1</sup> alleging that DeYoung personally and as the owner and agent of APS violated Sections 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933 (“Securities Act”) (Docket No. 1). Specifically, the Commission alleged that, beginning as early as 2000 and continuing until the action was filed, DeYoung misappropriated over \$24 million of investor funds in an ongoing scheme that defrauded over 5,000 APS customers.

On April 21, 2016, DeYoung consented to the entry of a Judgment without admitting or denying the allegations of the Complaint. (Docket No. 745). The Judgment, which was executed by the Court that same day, permanently restrained and enjoined DeYoung from violating Sections 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as Section 17(a) of the Securities Act. (Docket No. 747). The Judgment further ordered DeYoung to pay \$29,978,332.71 in disgorgement of ill-gotten gains and prejudgment interest thereon. The Judgment also ordered DeYoung to pay a civil monetary penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act. *Id.* The Judgment left the determination of the amount of the civil monetary penalty to be determined upon motion from the Commission. *Id.*

The Commission now files its motion for civil monetary penalties against DeYoung. To deter future violations of the securities laws, and as a penalty for his wide scale fraudulent

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<sup>1</sup> This motion pertains only to DeYoung.

conduct, the Court should order substantial third tier civil monetary penalties against DeYoung pursuant to Section 21(d)(3) of the Exchange Act and Section 20(d) of the Securities Act.

### STATEMENT OF FACTS<sup>2</sup>

1. On April 24, 2014, the Commission filed the instant action against APS and DeYoung requesting, among other relief, an *ex parte* temporary restraining order (“TRO”) against APS and DeYoung. The Court granted the Commission’s application that same day, entering a temporary restraining order against future violations of Sections 17(a) of the Securities Act of 1933 (“Securities Act”) and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder. (Docket No. 8). The Court also entered an order freezing the defendants’ assets, appointing Diane Thompson as a receiver over the assets and Piercy Bowler Taylor & Kern (“Piercy Bowler”) as the Accountant for the Receiver. (“Receivership Order”) (Docket No. 9).

2. Both APS and DeYoung were served with the Complaint, the TRO, and the Asset Freeze Order on Monday, April 28, 2014. After extensive briefing on the issue and expedited discovery, on July 23, 2014, the Court granted the Commission’s request for entry of a preliminary injunction against DeYoung and continued the asset freeze and appointment of the Receiver. *See* Docket No. 167.

3. Prior to the filing of this action, APS was a Utah Corporation which operated as the administrator for self-directed IRA, HSA, SEP and 401k retirement plans. Curtis DeYoung

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<sup>2</sup> These facts are provided to the Court to provide background information on the case. In the Consent entered in this case (Docket No. 745), DeYoung agreed to neither admit nor deny these facts.

was the President and sole shareholder of the company. (*See* Declaration of Mark D. Hashimoto (“Hashimoto Dec.”) at ¶ 1, attached hereto as Exhibit A).

4. The APS Master Trust Accounts consisted of three bank accounts at First Utah Bank which held the combined cash balances for all APS client accounts. Beginning in December 1999, there was a cash shortfall between the combined APS client cash balances as represented in the APS accounting system and the actual cash balance held in the APS Master Trust Accounts. By April 24, 2014, this discrepancy had grown such that the actual cash in the Master Trust Accounts was deficient by a total of approximately \$24.6 million. *See* Ex. A, ¶ 2.

5. Attached as Exhibit 3 to the Hashimoto Declaration is a monthly summary of the increase in the cash shortfall in the APS Master Trust Accounts. *See* Exhibit A. Exhibit 3 compares the cash balance as shown in the monthly bank statements issued by First Utah Bank (“APS Bank Balance”) to the combined APS investor account balances based on the APS accounting system (“APS Book Balance”). As can be seen in Exhibit 3, the actual cash balance at First Utah Bank was significantly less than what should have existed based on the accounting records of APS, and by April 24, 2014 this cash shortfall had grown to \$24,604,999.32. *See id.*, ¶ 4.

