(954)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

VS.

AMERICAN PENSION SERVICES, INC., A UTAH CORPORATION AND CURTIS L. DEYOUNG, AN INDIVIDUAL,

DEFENDANTS.

CASE NO. 2:14-CV-309

SALT LAKE CITY, UTAH
MAY 21, 2014

MOTION HEARING
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:33 A.M.)

3 THE COURT: Good morning everyone. We'll call case
4 number 2:14-CV-309. This is the Securities and Exchange
5 Commission versus American Pension Services and Curtis
6 DeYoung. Paul Moxley is here on behalf of Curtis DeYoung on a
7 limited appearance I think.

8 MR. MOXLEY: Yes. Good morning, Your Honor.

9 THE COURT: Good morning, Mr. Moxley. Daniel
10 Wadley, and is it Paul Feindt?

11 MR. FEINDT: Yes.

12 THE COURT: For the SEC. Mark Gaylord on behalf of
13 Receiver, Diane Thompson, who is with us this morning. Good
14 morning to all of you as well.

15 This is the time initially previously set for hearing on
16 a preliminary injunction. We had a telephonic conference with
17 the attorneys yesterday in view of some late filings by
18 Mr. DeYoung. And so that everyone is aware, and our docket
19 will reflect, based on the stipulation and agreement of the
20 attorneys, we have scheduled -- we have put in place a
21 briefing schedule both on the motion filed by the SEC for a
22 preliminary injunction and also on a motion filed by
23 Mr. DeYoung to dissolve the temporary restraining order and
24 the Receivership, and those motions will be heard now on June
25 20th.

1 In the interim, we have a handful of housekeeping matters
2 to take up, and I propose we move in this fashion. First, we
3 have the Receiver's motion to retain counsel to deal with
4 insurance coverage issues given the conflict that has arisen.
5 This is docket number 63. I've reviewed that motion, I find
6 good cause in support of it, and that motion is granted.
7 Second, there's a motion filed by the Receiver for
8 clarification concerning the Court's order appointing the
9 Receiver, freezing the assets, and for other relief. That is
10 docket number 54. The Receiver has also filed docket number
11 56 requesting expedited consideration of that motion. Your
12 motion for expedited consideration is granted. We'll decide
13 this issue today. And that's what I propose we next do.
14 And then I propose we take up, Mr. Moxley, your
15 attorney's fees issue.
16 Mr. Gaylord, let me invite you to come to the podium. I
17 have a handful of questions for you. I have carefully
18 reviewed your submission, and I think I understand it in
19 nearly all respects. Maybe for the benefit of those who
20 haven't seen it, why don't I give you a moment to just
21 articulate the relief that you're seeking and the basis for
22 it. Give us a little background, and then I some specific
23 questions for you.
24 MR. GAYLORD: Certainly, Your Honor. I think the
25 motion reflects that this is not your typical Receivership.

1 This isn't a Receivership in which we take over the company
2 and look for an immediate liquidation plan. We have a company
3 that does have a viable business operation in which it has
4 5,700, plus or minus, APS customers who have been using APS's
5 services for several years. I think in our preliminary report
6 we reflected that's been as high as up to 14,000. We're at
7 5,700.
8 There are a number of requests that have been made
9 because these are self-directed IRAs. These are individual
10 retirement plans created by each of the individual account
11 holders for the purposes of directing their own investments.
12 And one of the keys to this entire process has been when a
13 account is opened, the money that is either rolled into that
14 account, or it's usually cash, goes into a commingled account,
15 and that commingled account is the -- is part of what's at
16 issue in the SEC case. For the Receiver it's a little
17 different because it has a viable going business that it wants
18 to oversee and manage, while at the same time it has a
19 $24,000,000 liability that it needs to address and how it is
20 going about addressing that.
21 In addition to that, as a result, the Receiver is facing
22 how does it allow these self-directed investments, because you
23 have a variety? We gave you I think an example of the types
24 of people who have been inquiring, and I'm sure there's
25 several of them here in the audience today. They have real

1 investments that need to be addressed with on a daily basis.
2 For example, we have APS clients who has a self-directed IRA
3 that owns a piece of real property, and that real property may
4 need to be maintained. It has -- it may be a rental piece of
5 property, so it's got to maintain the premises. It's got to
6 keep upkeep.
7 There's just a variety of instances that come up that
8 have to be paid on a regular basis or else association fees
9 are paid or not paid, the association then would have a
10 priority lien. And those are the kind of transactions we want
11 to be able to deal with.
12 The title companies -- we also have those where the buyer
13 is interested in selling that real property. He has a buyer
14 for it. He wants to sell it. And then he wants to take that
15 cash and reinvest it into another piece of real property.
16 The title companies, because of the Court's order, has
17 been reluctant to allow those transactions to either close
18 and/or they are holding escrowed funds pending the outcome of
19 the Receivership. We think that the order that the Court has
20 already signed under paragraphs 3A and B do give the Receiver
21 some discretion, but we really would like the Court's
22 involvement in that decision-making process so that we feel
23 comfortable that the Court is comfortable with our decisions.
24 Another type of investment that we're dealing with is a
25 self-directed transaction being requested that involves an APS

1 client who assigned an interest in a limited liability company
2 and seeking to reinvest that, that sales proceeds, into a new
3 limited liability company. The Receiver has concerns, and
4 because of that we want to facilitate those transactions, but
5 we want to do so without causing necessary harm to the overall
6 APS customers.
7 I'll just kind of quickly run through the types of
8 transactions. We've received requests to fund newly formed
9 LLC entities from the cash that's currently held in an APS
10 Master Trust Account by a particular client. Once the cash is
11 funded to the LLC, the Receiver has no ability to control,
12 however, the deployment of this cash.
13 There are also situations in which an APS client
14 deposited funds into the APS Master Trust Account a day or two
15 before and now they're faced with wanting to make an
16 investment and can't make that investment because of the
17 frozen funds. And the Receiver is interested in allowing
18 those transactions to go forward under certain terms and
19 conditions.
20 It also wants -- it also has a concern because there
21 are -- there are APS clients who are over the age of 59 and
22 some of which who are over the age of 70 who have an absolute
23 obligation to have distributions or else they'll suffer IRS
24 penalties. So we're looking for the discretion to do that.
25 We want to move forward with allowing a limited number of

