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*Attorneys for Court-appointed Receiver,
Diane A. Thompson*

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**AMERICAN PENSION SERVICES, INC.,
a Utah Corporation and CURTIS L.
DeYOUNG, an individual,**

Defendants.

**RECEIVER'S SECOND MOTION AND
MEMORANDUM FOR AN ORDER
AUTHORIZING THE LIQUIDATION
OF PROMISSORY NOTES HELD BY
APS FOR THE BENEFIT OF APS
ACCOUNT HOLDERS**

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

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

Diane Thompson ("Receiver"), Court-appointed Receiver for American Pension Services, Inc. ("APS"), by and through undersigned counsel, hereby respectfully moves the

Court to authorize the liquidation of promissory notes held in eleven (11) APS accounts to satisfy the loss allocation per the Receiver's Amended Modified Plan of Liquidation.

RELIEF SOUGHT AND GROUNDS FOR MOTION

By this Motion, the Receiver seeks Court approval to liquidate promissory notes held by eleven (11) APS account owners (Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854) (collectively, "Non-compliant Accounts") through a sheriff's sale or public auction pursuant to 28 U.S.C. § 2004 and as described in the Court-approved Receiver's Amended Modified Plan of Liquidation ("Liquidation Plan") (Dkt. 458 and 458-1).

MOTION AND MEMORANDUM

On April 24, 2014, the Securities and Exchange Commission ("SEC") filed suit against APS and Curtis L. DeYoung, alleging, among other claims, that DeYoung, as president and CEO of APS, misappropriated over \$24 million of APS account owner funds from APS's master trust account. (Complaint (Dkt. 1), ¶ 1). That same day, the Receiver was appointed and tasked to promote the orderly and efficient administration of the Receivership Estate. (Order Appointing Receiver, Freezing Assets, and Other Relief (Dkt. 9) ("Receivership Order")).

On February 27, 2015, the Court approved the Receiver's proposed Liquidation Plan. The Liquidation Plan provides that the loss in the total value of the APS account owners' assets shall be divided among the accounts on a pro rata basis, resulting in an approximate loss of ten percent (10%) to each account. Under the Liquidation Plan, if an account owner fails to pay a loss allocation and transfer to Equity Trust Company ("Equity") by December 31, 2015, the Receiver may take certain action, including any of the following: (1) resigning as administrator and issuing an IRS Form 1099-R for tax reporting of the distribution of the total balance of the

account; (2) imposing a lien for the amount of the applicable loss allocation on IRA account owner assets; (3) pursuing collection; or (4) liquidating account assets sufficient to meet the loss allocation requirement. (Liquidation Plan at p. 46).

The Receiver has carefully considered the costs associated with pursuing the liquidation of account assets of non-compliant IRA account owners and developed a plan for ensuring the greatest recovery to the Receivership Estate. At the time of this filing, there are fifty-three (53) accounts remaining at APS. Of the fifty-three (53) remaining accounts, eleven (11) are the subject of this motion, twenty (20) will be the subject of future motions to be filed with the Court or are the subject of a motion filed concurrently herewith, seventeen (17) have been the subject of previous motions, two (2) are in the process of funding their loss allocation, and three (3) will be assigned by the Receiver as authorized in previous motions.¹

By this Motion, the Receiver seeks authorization to liquidate promissory notes held by eleven (11) Non-compliant Accounts through a sheriff's sale or public auction, as described in 28 U.S.C. § 2004, and after notice of the sale of promissory notes has been given to the account owners.