6. For the periods August 1, 2005 through March 31, 2014, Mr. Hashimoto also reviewed monthly bank transaction listings prepared by APS employees to account for and include checks which were issued and recorded in the APS accounting system, but had not yet cleared the bank (“Outstanding Checks”). These Outstanding Checks further added to the cash shortfall. It should be noted that for those months in which a monthly bank transaction listing

was not located, the potential Outstanding Checks for those months would have only increased the discrepancy between the APS Bank Balance and the APS Book Balance shown in Exhibit 3. *See id.*, ¶ 5.

7. The cash shortfall discussed above was the result of the unauthorized misuse of funds by Curtis DeYoung, the owner and President of APS. *See id.*, ¶ 6.

8. During the period from 1992 through May 6, 2008, Curtis DeYoung was the only authorized signer on the APS Master Trust Accounts. *See id.*, ¶ 7. Attached as Exhibit 4 to the Hashimoto Declaration are copies of the signature cards for the APS Master Trust Accounts accompanied by an email from Tricia Cook at First Utah Bank explaining the history of the accounts. *Id.*

9. Mr. Hashimoto supervised an analysis of bank transfers out of the APS Master Trust Accounts to identify funds which were transferred to payees unrelated to APS client accounts which were not authorized by APS clients. *See id.*, ¶ 8. Attached as Exhibit 5 to the Hashimoto Declaration is a listing of the unauthorized wire transfers which were identified to date, totaling \$19,078,381.61. Exhibit 5 also contains copies of the wire transfer requests and supporting documentation which document the transfers identified. *See id.*

10. It should be noted that detailed information to identify unauthorized transfers could not be located for periods prior to September 2004. *See id.*, ¶ 9. Therefore, unauthorized transfers could not be specifically identified prior to September 2004.

11. This misuse of funds and the resulting shortfall was concealed by Curtis DeYoung. *See id.*, ¶ 10. In a transaction dated October 19, 2009, a journal entry was recorded in

the APS accounting system to Account 1001 in the name of American Pension which reflected a decrease in cash in the amount of \$24,998,422.65. *Id.* The effect of this journal entry was to conceal the missing cash such that the overall cash balance in the APS accounting system would more closely match the cash that actually existed in the APS Master Trust Accounts at First Utah Bank. Mr. Hashimoto determined that Curtis DeYoung's user name and password for the APS accounting system was the only combination which could view and access account 1001 in the APS accounting system. *Id.*

12. In order to identify the missing funds, a basic bank reconciliation which reconciles the APS Bank Balance to the APS Book Balance would have revealed the existence and magnitude of the missing cash at First Utah Bank. Such a bank reconciliation is a standard operating task and procedure for virtually all businesses in any industry. Mr. Hashimoto found no evidence or documentation that shows that, prior to March 2014, such a bank reconciliation was ever performed by any of the employees of APS. *Id.*, ¶ 11. Based on interviews with APS employees, none of them were aware of any such bank reconciliation being performed on a contemporaneous basis until Lamont Smith did a bank reconciliation in March 2014. *Id.* As such, there appears to have been no internal controls implemented by Mr. DeYoung which would have identified the missing cash.

13. Mr. Hashimoto analyzed the accounting data related to the Master Trust Account from January 1, 2004 through April 24, 2014 to identify the plan participants who have liquidated retirement accounts held by other administrators and rolled those funds into a new account at APS. *Id.*, ¶ 12.

14. A comparison of the amounts rolled over versus amounts contributed by plan participants is shown below:

ROLLOVERS

Number of Participants	5,262
Amount Rolled Over	\$308,934,871

CONTRIBUTIONS

Number of Participants	4,818
Amounts Contributed	\$ 27,880,203

*See id.*, ¶ 13.

15. As can be seen above, the dollars which had been rolled over from existing retirement accounts to APS were over ten times as much as amounts contributed during the period from January 1, 2004 through April 24, 2014.

16. In order to identify the plan participants and the amounts which were rolled to APS, Mr. Hashimoto and his staff performed the following:

(1) Mr. Hashimoto identified the accounting transaction codes which related to rollovers which included “ROLC” which relates to cash transferred from ERISA qualified plans to APS, and “TRFC” which relates to cash transferred from IRA’s or other non-qualified plans to APS.

(2) Mr. Hashimoto sorted the data in the APS database during the relevant time period to segregate all transactions which were coded as “ROLC” and “TRFC.” In addition, he limited the transactions only to those which were less than 60 days after the

plan was initiated. This was done based on discussion with Megan Cloward who is in charge of new accounts. Ms. Cloward stated that it normally took less than 60 days to get paper work processed and funds transferred from other outside plans.