1 those transactions on a case by case basis. We will evaluate
2 those to determine whether -- to ensure that we have the
3 required verifications, assurance that there are sufficient
4 funds, and that we closely track the use of those funds.
5 One of the things that our motion deals with though is a
6 holdback provision, and that may be the most important aspect
7 from the Receiver's point of view. And that is because of the
8 loss of the $24,000,000, the Receiver is faced with the second
9 part of what the Receiver does, which is how do we try to
10 recover the $24,000,000 loss? Do we sell the assets of APS?
11 Do we sell the assets of the DeYoungs? Do we use that source?
12 The insurance -- there's potential insurance. There's other
13 potential claims that may be out there that we're evaluating,
14 fraudulent transfer claims that -- from monies that have gone
15 to third parties fraudulently.
16 As a result of those transactions, and because we don't
17 know what the outcome will be, we want to hold back 20 percent
18 of any investment or ensure that anyone who wants to make
19 these transfers, any self-directed APS client who wants to
20 make these transfers, has the sufficient funds to cover a
21 proportionate share of the potential loss because that may be
22 the only way everybody shares in a proportionate basis for the
23 losses.
24 As you know, sometimes you have winners and losers. We
25 haven't evaluated all those aspects, but until we do, we need

1 to assure that if transactions are going to go forward that
2 the APS clients have left in the pipe, if you will, the
3 ability for us to take that and spread the loss across
4 everybody. I'm not saying that's what we're going to do. I'm
5 simply saying that's an option that we are evaluating, and we
6 can't allow APS trust funds to be used just simply going out.
7 The other hurdle we have is what's to -- basically as you
8 might term it a run on the bank. Everybody, once we open up
9 the door, the flood gates go out and these clients suddenly
10 say we're moving our account.
11 And that's going to be a difficult thing moving forward
12 for two reasons. One is there is a management fee that's
13 charged. We want to give the APS clients the ability to
14 continue to direct their investments within some guidelines,
15 to also request and assure that they continue to make the
16 management fees, because for this to really succeed is going
17 to require the cooperation of both the receiver and the APS
18 clients in making sure those management fees are paid so that
19 we can continue to do business and continue to decide if we
20 can take that whole block of clients, sell it as -- to another
21 third-party administrator or such.
22 So that's really the gist of what we're seeking in terms
23 of the relief.
24 THE COURT: All right. So with respect to that 20
25 percent liquidity issue, I think my first question for you

1 relates to paragraph number 14 of your submission which is on
2 page 11. And you identify in your paper beginning on page 12
3 seven different kinds of transactions you're asking the Court
4 to authorize, and many of them make reference to including a
5 limitation and acknowledgment in a form that's generally
6 described in paragraph 14.
7 I think I understand perfectly well the purpose for the
8 acknowledgment you're requesting. I don't understand why
9 you're proposing that the account holders be required to
10 maintain or reach a ratio of 20 percent cash to asset value
11 prior to any reinvestment as opposed to post-reinvestment. If
12 I understand the concern, it's -- it's twofold, but it
13 involves some issue involving the liquidity of the cash
14 account and especially for folks for example under your
15 subparagraphs C and D who are looking to utilize cash and
16 employ it through purchasing non-liquid assets. You're
17 seeking to avoid the difficulty that may arise if there's a
18 net loss and everyone is in six percent, say -- I'm making
19 that up -- and somebody has to try to sell a non-liquid asset
20 to cover that, everyone is better off if there's some cash
21 reserve.
22 Have I misread what you've stated in paragraph 14 or do
23 you intend the 20 percent be cash left after any reinvestment?
24 MR. GAYLORD: Our hope would be that it would be a
25 little bit of both. Maybe that's not the answer you're

1 looking for. You know, I think you've hit it exactly on the
2 point. I mean if there is let's say a hundred thousand
3 dollars into -- in one person's APS cash account, we would
4 prefer to keep a $20,000 cash in that cash account for that
5 client if they want to invest 80,000. The problem with that
6 might be that the investment requires a hundred thousand.
7 So then the question is, well, is there a means to giving
8 that -- allowing them to use the hundred but we have
9 assurances that you're going to liquidate that asset. It's a
10 simple thing if it's stock. If somebody takes a hundred
11 thousand dollars cash and invests it in a stock, that's easy.
12 But when its invested in real estate or invested in a small
13 LLC, it doesn't necessarily have the asset base. That cash
14 could then be squirreled away and skirted away without any
15 ability for us to recover that 20 percent. So the idea is we
16 have to be able to evaluate whether or not we need to hold
17 back that 20 percent, $20,000 as the case may be in that
18 circumstance.
19 THE COURT: And where does 20 percent come from? If
20 I do some quick math in my head, that will make the account
21 overliquid. I mean I can't imagine -- given the loss, I can't
22 see the 20 percent is -- it may be the right number. Is it
23 too high?
24 MR. GAYLORD: It's a good question.
25 THE COURT: The tension that I see is -- I'm not

1 expert in this. It seems to me that both the Receiver, APS
2 and the investors have some interest in facilitating the
3 deployment of that cash in ways that help promote returns. So
4 don't we want to enable people to use as much of that as they
5 can to try to generate returns and keep as little back as we
6 need to ensure that we can cover a prospective loss?
7 MR. GAYLORD: The answer to that is yes, Your Honor.
8 The 20 percent comes up as an out of an abundance of caution
9 because we still don't have a full picture of what the
10 potential exposure is. For example, there is a
11 $382,000,000 -- based upon the records we've looked at, we
12 have 5,700 clients with a purported value, market value, of
13 $382,000. If you take that and take the $24,000,000 loss, you
14 get to the six or seven, eight percent delta. But we believe
15 the 382 is overstated. So then that means are we at six
16 percent, are we at 12 percent, are we at 20 percent? So the
17 20 percent becomes a con -- maybe -- maybe a conservative
18 number we think in order to assure that we have sufficient.
19 Of course, if it's in cash, it's not like it's going
20 anywhere. We are tracking it exactly. One of the things
21 we've been -- had the benefit of doing, we know what the loss
22 is as of April 25th. We're tracking now any money that's
23 coming in so we know what that account looks like going
24 forward. So we can track it fairly closely. Our concern then
25 comes with just the impact at the end of the day when we