¹ The three (3) accounts to be assigned contain LLCs organized under the laws of Arizona, Colorado, and Michigan. In these particular states, judicial dissolution is available when a member files a motion in the court for the county in which the registered office of the LLC is located, and only when the LLC is unable to carry on business in conformity with the LLC articles of organization and operating agreement. ARIZ. REV. STAT. ANN. § 29-785 (2016) (West); COLO. REV. STAT. ANN. § 7-80-810(3) (West 2016); MICH. COMP. LAWS § 450.4802 (West 2016). Alternatively, in Colorado and Michigan, a judicial dissolution is available on the grounds that the LLC acted in an unlawful manner only upon application by the attorney general. COLO. REV. STAT. ANN. § 7-80-810(1) (West 2016); MICH. COMP. LAWS § 450.4803 (West 2016). Based on the statutory requirements for a judicial dissolution, the Receiver believes it is more economically sound to resign as administrator and assign these assets to the clients with the accompanying tax documents.

BACKGROUND FACTS

1. On April 24, 2014, the Securities and Exchange Commission (“SEC”) filed suit against APS and Curtis L. DeYoung, alleging, among other claims, that DeYoung, as president and CEO of APS, misappropriated over \$24 million of APS account owner funds from APS’s master trust account. (Complaint (Dkt. 1), ¶ 1). That same day, the Receiver was appointed and tasked to promote the orderly and efficient administration of the Receivership Estate. (Order Appointing Receiver, Freezing Assets, and Other Relief (Dkt. 9) (“Receivership Order”).

2. Following her appointment, the Receiver filed notice of the Receivership with the district court for each district in which APS property or Receivership Assets were located, pursuant to 28 U.S.C. § 754.

3. On August 22, 2014 the Receiver filed a motion for Court approval of the Liquidation Plan.

4. The Receiver provided notice of the Liquidation Plan to all APS account owners by mail, e-mail, and posting on the Receivership website at www.apsreceiver.com. (Dkt. 221; Dkt. 316 at p. 2).

5. The Receiver responded to a significant number of written objections from APS account owners regarding the proposed Liquidation Plan. (Dkt. 425 at p. 10). The Receiver filed a summary of these objections with the Court on November 11, 2014. (Dkt. 316). The Receiver then filed a response to APS account owner objections with the Court on December 3, 2014. (Dkt. 356).

6. The Court held a hearing on the Receiver’s proposed Liquidation Plan on December 17, 2014, and afforded APS account owners the opportunity to be heard on the

proposed Liquidation Plan in oral argument.

7. This Court approved the Liquidation Plan on February 27, 2015. (Dkt. 458). The Receiver provided notice of the approved Liquidation Plan to each account owner by mail, e-mail, and posting on the APS Receivership website at www.apsreceiver.com.

8. The Liquidation Plan required that APS account owners provide a loss allocation equal to ten percent (10%) of the total value of their accounts as of April 24, 2014. (Dkt. 458-1 at p. 44). This loss allocation applied to clients regardless of the form in which their assets within their account were held. (*Id.*). APS account owners were required to fund their loss allocation by May 27, 2014. (*Id.*).

9. The Liquidation Plan allowed clients with illiquid assets to preserve those assets by funding their loss allocation by direct payment of the loss allocation to the Receiver. In order to resolve potential tax reporting issues, the Receiver also sought a Private Letter Ruling (“PLR”) from the IRS. (Liquidation Plan at 40–41). Clients that were awaiting the outcome of the PLR were allowed to defer their loss allocation until a determination on the PLR was made. (*Id.*).

10. Furthermore, the Liquidation Plan authorized the Receiver to take certain actions if the APS account owner failed to fund their loss allocation. (Liquidation Plan at p. 46). Under the Liquidation Plan, the Receiver is authorized to: (1) resign as administrator and issue an assignment of assets and IRS Form 1099-R reporting a full distribution based on the recorded value of account assets of April 25, 2014; (2) impose a lien on APS account owners’ assets; (3) pursue collection from APS account owners who refuse to comply with the Liquidation Plan; (4) liquidate assets sufficient to meet the loss allocation requirement; or (5) any combination of the

above. (*Id.*).