(3) Mr. Hashimoto eliminated all negative amounts which would relate to rollovers out of APS.

(4) Mr. Hashimoto analyzed the remaining transactions to eliminate any adjustments, corrections, stop payments, voids, refunds, internal rollovers or any other entries which would relate to the reversal or elimination of any transactions which were not valid rollovers.

(5) Finally, Mr. Hashimoto reviewed the individual transactions and their transaction descriptions to assure that the remaining transactions were rollovers of accounts to APS.

*See id.*, ¶ 15.

17. From the data compiled through the steps listed above, Mr. Hashimoto determined the number of plan participants and the dollar amounts rolled over from other accounts for each year from 2004 through 2014 prior to the Receivership. *Id.*, ¶ 16. Those results on a year by year basis are contained in Exhibit 6 attached to the Hashimoto Declaration.

18. As can be seen in Exhibit 6, in total, Mr. Hashimoto identified 5,262 plan participants who had rolled cash totaling \$308,934,871 from other former retirement plans to APS administered plans during the period from January 1, 2004 through April 24, 2014. *Id.*, ¶ 17 and Ex. 6 attached thereto.



19. In contrast, Mr. Hashimoto identified plan participants who had made contributions of funds directly to APS, and were not rolled from another plan. *Id.*, ¶ 18. Again, he identified the accounting code of “CONT” which related to all contributions of funds to APS accounts, and sorted the APS data to isolate all contributions by participants. His findings on contributions on a year by year basis are shown in Exhibit 7 attached to the Hashimoto Declaration. As can be seen in Exhibit 7, during the period from January 1, 2004 through April 24, 2014, a total of 4,818 plan participants contributed a total of \$27,880,203.

20. During the course of the litigation, Mr. DeYoung on several occasions attempted to circumvent the Court-imposed asset freeze by transferring or concealing cash and valuable property from the Receiver.

21. The first major instance of DeYoung’s efforts to violate the asset freeze occurred just days after the action was initiated. On April 28, 2014, DeYoung, acting with the assistance of his wife, Michelle DeYoung, and his former APS paralegal, Dean Becker, liquidated nearly \$200,000 from four accounts held at Zions First National Bank and redposited those funds into three newly opened bank accounts held at Brighton Bank. *See* Doc. No. 48, Emergency Motion for Writ of Seizure, p. 9, and Exhibit 4 attached thereto.

22. At or around that same time DeYoung also removed valuable property from his home and attempted to sell the property for \$10,000. *See id.*

23. After learning of DeYoung’s efforts, the Receiver sought emergency action seeking to further clarify the scope of the asset freeze and to take possession of the property and assets in question. The Motion was granted on May 15, 2014. *See* Doc. No. 55.

24. The second major instance of DeYoung attempting to violate the asset freeze occurred much more recently. On Thursday, April 7, 2016, Ricky Memmott, Michelle DeYoung's employer, discovered a 20 gallon plastic bin and two separate bags full of jewelry, precious stones, silver, collectible coins, and other valuable personal property concealed by the DeYoungs in the ceiling of one of Memmott's vacant offices, to which Curtis and Michelle DeYoung had been given access. *See* Notice of Noncompliance with Receivership Order, Doc. No. 748.

25. DeYoung does not contest that he concealed these assets, in violation of the asset freeze, from the Receiver.

### **ARGUMENT**

DeYoung should be ordered to pay significant civil monetary penalties as a result of his massive and long-standing fraudulent enterprise, and because of his lack of remorse or acknowledgement of any wrongdoing. DeYoung stole tens of millions of dollars from unsuspecting investors who had placed their trust in him to safeguard and administer their retirement funds. After stealing their retirement funds, he then went to great effort to conceal this theft for years, further multiplying the harm to thousands of new investors who now are now forced to shoulder the loss.