1 present the liquidation plan for APS, what it's going to look
2 like and how much we're going to be able to recover and what
3 that delta will be at the end of the day.
4 THE COURT: So I think we're saying the same thing.
5 How does the 20 percent cash to asset value prior to reinvest
6 give you the protection you're -- am I just misunderstanding
7 how that operates? Don't -- do we mean 20 percent after
8 reinvestment?
9 MR. GAYLORD: Yes.
10 THE COURT: All right. That addresses I think my
11 questions about subparagraphs C and D. You raised just a
12 moment ago an issue that was confusing to me about
13 subparagraph E. This relates to new cash coming in from
14 investors. And in your proposal here on page 12, and then you
15 discuss it again further on page 17, you suggest that clients
16 that bring new cash into the APS master trust account have
17 access to that account -- excuse me -- access to that cash,
18 but then you say subject to the disclosure requirements in
19 paragraph 14.
20 As I understand how the Receiver is treating that money,
21 folks that bring in new money do so without fear that they're
22 going to lose some portion of that to the loss that predated
23 the new cash coming in. So is there any reason for there to
24 be a disclosure under -- or a limitation under paragraph 14?
25 That new cash is theirs. You're not going to reach into those

1 accounts; is that right?
2 MR. GAYLORD: I think the answer is yes. I mean the
3 answer is yes to that. We can --
4 THE COURT: Well, the folks in the courtroom and
5 elsewhere need the answer to that question I think.
6 MR. GAYLORD: The answer to that is yes because we
7 can track it. I suppose your concern -- our concern would be
8 as it relates to that transaction, I suppose that the Receiver
9 could easily say you can invest that hundred thousand because
10 it's traced outside of the April 25th without any limitations.
11 SO I guess the answer to that would be yes. We don't
12 necessarily need the qualification. The qualification comes
13 with if -- if it's new money coming in, that's a different
14 story than -- than if it's old money that's coming in but it's
15 based on an old investment. So if they sold stock and it's
16 coming into the cash account, so they have new cash in, we
17 know that it came in after April 25th, we know it's from the
18 investment but it's part of the APS clients' investments prior
19 to April 25th is the other issue we have, and I suppose that's
20 different than paragraph E.
21 THE COURT: Ms. Thompson, you had something to add.
22 MS. THOMPSON: Yes, I was trying to clarify that,
23 Your Honor, that the cash infusion could come from the
24 liquidation of an asset that was in place prior to April 25th,
25 in which case that account could potentially be impacted

1 because of the commingling status as opposed to clearly new
2 cash from a new account, which we don't anticipate having a
3 significant number of those in any event.
4 THE COURT: All right. So that's what paragraph E
5 addresses is the former?
6 MR. GAYLORD: Yeah.
7 THE COURT: Now I understand. Okay. Mr. Gaylord,
8 let me direct your attention to paragraph nine beginning on
9 page seven. I think you were describing here -- I think
10 there's a good deal of work to do even to define your
11 priorities moving forward. I don't understand what is
12 intended -- what you intend to communicate when you say in
13 paragraph nine that it is becoming apparent that it may not be
14 possible or economically prudent for the forensic accountants
15 to identify or trace the specific APS client's cash that was
16 affected by the identified $24,000,000 loss. What do you mean
17 by that?
18 MR. GAYLORD: That is a reference to the difficulty
19 that may exist in attempting to trace back where exactly that
20 $24,000,000 loss is attributable to. As you know, the APS
21 trust account is a commingled account. Its a been a
22 commingled account since its inception. So we have investors
23 who may have been an APS client put in a hundred thousand
24 dollars and in 2010 took out that $200,000 -- or that hundred
25 thousand dollars and is a hundred percent whole.

1 We have others who now come in late in the game who just
2 barely put in money and they're looking at a cash loss in
3 their account of 50 percent, if you will. So what we're
4 wondering and what we're still evaluating is what is it going
5 to be? What's it going to cost this Receivership to go back
6 and do that tracing, or are we better off proposing a plan in
7 which we allocate the loss across all current clients? It may
8 be easier to do that because you then -- everybody just
9 realizes they suffer a loss.
10 There are going to be though APS clients who say no. I
11 know exactly where my money is. I can trace it to the penny.
12 I have everything. And so we have to deal with those issues
13 in terms of how APS clients look at it. I mean I can tell you
14 we receive, you know, communications with APS clients saying,
15 look, I know exactly where my money is, so I shouldn't have to
16 share in the loss.
17 So what that means is just simply we aren't quite sure --
18 the forensic accountants aren't quite sure where they're going
19 to get it. It also is dependent -- let's not forget, we have
20 a company that when we took over had a shortfall. We know
21 that that company has only about 150,000 in its operating
22 account. That's it. And we're -- although we've
23 substantially reduced expenses, we don't have all of the
24 necessary funds. And I think, as Mr. Wadley told you early
25 on, our hope is, the Receiver's hope, is to regenerate revenue

1 sufficient to cover the costs of operating the business and
2 the administrative costs. So right now there's just barely
3 enough in that operating account to do so.
4 The company itself, APS, although generates revenue of
5 approximately $2,000,000 a year, that's gross revenue. That's
6 not net. And as of 2013, the records reflected a gross net
7 operating income of only $254,000, which was then distributed
8 out by APS's President, Mr. DeYoung, to himself in the tune of
9 83,000, to Judson Pitts in the tune of 30,000, in the tune of
10 155,000 to Michael Memmott who has been implicated in this
11 lawsuit for investment. So there's no real income, no cash,
12 for them.
13 So we're looking at having to identify how we allocate
14 that loss, and the only way we can do so is with excess profit
15 generated from our operations of the Receivership at APS, and,
16 two, claims against APS assets, the DeYoungs, and any other
17 claims that we may have against people like Michael Memmott to
18 recover stuff for fraudulent transfers, and family.
19 THE COURT: There's a defined term in your paper,
20 the loss period, which you define, if I read it correctly, as
21 the period from the -- from the formation of APS in 1982 to
22 the date of the appointment of the Receiver.
23 MR. GAYLORD: Right.
24 THE COURT: You don't intend that to be the loss
25 period in some formal sense moving forward in allocating loss.