11. On July 2, 2015, the IRS declined to issue a PLR for procedural reasons. (Dkt. 592 at p. 4). As a result, the Receiver proposed, and this Court approved, an alternative method for reporting a cash payment to fund a loss allocation and requiring all remaining APS account owners to transfer their accounts by September 15, 2015. (Dkt. 592).

12. The Liquidation Plan recognized that some APS account owners required additional time to liquidate or otherwise fund a loss allocation. (Liquidation Plan at p. 45). Thus, the Liquidation Plan required all loss allocations be funded by December 31, 2015. (*Id.*).

13. On February 10, 2016, the Receiver filed a motion seeking to force transfer certain remaining APS account owners. (Dkt. 705). For that motion, the Receiver evaluated over 1,100 APS accounts and determined that, based on a cost-benefit analysis, 786 accounts had loss allocation amounts that did not justify the cost of liquidation and therefore transferred those accounts to the successor custodian. (*Id.*). The Court approved this motion on February 19, 2016, concluding that the transfer of these 786 accounts “would further implement the purpose and intent of the Liquidation Plan.” (Dkt. 720). Those APS account owners that were transferred without a loss allocation forfeited “any opportunity to participate in future recoveries” made by the Receiver. (*Id.*). The Receiver then transferred the 786 APS accounts.

14. The Receiver has taken actions permitted by the Liquidation Plan and subsequent Court orders to collect required loss allocation payments from non-compliant accounts, including sweeping accounts of cash, and liquidating foreign currency, gold, silver, coins, and brokerage accounts.

15. APS records contained limited information regarding certain assets. In an effort to ascertain additional information, and to evaluate whether liquidation of assets was justified from a cost-benefit standpoint, the Receiver issued subpoenas and a cover letter to remaining APS account owners. The subpoena and cover letter explained the APS account owners' obligations to comply with the Liquidation Plan and other Court orders. The subpoenas requested a number of financial records and other documents related to the APS account owners' assets.

16. The owner of Account Number 5504 is a resident of Utah.

17. The owner of Account Number 5504 was served a subpoena at his residence on October 14, 2016. The owner of Account Number 5504 has responded to the subpoena. After a review of the documents supplied with the subpoena, the Receiver believes the owner of Account Number 5504 has sufficient assets to fund his loss allocation.

18. The owner of Account Number 5767 is a resident of Utah.

19. The owner of Account Number 5767 was served a subpoena at his residence on August 4, 2016. As of this filing, the owner of Account Number 5767 has not responded to the subpoena.

20. The owner of Account Number 6362 is a resident of Utah.

21. The owner of Account Number 6362 was served at his residence on July 27, 2016. As of this filing, the owner of Account Number 6362 has not provided responsive documents as required in the subpoena. However, the client has contacted the Receiver to discuss payment of his account.

22. The owner of Account Number 6723 is a resident of Utah.

23. The owner of Account Number 6723 was served at his residence on July 30, 2016. The owner of Account Number 6723 was served at his residence on May 14, 2016. The owner of Account Number 6723 has responded to the subpoena. After a review of the documents supplied with the subpoena, the Receiver believes the owner of Account Number 6723 has sufficient assets to fund his loss allocation.

24. The owner of Account Number 8791 is a resident of Idaho.

25. The owner of Account Number 8791 was served at her residence on May 12, 2016. The owner of Account Number 8791 has responded to the subpoena. After a review of the documents supplied with the subpoena, the Receiver believes the owner of Account Number 8791 has sufficient assets to fund her loss allocation.

26. The owner of Account Number 8841 is a resident of Wyoming.

27. The owner of Account Number 8841 was served at his residence on July 30, 2016. The owner of Account Number 8841 has responded to the subpoena. After a review of the documents supplied with the subpoena, the Receiver believes the owner of Account Number 8841 has sufficient assets to fund his loss allocation.