Throughout this action, DeYoung has remained obstinate and unrepentant, refusing to accept any responsibility for what were undisputedly his own actions. Instead, he has sought to cast blame on anyone and everyone else for the damage and harm he caused, including unscrupulous individuals who received (and either lost or absconded with) his misappropriated

funds, the bank that acted as the custodian of the funds, the Commission who put an end to his scheme, and the Court who has treated him, in his view, unfairly throughout these proceedings. Ultimately, it is DeYoung that bears the primary responsibility for the fraud he perpetrated on APS investors. As a consequence of his fraudulent actions, and to deter future violations, DeYoung should be given a substantial monetary penalty that is commensurate with his conduct.

In his Consent to Entry of Final Judgment (Doc. No. 745), DeYoung agreed that, upon motion by the Commission, “the Court shall order a civil penalty” pursuant to Section 20(d) of the Securities Act of 1933 and 21(d)(3) of the Securities Exchange Act of 1934. DeYoung further agreed that,

in connection with the Commission’s motion for civil penalties, and at any hearing on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of this Consent for the Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.

*Id.* at p. 2. Based on this Consent, the Court may therefore take as true and demonstrated the facts that it has already found preliminarily in this case, *i.e.* that, through an elaborate and longstanding scheme, DeYoung misappropriated over \$24 million from individual APS investors; that he undertook steps to conceal this misappropriation by making adjusting entries in the APS accounting records as to which only he had access; and that he sustained this fraud by bringing in tens of millions of dollars each year in new investor cash, thus preventing the balance

in the Master Trust Account from falling below a level that would have revealed the massive shortfall. *See* Statement of Facts (“SOF”) ¶¶ 3-19.

Civil penalties are available in securities actions such as this to provide a monetary sanction as a consequence of the defendant’s fraudulent conduct. “Disgorgement alone is an insufficient remedy” as “there is little deterrent in a rule that allows a violator to keep the profits if [he] is not detected, and requires only a return of ill-gotten gains if [he] is caught.” *SEC v. Inorganic Recycling Corp.*, Fed. Sec. L. Rep. P 92, 269 (S.D.N.Y. 2002). The Securities Act and the Exchange Act permit the Commission to seek civil penalties either tied to each violation of the federal securities laws or in an amount equal to the gross pecuniary gain, whichever is greater. Securities Act, 15 U.S.C. § 77t(d); Exchange Act, 15 U.S.C. § 78u(d)(3). The Court exercises discretion in determining the proper amount of the penalty. *See SEC v. Universal Exp., Inc.*, 646 F.Supp.2d 552, 567 (SDNY 2009).

Civil penalties are imposed both to punish and to deter the wrongdoer from similar misconduct in the future. Accordingly, the factors considered to determine the likelihood of future violations for the purposes of a permanent injunction are also useful in assessing civil penalties. *SEC v. Smart*, 2011 U.S. Dist. LEXIS 61134 at 55 (D. Ct. Utah 2011) (citing *SEC v. Brethen*, 1992 U.S. Dist. LEXIS 20665 at 104 (S.D. Ohio 1992)). When determining the appropriate civil penalty to impose, the *Smart* court recognized and examined three salient factors identified originally in *SEC v. Youmans*: (i) the egregiousness of the violations, (ii) the isolated or repeated nature of the violations, and (iii) the degree of scienter involved. *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir.1984); *see also SEC v. Deyon*, 977 F. Supp. 510, 519 (D.

Me. 1997) (imposing \$75,000 penalty against Defendant based on his “fraudulent” conduct); *SEC v. Custable*, 1996 U.S. Dist. LEXIS 19321 \*\*13-14 (N.D. Ill. 1996) (imposing a civil penalty of \$60,000, less than the maximum penalty, based in part on Defendant's cooperation during the course of litigation).

A third-tier penalty is appropriate where the violations (1) involve “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” and (2) “directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.” Securities Act, 15 U.S.C. §§ 77t(d)(2)(c); Exchange Act, 78u(d)(3)(b)(iii).

The facts in this case confirm that a third tier civil monetary penalty is appropriate under both the Securities Act and the Exchange Act. Between 1999 and 2007, DeYoung stole, and then lost or spent, over \$24 million from APS investors – investors who had entrusted him with their retirement funds. *See* SOF ¶ 7-8. After stealing the funds, beginning in 2007 and continuing until this action was filed, DeYoung then undertook steps to conceal the theft and loss from other APS employees, investors, and First Utah Bank, by making adjusting accounting entries in APS’s financial records. *See* SOF, ¶ 11. There is no dispute as to his culpability in this theft and subsequent cover up – he alone authority to authorize the transfer of funds out of the Master Trust Account, and he alone had access to the APS accounting file in which he made the adjusting entry. *See* SOF ¶¶ 7-11.