1 That's a convenience for the purpose of this paper. Are you
2 undertaking some effort to identify more specifically the
3 period in which the $24,000,000 loss occurred?
4 MR. GAYLORD: Yes. Our forensic accountants have
5 pinpointed I believe that the losses -- there became a
6 negative account or loss in the APS account in approximately
7 2000 to 2004. I don't have the exact date for you.
8 THE COURT: All right. All right. So with what I
9 think may be a modification in the final paragraph of the
10 proposed order that you submitted with your motion referring
11 to 20 percent cash to asset value prior to any reinvestments,
12 if you'll modify that in accordance with what we've discussed.
13 Mr. Moxley.
14 MR. MOXLEY: I'd like to be heard briefly on these
15 topics, Your Honor.
16 THE COURT: So I thought about this, and I observed
17 that your notice of limited appearance was quite specific
18 about the issues that you were appearing to address. But why
19 don't we hear from you before I rule. That's fine I think.
20 Thank you, Mr. Gaylord.
21 MR. GAYLORD: You're welcome, Your Honor.
22 THE COURT: In this respect, I think, Mr. Moxley,
23 everyone, including Mr. DeYoung and APS and the Receiver, I
24 think we all have the same interest here in ensuring that
25 we're not further harming investors who are in essence

1 victims, if there is in fact a $24,000,000 shortfall from
2 their accounts. This seems to me an effort to facilitate some
3 level of protection for those folks on an ongoing basis, but
4 I'm anxious to hear what you think.
5 MR. MOXLEY: Appreciate that. Incidentally,
6 Mr. Burns has joined us. He's also a lawyer of record. He
7 had another Court hearing, apologizes for being late.
8 THE COURT: Thank you.
9 MR. MOXLEY: Judge, I don't want to belabor the
10 arguments that we made in reference to the motion to dissolve,
11 and I don't know whether the Court has had an opportunity to
12 review those. When we spoke last -- yesterday afternoon you
13 hadn't had that opportunity yet.
14 THE COURT: I reviewed them last night.
15 MR. MOXLEY: Thank you for that. And I recognize
16 that we have agreed, counsel and the Court, to defer argument
17 on those points until later, June 20th, or whenever --
18 whenever we get to do that. But I'm duty bound to explain to
19 the Court that it's the view of Mr. DeYoung that this ex parte
20 order was improperly entered because there are no violations
21 of the securities statutes.
22 THE COURT: You mean the ex parte TRO application
23 and appointment of the Receiver?
24 MR. MOXLEY: That's correct.
25 THE COURT: Right.

1 MR. MOXLEY: Because the point is is that the relief
2 that is sought is sought under the 33 act and the 34 act. And
3 we've given you many cases which involve a fairly complex
4 analysis, but at the end of the day it's fairly simple, that
5 there's no security that was sold here. And so consequently
6 Mr. DeYoung objects to any -- well, the appointment of the
7 Receiver and any further work by the Receiver.
8 And also in that connection, one of the issues we raised
9 was the statute of limitations. And we gave you the Gabelli
10 case, which is the U.S. Supreme Court case unanimous from the
11 Roberts Court, that as far as the Government is concerned,
12 when they bring a case under the securities statutes, there's
13 a hard stop of five years.
14 So, consequently, anyone who invested in APS -- well,
15 they didn't invest actually because you'd have to look at the
16 paper, and the relationship wasn't an investment relationship.
17 And if you read what it is APS was doing, it's obvious it was
18 all self-directed. There were no investment services sold,
19 etcetera, but we'll get to that later. So, consequently,
20 their -- their plan doesn't work at least as to the people who
21 invested after April of 2009.
22 THE COURT: I understand your argument in that
23 respect, Mr. Moxley. The concern that I have, of course, is
24 you've raised issues and the SEC has as well that merit
25 complete briefing and argument from the parties so that I can

1 make an informed decision, and in the interim we need to
2 protect these folks who have had their assets frozen.
3 MR. MOXLEY: Mr. DeYoung has concerns. But I didn't
4 want to stand quiet because Mr. DeYoung has very strenuous
5 objections to this Receiver and how this receiver is
6 proceeding. And what we really need here is something like a
7 Special Master or a CFO. And if you're going to run this
8 business, you have to go get new customers, which is what
9 Mr. DeYoung did all the time, and there was no discussion
10 about that in their plan operating the business. They've
11 retained all the employees except for the family members and
12 the lawyer and the accountant.
13 Anyway, I don't want to belabor the points, but I wanted
14 to give you the benefit of my thoughts.
15 THE COURT: I appreciate that, and I note
16 Mr. DeYoung's objection to the proposed order.
17 MR. MOXLEY: Thank you.
18 THE COURT: Thank you. Mr. Gaylord, if you'll
19 modify the last paragraph of your proposed order in the way
20 that we've just discussed and submit it to the Court, I'll
21 sign it and execute it and we'll enter it, and the Receiver
22 will be authorized to oversee and engage in those transactions
23 expressly identified in the order within the Receiver's
24 discretion.
25 MR. GAYLORD: Thank you, Your Honor.

1 THE COURT: All right, thank you.
2 Mr. Moxley, let's turn now, should we, to your motion to
3 release profits of APS for payment of attorney's fees. Let me
4 note first that this was filed I think late in the day -- was
5 it Monday evening?
6 MR. MOXLEY: Monday night.
7 THE COURT: And the SEC and the Receiver have both
8 expressed objection informally -- of course, the time for any
9 briefing on this motion has not yet lapsed, and they'll have
10 an opportunity to weigh in. I'm interested in determining
11 whether we can divide this motion. You've submitted a motion
12 that's really in two parts, one involving an $80,000 cash
13 retainer that you have personally investigated, and then the
14 second is your request for release of $240,000 that I think
15 you characterize as profits to enable Mr. DeYoung to pay his
16 lawyers. Why don't we focus first on the $80,000 part.
17 You mention in your papers that there was some request by
18 the SEC for what you termed privileged information in relation
19 to that $80,000. What did they ask you that you think called
20 for the disclosure of privileged information?
21 MR. MOXLEY: When I first was contacted about the
22 case, I called the SEC to obtain some sort of an agreement
23 about their agreeing to some funds being released, and the
24 answer was, well, we have a dollar in our pocket. And then
25 subsequently I think in that conversation and other

1 conversation I explained that I was getting money from friends
2 and family, and they wanted to know the details of who
3 provided the money, and I was unwilling to give that
4 information.
5 And what I did to vet the money, other than talk to the
6 lawyer in my firm who is responsible for ethical type stuff,
7 was I spoke with the client. And you have to recognize that
8 in the attorney-client relationship, particularly in the
9 beginning of the relationship, the client comes and says --
10 you know, you talk to them about their case and you talk about
11 the finances. And it's not as though we should be required to
12 hire an accountant and go audit fees.
13 So I spoke -- I spoke with him about where the money was
14 coming from. And I got on the telephone with two of the
15 people who are providing the funds, and I basically said I
16 understand this is your money. I understand you didn't
17 receive this money from Mr. DeYoung or the company, and they
18 told me that that was the case. I haven't met any of these
19 people. It was just telephonic. And, in any event, that's --
20 that's what I did.
21 THE COURT: Well, you've anticipated maybe with your
22 answer my second question was whether there were nonprivileged
23 sources of the information that you're relying on that --
24 MR. MOXLEY: Well, they're third parties, but I got
25 that information about who these friends and family were

1 through the client.