28. The owner of Account Number 9002 is a resident of California.

29. The owner of Account Number 9002 was served at her residence on May 13, 2016. The owner of Account Number 9002 has responded to the subpoena. After a review of the documents supplied with the subpoena, the Receiver believes the owner of Account Number 9002 has sufficient assets to fund her loss allocation.

30. The owner of Account Number 9444 is a resident of the State of New York.

31. The process server has made several attempts to serve a subpoena on the owner of Account Number 9444 requesting additional information on Account Number 9444. The process server has confirmed with security at the owner's apartment building that the address for the owner of Account Number 9444 is correct and attempts to serve have been conducted at various times of the day. The Receiver believes the owner of Account Number 9444 is evading service of the subpoena.

32. The owner of Account Number 11131 is a resident of California.

33. The process server has made several attempts to serve a subpoena on the owner of Account Number 11131 requesting additional information on Account Number 11131. The process server has confirmed with security at the owner's apartment building that the address for the owner of Account Number 11131 is correct and attempts to serve have been conducted at various times of the day. The Receiver believes the owner of Account Number 11131 is evading service of the subpoena.

34. The owner of Account Number 11637 is a resident of New Jersey.

35. The process server has made several attempts to serve a subpoena on the owner of Account Number 11637 requesting additional information on Account Number 11637. The process server has confirmed with neighbors that the owner does live at the address. Attempts to serve the owner of Account Number 11637 have been conducted at various times of the day. The Receiver believes the owner of Account Number 11637 is evading service of the subpoena.

36. The owner of Account Number 14854 is a resident of Utah.

37. The owner of Account Number 14854 was not served a subpoena. Rather, the owner of Account Number 14854 has been communicating regularly with the Receiver regarding

payment of his loss allocation. Despite the partial payments of his loss allocation, the owner of Account Number 14854 has not yet completely funded his loss allocation.

38. In addition to service of a subpoena and cover letter, the owners of Non-compliant Accounts were mailed and e-mailed a copy of the Liquidation Plan on or about February 27, 2015, and were provided notice of additional court orders via the Receivership website at www.apsreceiver.com.

39. Account Number 5504 holds one promissory note with a reported value of \$273,364.72. Account Number 5504 has a loss allocation of \$27,336.47 and owes \$0.00 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation and outstanding management fees for Account Number 5504.

40. Account Number 5767 holds one promissory note with a reported value of \$6,950.00.² Account Number 5767 has a loss allocation of \$21,493.32 and owes \$4,984.18 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation and outstanding management fees for Account Number 5767.

41. Account Number 6362 holds four promissory notes with an aggregate reported value of \$81,000.00.³ Account Number 6362 has a loss allocation of \$13,557.48, has made partial payments totaling \$2,322.02, and owes \$0.00 in outstanding management fees. The Receiver believes one or more of the promissory notes can be liquidated to fund the loss allocation and outstanding management fees for Account Number 6362.

² Account Number 5767 holds assets in addition to the promissory note. Those assets will be the subject of separate motions filed by the Receiver.

³ Account Number 6362 holds assets in addition to the promissory note. Those assets will be the subject of separate motions filed by the Receiver.

42. Account Number 6723 holds three promissory notes with an aggregate reported value of \$136,940.28. Account Number 6723 has a loss allocation of \$13,500.00 and owes \$1,940.28 in outstanding management fees. The Receiver believes one or more of the promissory notes can be liquidated to fund the loss allocation for Account Number 6723.

43. Account Number 8791 holds five promissory notes with an aggregate reported value of \$316,000.00.⁴ Account Number 8791 has a loss allocation of \$40,605.96, has made partial payments totaling \$6,477.04, and owes \$0.00 in outstanding management fees. The Receiver believes one or more of the promissory notes can be liquidated to fund the loss allocation for Account Number 8791.

44. Account Number 8841 holds two promissory notes with an aggregate reported value of \$59,987.50.⁵ Account Number 8841 has as loss allocation of \$15,192.83 and owes \$0.00 in outstanding management fees. The Receiver believes one or more of the promissory notes can be liquidated to fund the loss allocation for Account Number 8841.