After making these adjustments in the accounting records, DeYoung further concealed his theft by enthusiastically and repeatedly inducing thousands of new investors to roll their retirement funds into APS without informing them that, in doing so, they would immediately

become victims in his fraudulent scheme. *See* SOF ¶¶ 13-19. DeYoung was phenomenally successful in persuading new investors to roll over their IRA funds , bringing in over \$30 million each year from 2009 to the time this action was filed. *See id.* DeYoung used these new investor funds to sustain his fraud for years. The newly-rolled-over funds enabled to DeYoung to keep a sufficient cash balance in the Master Trust Account that prevented his misappropriation, and the resulting shortfall, from becoming manifest. Each new investor that rolled his or her funds into APS became a new victim. Moreover, once the loss reached its near highpoint in 2007, the APS bank and financial records clearly demonstrate that DeYoung made virtually no effort to repay the stolen funds, as the shortfall fluctuated between \$24 million and \$26 million from that point until the action was filed. *See* SOF ¶¶ 4-5.

Even after having been caught by the Commission, and having the scope of his fraud revealed in full relief, DeYoung did not cease his efforts to further victimize his investors. Three days after the Commission initiated this action, DeYoung liquidated nearly \$200,000 in funds that were subject to the asset freeze and sought to deposit them in a separate financial institution. SOF ¶¶ 21-23. In the days following this effort, he removed items from his home and sought to sell personal property for \$10,000. *See id.* All of these assets, again, were subject to the asset freeze. More recently, additional frozen assets that DeYoung had improperly absconded with were serendipitously found concealed by DeYoung in the rafters above a work space made available to the DeYoung's by Michelle DeYoung's employer. SOF ¶ 24. These assets, consisting of jewelry, gems, silver, collector coins, and other valuable personal property have a value well into the tens of thousands of dollars.

Through all of these known actions, DeYoung has demonstrated a remarkable disregard of the harm his fraud has caused and an unwillingness, or inability, to acknowledge or take responsibility for his actions. DeYoung clearly knew, and knows, what he is doing. The fact that he attempts to conceal his actions clearly demonstrates that he knows that what he is doing is wrong. As such, there can be no question that his actions were egregious, that they were repeated, and that in perpetrating his fraud DeYoung acted with a high degree of scienter. A third-tier penalty therefore is very appropriate in this case.

As discussed briefly above, for violations occurring between the dates of February 1, 2008 and November 30, 2015, third tier civil penalties may be imposed at a rate of up to \$130,000 per violation (*i.e.* each of the thousands of APS customers who became victims of his fraud), or in the amount of the gross pecuniary gain, whichever is greater. *See* 17 C.F.R. 201.1003. Within these guidelines, it is in the Court's discretion to determine the proper amount of the civil penalty, and how that amount is determined – whether by multiplying the statutory \$130,000 amount by the thousands of individual violations here, or by setting the penalty at some fixed amount up to the \$24 million pecuniary gain.

Although it is unlikely that DeYoung will ever fully repay the disgorgement ordered in this case, considering the magnitude of the loss and the criminal sanctions DeYoung is currently facing, it is nevertheless appropriate to still bestow a significant monetary penalty in addition to the disgorgement amount. Ordering a significant penalty that may never be repaid is necessary and proper, as it is a public recognition of the magnitude of DeYoung's fraud and the serious and generational consequences his fraud has and will have on his investors. As a result, in

determining the penalty, the Commission simply requests that the Court choose an amount that reflects the gravity of DeYoung's fraud and that his subsequent actions have threatened to further victimize APS investors.

### **CONCLUSION**

For the foregoing reasons, the Commission respectfully requests that the Court grant the Commission's Motion for Civil Monetary Penalties against Curtis L. DeYoung.

Dated this 21st day of June, 2016.

Respectfully submitted,

/s/ Daniel J. Wadley  
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Securities and Exchange Commission



**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of June, 2016, I served the foregoing **MOTION FOR CIVIL PENALTIES AGAINST CURTIS L. DEYOUNG** through the Court's CM/ECF system on the following:

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