2 THE COURT: Are you asking the Court today for a

3 finding that the $80,000 is not in any way associated with the

4 alleged securities fraud in this case or are you just seeking

5 in an abundance of caution some blessing to deposit those

6 funds in the client trust account and carry on and see what

7 happens?

8 MR. MOXLEY: Well, I have deposited the funds, and I

9 was hoping to get an order from the Court sanitizing those

10 funds. Obviously the SEC and the Receiver want to proceed in

11 this case without opposition for the Defendant. It's much

12 more convenient and easy for them, and I think they've

13 telegraphed that they're going to do anything and all things

14 within their power. Frankly, I don't want to be a defendant.

15 I don't know what the facts are other than what I've

16 represented, and I don't think a lawyer needs to do more than

17 that.

18 THE COURT: I think my initial reaction is that if

19 you're asking the Court to make a finding, that I need more

20 information than you've supplied, and maybe it's something we

21 could take up ex-parte in chambers. But let me hear from the

22 SEC first and determine whether there's even a dispute here.

23 Mr. Wadley.

24 MR. WADLEY: Thank you, Your Honor. As to the

25 motion, I actually believe that your suggestion to essentially

1 bifurcate the issue is a good suggestion. The $80,000 is
2 separate and apart from the $250,000 release that they're
3 asking for. And the $250,000 release, as I indicated last
4 night, appears to be tied up with their argument that, you
5 know, we don't have a security, and that we violated statute
6 of limitations and so forth. Whereas, the $80,000 comes from
7 a separate source, isn't tied in any way to those arguments,
8 and frankly I think is subject to a separate inquiry. And so
9 I like the idea of separating the two issues.
10 The $250,000, we can't address that argument without
11 addressing the arguments that they raised in connection with
12 the TRO. They're the very same arguments, and so tying those
13 two together just simply makes sense.
14 THE COURT: It seems to me that the way that issue
15 was presented by Mr. DeYoung, I agree, they seem bound.
16 MR. WADLEY: So with respect to the $80,000, Your
17 Honor, when Mr. Moxley calls at the initiation of his
18 relationship with Mr. DeYoung and said I've got this $80,000,
19 I want to know if I can use it, our first question was, well,
20 where did you get it from? And he objected and said, well, I
21 don't want to tell you that because it's privileged.
22 If Mr. Moxley wants an inquiry into whether or not this
23 money is legitimately used for defense costs, we would welcome
24 that inquiry. We Have no interest whatsoever in preventing
25 Mr. DeYoung from having counsel. However, an inquiry into

1 whether or not the $80,000 would be legitimately used for
2 defense costs would necessarily require knowing where he got
3 the money.
4 As Your Honor knows, a third-party payor is not subject
5 to the attorney-client privilege. It is not privileged
6 information, either the identity of that third party or,
7 frankly, any conversations he has with that third party. It
8 is not subject to the attorney-client privilege unless he has
9 a separate relationship, an attorney-client relationship, with
10 that third party, which it doesn't seem to be the case here.
11 Your Honor, I am perfectly willing at this point,
12 speaking on behalf of the SEC and not the Receiver, to allow
13 Mr. Moxley to make that determination, to use the funds
14 however he wants, subject to the understanding that if it
15 turns out that those funds were properly attributable to APS,
16 it may be subject to clawback by the Receiver. That's a risk
17 that Mr. Moxley is going to have to take.
18 If he wants to proceed with a more formal inquiry, then
19 going forward on an ex parte basis without disclosing the
20 identity either to the Receiver or the Commission frankly I
21 think is improper because that's not privileged information.
22 He may have learned the identity from his client, and he can't
23 testify as to the conversations he had with his client, but
24 once he reached out to those third parties, had conversations
25 with them, accepted their funds, none of that information

1 would otherwise be privileged.

2 THE COURT: Well, what interest is it to the SEC if

3 I make an independent inquiry and conclude and determine that

4 these individuals don't have any relation to the alleged fraud

5 here, and they don't want to be associated with it, they don't

6 want their names associated with it but they're willing to

7 provide funds so that Mr. DeYoung can put on a defense?

8 I'm interested in having this man represented by counsel.

9 The United States Government sought on and ex parte basis to

10 seize this man's business that he's operated for 30 some

11 years, seize his personal assets, his personal accounts, his

12 home, everything that would enable him to put on his own

13 defense, and I found that there was a basis to do it under the

14 law, and I entered that order.

15 I think fairness and due process provide strong support

16 for finding some way for Mr. DeYoung to have counsel

17 representing him. And I think it's potentially very -- it

18 could really interfere with that ability if we put Mr. Moxley

19 on the hook and say, well, good luck. We'll let you know some

20 day whether your firm is going to be paying all that money

21 back.