45. Account Number 9002 holds one promissory note with a reported value of \$153,000.00. Account Number 9002 has a loss allocation of \$16,253.88, has made partial payments totaling \$8,459.19, and owes \$0.00 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation for Account Number 9002.

⁴ Account Number 8791 holds assets in addition to the promissory note. Those assets will be the subject of separate motions filed by the Receiver.

⁵ Account Number 8841 holds assets in addition to the promissory note. Those assets will be the subject of separate motions filed by the Receiver.

46. Account Number 9444 holds seven promissory notes with an aggregate reported value of \$330,000.00. Account Number 9444 has a loss allocation of \$33,127.34 and owes \$411.95 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation for Account Number 9444.

47. Account Number 11131 holds two promissory notes with an aggregate reported value of \$83,000.00. Account Number 11131 has a loss allocation of \$8,320.00 and owes \$647.60 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation for Account Number 11131.

48. Account Number 11637 holds two promissory notes with an aggregate reported value of \$340,790.00. Account Number 11637 has a loss allocation of \$34,079.00 and owes \$1,701.19 in outstanding management fees. The Receiver believes the promissory notes can be liquidated to fund the loss allocation for Account Number 11637.

49. Account Number 14854 holds one promissory note with a reported value of \$499,570.00. Account Number 14854 has a loss allocation of \$49,957.00, has made a partial payment of \$4,095.86, and owes \$0.00 in outstanding management fees. The Receiver believes the promissory note can be liquidated to fund the loss allocation for Account Number 14854.

50. The Receiver will incur fees and costs associated with the liquidation of the promissory notes in the Non-compliant Accounts.

ARGUMENT

I. The Receiver Has Authority to Sell Assets Within APS Accounts.

The district court has broad powers and wide discretion to determine relief in an equity receivership. *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). “When a

district court creates a receivership, its focus is to . . . achiev[e] a final, equitable distribution of the assets.” *Id.* The district court has authority to accomplish the goal of an equitable distribution, including the liquidation of assets from individual accounts. *See, e.g., In re Comm’r of Banks and Real Estate*, 764 N.E.2d 66, 86 (Ill. App. Ct. 2001); *see also SEC v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004) (holding a district court has personal jurisdiction over non-resident that holds property subject to receivership in another jurisdiction). Furthermore, no preference should be given to some account holders to the detriment of others. *See generally Cunningham v. Brown*, 265 U.S. 1 (1924); *Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980); *see also In re Comm’r of Banks and Real Estate*, 764 N.E.2d at 101; *Reichert v. Fidelity Bank & Trust Co.*, 245 N.W. 808, 810 (Mich. 1932); 5 Scott on Trusts § 519. This Court recognized the Receiver’s authority to “pursue collection from APS clients who refuse to cooperate with th[e] Liquidation Plan and, if necessary, liquidate the assets and deposit the client’s proportionate share of the loss allocation with the balance, if any, transferred to the Successor [custodian] on behalf of the APS client” when it approved the Receiver’s Liquidation Plan. (Plan of Liquidation at p. 46).

Pursuant to the Liquidation Plan, the Receiver now seeks approval from this Court to liquidate promissory note assets from Non-compliant Accounts to satisfy the loss allocations and outstanding management fees for the respective accounts. Account Number 5504 has a loss allocation of \$27,336.47 and owes \$0.00 in outstanding management fees. Account Number 5767 has a loss allocation of \$21,493.32 and owes \$4,984.18 in outstanding management fees. Account Number 6362 has a loss allocation of \$13,557.48, has made partial payments totaling \$2,322.02, and owes \$0.00 in outstanding management fees. Account Number 6723 has a loss