22 MR. WADLEY: Your Honor, allow me to be clear. I

23 have absolutely no concern with Your Honor conducting an

24 investigation and determining whether or not these funds can

25 or cannot be tied to APS, and, frankly, I don't believe the

1 SEC has to be part of that inquiry. I would suggest that the
2 Receiver be given the opportunity to participate informally or
3 formally, however Your Honor wants, simply because they have
4 much more information as to the use of funds by Mr. DeYoung
5 and could potentially weigh in on the issue of whether or not
6 these funds were or were not at some point attributable back
7 to APS.
8 THE COURT: And as an officer of the Court, I think
9 an extension of the Court, Ms. Thompson would be bound by the
10 same duties that I have to hold that information I think
11 confidential.
12 Mr. Moxley -- thank you, Mr. Wadley.
13 Mr. Gaylord, did you wish to be heard separately?
14 MR. GAYLORD: Just briefly, Your Honor, if I may. I
15 want to make it perfectly clear I concur in part with what the
16 SEC says, but I want to make sure. We want Mr. DeYoung to be
17 able to proceed with counsel. Mr. Wadley has pointed out I
18 think the concern, and you've identified the concern. We
19 think we need to know who -- what the source of those funds
20 are. Our job as the Receiver, the Receiver's job, is to
21 identify all sources of Receivership assets in the estate we
22 have reason to believe. We have filed a writ of entry --
23 motion for writ of entry, we filed a motion for writ of
24 seizure, both of which have declarations attached relating to
25 transactions and movement of funds that when we hear about the

1 80,000 it puts our antenna up. The Court's antenna is already
2 up. We just feel because of what we do know about transfers
3 of funds and transfers in the creation of entities by the
4 Defendants during the relevant time periods, we're tracing
5 those funds, and if those funds come from those people -- I
6 mentioned 155,000 went to Michael Memmott last year at the end
7 of the year. Is he one of the sources of those funds? If he
8 is, we think that that's probably a fraudulent transfer for
9 which we would want to be recovering. But I'm happy to let
10 the Court look at that. If the Court wants direction or
11 assistance from the Receiver, we're available to assist the
12 Court in that respect.
13 The COURT: Thank you.
14 MR. GAYLORD: Thank you.
15 THE COURT: Mr. Moxley.
16 MR. MOXLEY: As far as the declarations are
17 concerned, Your Honor, there was a representation about
18 $200,000, but what isn't explained is I think 197,000 of that
19 is accounted for, and it was money that never left another
20 IRA, and I think those transactions started before the
21 Receivership.
22 THE COURT: I'm keeping my eye strictly on the ball
23 that we're bouncing back and forth right now, the $80,000.
24 MR. MOXLEY: Okay. Okay, fine. I don't know what
25 else to say. I'd welcome an ex parte conference with the

1 Court.

2 THE COURT: All right. Let me -- thank you,

3 Mr. Moxley. I think -- I think that's where we're going to

4 start. And I think what we may do is I'd like to try to make

5 some progress on this right now, at least understand what's in

6 front of us. So what I'm going to propose is that we take a

7 short recess and you and I visit, Mr. Moxley, in chambers.

8 And then, Ms. Thompson, we may invite you into that

9 meeting as well.

10 Let me further complicate this just a teeny bit. As best

11 I understand the case law, a majority of courts that consider

12 requests for release of funds by defendants who are charged

13 with securities fraud in the face of a prima facie showing not

14 unlike the showing that the Securities and Exchange Commission

15 has made here, most courts say that the defendants are not

16 entitled to release of those funds, for the reasons I think

17 that you articulated, Mr. Wadley, at our last hearing, mainly

18 this policy that -- I think the word you used was a robber.

19 Someone who goes in and robs some asset from somebody, can't

20 then use the proceeds from that theft to defend themselves. I

21 understand that that's how most of the courts come out.

22 As best I understand the legal authority, this Court

23 retains some substantial discretion in this regard, and I

24 think it's an equitable consideration for the Court. And in

25 this regard I have some deep concerns on what is only a

1 limited record before me thus far, and so far a record
2 supplied almost entirely by the Securities and Exchange
3 Commission, and to a lesser extent the Receiver. I have
4 concerns that Mr. DeYoung may have intentionally violated the
5 Court's temporary restraining order after receiving notice of
6 it by destroying documents. That he may have sought to
7 transfer funds that were frozen by the Court's order. That he
8 may have deliberately delayed participation in communication
9 with the Commission to facilitate a timely inventory of
10 equipment and documents in accordance with the Court's order,
11 and that all concerns me.
12 On the other hand, I'm deeply concerned that we have --
13 I'm deeply concerned with the reach of the asset freeze and
14 the restraining order that the Court has put in place. I
15 think it's based on a proper showing, a prima facie showing by
16 the Securities and Exchange Commission. I think basic due
17 process and fairness considerations dictate, and I think it's
18 beneficial to the Court and the public interest that the
19 issues raised in this case, at least in the first instance
20 through the preliminary injunction, be determined with the
21 benefit of competent counsel on both sides so that the Court
22 is supplied the benefit of an adversarial proceeding.
23 I'm leaving open in my mind the possibility of directing
24 the release of some funds from the Receiver, from APS,
25 potentially on a rolling basis with a cap in mind and based on

1 submission of redacted invoices from Mr. Moxley's firm to
2 validate the reasonable attorney's fees incurred between now
3 and the preliminary injunction.
4 I only mention that so you have that in mind as we're
5 talking first about the 80,000. And in the event that's not
6 available for one reason or another, I think I'm going to be
7 talking about a reasonable sum to ensure participation of
8 counsel through the injunction. So let me just share that
9 with you.
10 I'm going to propose we take a short recess and
11 Mr. Moxley and I visit. Is there anything more we should take
12 up before we do that? And let me say I have in mind that
13 we'll come back into the courtroom after that visit, so I'm
14 going to ask the attorneys to stay. But is there anything
15 more we should discuss before I go visit with Mr. Moxley?
16 I'll take that as a no.
17 All right. We'll have a brief recess, thank you.
18 (RECESS FROM 11:20 A.M. UNTIL 11:46 A.M.)
19 THE COURT: All right. Thank you all for your
20 patience. We'll go back on the record. I've had an in camera
21 discussion with Mr. Moxley about the source of the $80,000
22 that he proposes to use to facilitate a defense for
23 Mr. DeYoung in the interim until we can reach the issues
24 raised in your briefs on the merits. I'm satisfied that
25 subject to some documentation I've identified for Mr. Moxley

1 that I'd like to receive to verify representations made by
2 third parties to him, if those documents are received, your
3 motion will be granted. I will be making -- subject to that
4 documentation, I'll be making a finding that those funds are
5 not in any way directly associated with the securities fraud
6 alleged in the complaint.
7 So subject to the receipt of those documents, your motion
8 will be granted in part with respect to the $80,000, denied in
9 part with respect to the $250,000. And at the risk of opening
10 the door that might be a little early to open, Mr. Moxley, let
11 me just say that with respect to further funds for defense
12 through the preliminary injunction hearing, subject to a
13 rigorous showing accounting for what services you've provided,
14 showing the necessity of those services, if the $80,000
15 doesn't get you through the injunction, come back and see us
16 and there may be some room for something beyond that, but it
17 will have to require a significant showing that there's a
18 necessity for it.
19 MR. MOXLEY: May I suggest something --
20 THE COURT: You may.
21 MR. MOXLEY: -- as far as the schedule is concerned?
22 It seems to me that the motion that we had filed Monday night
23 the Court in our telephone conversation yesterday was coupling
24 that with the preliminary injunction. Frankly, if we're going
25 to have a preliminary injunction hearing, I'm going -- if I'm

1 going to do it in a competent way, I'm going to have to do
2 some discovery. For example -- when there will be motion
3 practice. For example, as I understand it, Max Wheeler
4 explained this to me, who was involved in the informal
5 investigation by the SEC, that Mr. Pitts, the lawyer for the
6 company, testified at his deposition for example that he was a
7 lawyer not only for the company but for Mr. DeYoung as well,
8 and it was a -- it was a company that was totally owned by
9 Mr. DeYoung and his family.
10 As I understand it, either the SEC or the Receiver,
11 according to Mr. Wheeler, got an order from the Magistrate
12 that the attorney was only the lawyer for the company and
13 therefore there was no privilege. So, for example, I have to
14 jet up a motion to quash all that deposition testimony and any
15 testimony at any evidentiary hearing. And I might have to
16 take -- for example, they say themselves they can't identify
17 when the problem occurred or how it occurred. I'll want to
18 take the deposition of their accountant in all likelihood.
19 So my point is, it might make a lot more sense, at least
20 as far as being a lawyer for Mr. DeYoung, is to argue our
21 motion, which is purely a legal motion. Because if the TRO is
22 dissolved and the Receiver and the asset freeze goes away,
23 which we think it should, then there's no need for the
24 preliminary injunction and we can certainly do that for within
25 $80,000 without any difficulty.

1 THE COURT: Of course the preliminary injunction, as
2 I've thought about it, is an -- is an injunction enjoining
3 Mr. DeYoung from further violations -- any violations of the
4 securities laws. I mean that's -- that's the TRO. Your
5 motion is focused I think on the asset freeze and the
6 propriety of the asset freeze and the appointment of the
7 Receiver. Those are the questions that --
8 MR. MOXLEY: And even the injunction because under
9 the Supreme Court case -- well, first there has to be a sale
10 of a security, which there wasn't, and, secondly, it had to
11 have occurred before April of 2009. So if -- if things go our
12 way, and we recognize the Court in the midst of some potential
13 wrongdoing may be reluctant to grant our motions, but the
14 whole case goes away at that point because there will be no
15 jurisdiction.
16 THE COURT: Let me reiterate what I said I think at
17 our last hearing, which is this. Provided there's some
18 agreement by Mr. Young to the TRO and the Court's orders
19 remaining in place, we'll take up these issues as quickly or
20 as slowly as you wish to take them up. If you want discovery
21 and an opportunity to develop a record to present, we'll do
22 that. If you want to have this heard next week without
23 further briefing -- I mean --
24 MR. MOXLEY: Appreciate that.
25 THE COURT: So --

1 MR. MOXLEY: We feel the best thing for him right
2 now is to agree to the extension of the TRO and have our
3 motion to dissolve and dismiss the case heard as soon as
4 possible, and we agree because of the Court's schedule and
5 counsel wanting to brief this to June 20th.
6 THE COURT: If that's true, and it is true that's
7 the earliest I think we can have you in if both sides have a
8 chance to weigh in, is there any reason we wouldn't just take
9 up both motions at that time? Let me say back to -- I think
10 what you're saying is you could avoid some discovery on the
11 Government's motion?
12 MR. MOXLEY: Correct. And also preparation of
13 witnesses. As I understand it, they've subpoenaed a number of
14 witnesses for the preliminary injunction.
15 THE COURT: So I was going to touch on that in a
16 moment, the Court's preliminary injunction practices, but let
17 me rewind. Maybe I'm being slow now. I'm trying to think in
18 my mind about what -- I guess it's testimony and evidence that
19 goes to, what, the showing of the likelihood of success on the
20 merits? Is that what the testimony relates to? All right.
21 And if that's right, then, Mr. Moxley, what you're saying is
22 you'd like a chance to take some discovery between now and
23 then to address that. Well, what you'd --
24 MR. MOXLEY: I really don't want discovery without
25 being paid for it.

1 THE COURT: Well, we're going to have an answer to
2 that question by early next week. What you really want is a
3 hearing separate from that hearing on the legal issues, but --
4 MR. MOXLEY: Right.
5 THE COURT: -- we're going to move expeditiously.
6 They're going to be bound together. We're going to decide
7 them together on June 20th. If you want to take some
8 expedited discovery, I'll grant that. I'd like to see what
9 that looks like. The Commission got partway through the
10 expedited discovery it sought before we sort of seized that.
11 There may be some reciprocal discovery. If you can agree
12 amongst yourselves about some timing of what that looks like,
13 then proceed. If I need to be involved, you know how to reach
14 me. Thank you.
15 My practice with respect to preliminary injunctions is
16 this. They are evidentiary hearings as appropriate in any
17 particular case. If you -- either side that intends to put on
18 evidence through witness testimony will be directed to submit
19 that testimony in the form of a declaration or affidavit in
20 the first instance. And any witness who submits a declaration
21 or affidavit should be made available at the hearing for
22 cross-examination.
23 That will give us a chance to review all of your -- your
24 direct testimony before we get to the hearing. This helps us
25 do the next thing that I do. In every instance save for one

1 so far since coming to the bench I've given a ruling on the
2 preliminary injunction or TRO at the conclusion of the
3 hearing. The more information you can provide me in advance,
4 the more likely it is that I can rule that day. If it's not
5 that day, it will be as quickly thereafter as possible.
6 I'll leave to both of you to coordinate the exchange of
7 those declarations and affidavits so you both have notice of
8 them and you both have a chance to obtain additional testimony
9 that you might want to put on to rebut what the other side is
10 saying. We have some time to work between now and June 20th,
11 so there should be ample opportunity to develop that record.
12 Are there any questions about that? That's a procedure that's
13 familiar to both of you I'm sure.
14 MR. WADLEY: Your Honor, as you know, we have
15 submitted deposition testimony. Several of the witnesses may
16 be adverse and not willing to cooperate with us in preparing a
17 declaration.
18 THE COURT: That's right, I'm sorry, the deposition
19 testimony in that instance is fine. Obviously only
20 declarations or affidavits from witnesses that you control or
21 are otherwise cooperative with you.
22 MR. WADLEY: Thank you, Your Honor.
23 THE COURT: Thank you. We should subpoena those
24 witnesses though. If you've submitted deposition testimony,
25 let's ensure there's a subpoena so they're here.

1 MR. WADLEY: Absolutely, Your Honor. That is our
2 intent. May I have just a minute, Your Honor?
3 THE COURT: Please.
4 MR. WADLEY: So we learned last night after our
5 telephonic hearing that Mr. Hashimoto, who is the accountant
6 for the Receiver, will be in Japan from approximately, if I've
7 got my dates right, June 12th through June 26th. That
8 obviously poses a pretty significant logistical issue for our
9 purposes on the June 20th hearing in that he will be one of
10 our primary witnesses as to APS's financial condition. I
11 raise this with Your Honor simply, you know -- and would be
12 happy to consult with Mr. Moxley as to whether or not we could
13 reach a different date for the hearing so that Mr. Hashimoto
14 can be present.
15 THE COURT: Ms. McNamee, do you have the calendar?
16 I'm concerned, Mr. Wadley, as you know, about moving as
17 expeditiously as we can given -- given the orders that the
18 Court has entered.
19 (BRIEF PAUSE)
20 I'm looking to see whether it's possible to move some
21 hearings that I have scheduled on the 13th and move our
22 injunction hearing up a week. If we do that, are counsel
23 available that day?
24 MR. MOXLEY: Yes.
25 THE COURT: Does that enable you enough time to

1 prepare?

2 MR. WADLEY: Well, Your Honor, so Mr. Hashimoto is

3 out of town from June 12th to the 26th.

4 The COURT: I'm sorry, you said that. I was

5 thinking you said the 16th to the 26th. I'm sorry. Okay.

6 Well, then I think the next available date is the following

7 Friday, the 27th.

8 Mr. Moxley?

9 MR. MOXLEY: I'm available.

10 MR. WADLEY: Yeah, I'm available, Your Honor.

11 THE COURT: The day after your witness gets back.

12 He'll have to be tough.

13 MR. WADLEY: He'll have jet lag but I'm sure will be

14 okay.

15 THE COURT: Business class makes all the difference;

16 right? All right, we'll do that.

17 Mr. Moxley, my apologies to Mr. DeYoung for additional

18 delay. This is just as quickly as we can do it.

19 MR. MOXLEY: Understand.

20 THE COURT: Let's have it resolved on the merits.

21 All right. Was there anything further, Mr. Wadley, with

22 respect to scheduling?

23 MR. WADLEY: Not with respect to scheduling, Your

24 Honor. If I might --

25 THE COURT: Let me add something, I'm sorry. Those

1 briefing dates that we talked about, you all feel free to move
2 those dates around now we have a little more time to work
3 with. If you want to conduct some discovery upfront, push
4 those dates back. All I'm going to ask is that you try to
5 have your briefing completed and your declarations
6 submitted -- wait.
7 (BRIEF PAUSE)
8 We're in trial. We're going to keep that date. My trial
9 schedule goes 8:30 in the morning until 2:30. So we'll start
10 at 3:30 and we'll stay as late as we need to stay. I'm not
11 comfortable going any later than that. And we go right back
12 into trial immediately after that trial, so there are just no
13 days. It may be a late night. Pack a lunch.
14 Go ahead, Mr. Wadley.
15 MR. WADLEY: Your Honor, the last issue -- and I
16 only raise this because Your Honor has introduced the topic,
17 and that is with respect to continuing legal bills for
18 Mr. Moxley. Contrary to Mr. Moxley's suggestion, we
19 actually -- the Government prefer the Defendants to be
20 represented both for practical and legitimacy reasons with our
21 cases, and so we have absolutely no concern with the Court's
22 ruling on the $80,000.
23 To the extent that there's an invitation to Mr. Moxley to
24 submit additional bills in the event that he -- the $80,000
25 was not sufficient to adequately pay for the defense, may I

1 make a suggestion to Your Honor that in the event that
2 additional funds are necessary, that Your Honor consider
3 utilizing Mr. DeYoung's personal assets as opposed to the
4 assets of the company to fund those litigation costs.
5 THE COURT: I'm open to that idea. I probably was
6 imprecise on this point, so let me just be clearer. What I
7 anticipate, Mr. Moxley, is that if you begin to approach the
8 exhaustion of the $80,000 and you think more is necessary, you
9 should make an application in advance. And you're welcome to
10 submit that application as a sealed document and make a
11 showing about what you're specifically requesting in
12 addition -- I'm not inviting it. I don't want it. But I want
13 you to have a chance to put on an adequate defense. If it
14 will require more and you can justify that reasonably, we're
15 going to ensure you have a chance, but make an application in
16 advance so we can have this discussion that Mr. Wadley is
17 talking about and figure out logistically whether it's
18 reasonable and I'll approve it, and if so under what
19 conditions and where it will come from.
20 MR. WADLEY: Thank you, Your Honor.
21 THE COURT: Thank you, Mr. Wadley. All right.
22 Anything more while we're here? This has sort of been
23 dynamic, as scheduling often is.
24 Mr. Gaylord?
25 MR. GAYLORD: Nothing further, Your Honor.

1 THE COURT: Does the Receiver have what you need
2 from me on your outstanding motions?
3 MR. GAYLORD: We do, Your Honor. Thank you for your
4 time.
5 THE COURT: Mr. Wadley, anything more?
6 MR. WADLEY: No, Your Honor, thank you.
7 MR. MOXLEY: No, Your Honor.
8 THE COURT: All right. Thanks to all of you for
9 your patience. We'll be in recess.
10 Mr. Moxley, I'll look for your submission in camera as
11 quickly as you can get it to me.
12 MR. MOXLEY: Will do. Thank you.
13 (HEARING CONCLUDED AT 12:04 P.M.)
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Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Securities and Exchange Commission Vs. American Pension Services, Inc., et al., case No. 2:14-CV-309, in said Court, on the 21ST day of May, 2014.

I further certify that the foregoing pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 30th day of May, 2014.

/s/ Raymond P. Fenlon