allocation of \$13,500.00 and owes \$1940.28 in outstanding management fees. Account Number 8791 has a loss allocation of \$40,605.96, has made partial payments totaling \$6,477.04, and owes \$0.00 in outstanding management fees. Account Number 8841 has as loss allocation of \$15,192.83 and owes \$0.00 in outstanding management fees. Account Number 9002 has a loss allocation of \$16,253.88, has made partial payments totaling \$8,459.19, and owes \$0.00 in outstanding management fees. Account Number 9444 has a loss allocation of \$33,127.34 and owes \$411.95 in outstanding management fees. Account Number 11131 has a loss allocation of \$8,320.00 and owes \$647.60 in outstanding management fees. Account Number 11637 has a loss allocation of \$34,079.00 and owes \$1,701.19 in outstanding management fees. Account Number 14854 has a loss allocation of \$49,957.00, has made a partial payment of \$4,095.86, and owes \$0.00 in outstanding management fees. Promissory notes can be liquidated in each of these accounts to fully or partially fund the respective loss allocations and outstanding management fees.

The Receiver has reached out to each of the owners of Non-compliant Accounts on numerous occasions to pay their loss allocations. The Receiver has obtained additional Court orders requiring these owners to pay their respective loss allocations and transfer their accounts. *See, e.g.*, Order Requiring All Remaining APS Account Holders to Transfer Within 30 Days (Dkt. 592). Despite the Receiver's numerous communications, each of the above account owners has failed to cooperate with the Receiver to resolve their loss allocation. Ultimately, the Receiver issued subpoenas to the owners of the Non-compliant Accounts in order to compel cooperation. Of the ten owners served or attempted to be served, only five owners responded to the Receiver's subpoena. While the owners of each of the accounts may believe they are being

punished (and most assuredly, the owners are victims of Curtis DeYoung's misappropriation), the loss allocation is the product of a lawful court order, and the owners of Non-compliant Accounts are in violation of this Court's order. *See In re Comm'r of Banks and Real Estate*, 764 N.E.2d at 123.

The United States Code describes the procedure for selling personal property assets. 28 U.S.C. §§ 2001, 2004. According to 28 U.S.C. § 2004, "Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise." According to 28 U.S.C. § 2001(a), "Property in the possession of a receiver . . . appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city" where the property is located, "or on the premises" of the property. The Receiver seeks the approval of this Court to sell the promissory notes held within the Non-compliant Accounts.

Should this Court approve, the Receiver intends to hold a public sale or auction that will bring the highest and best value for the promissory notes. The Receiver requests the Court grant the Receiver authority to sell the promissory notes at a public sale, either by a sheriff's sale or public auction, whichever the Receiver determines will bring the highest and best value. Regardless of the method of sale, the Receiver will strive to obtain a minimum bid equal to the loss allocation and outstanding management fees owed by each of the respective accounts, and reasonable fees and costs associated with liquidating the properties in the respective accounts. Should a minimum bid not be obtained, the Receiver will strive to liquidate the assets for the highest and best value. The Receiver should also be awarded her reasonable costs and fees

associated with the liquidation of the promissory notes, as this Motion is necessary only because the Non-compliant Accounts have completely disregarded this Court's orders. Furthermore, those account owners that have willingly complied with this Court's orders should not be harmed by subsidizing the costs incurred by the Receiver in executing against the Non-compliant Accounts.

Should the Receiver elect to hold a sheriff's sale, the Receiver will follow the procedure for a sheriff's sale for the county in which she elects to conduct the sale. *See, e.g.*, UTAH CODE ANN. § 57-1-25. The typical process involves a payment of a fee to the sheriff's office, and providing the sheriff's office with a court order authorizing the sale, the amount due at the sale (a minimum bid), and a legal description of the property. *Id.* The sheriff's office will then publish notice of the sale in the newspaper and other public places. *Id.* Typically, notice is published three weeks prior to the sale.⁶ *Id.*

Alternatively, the Receiver seeks authorization to engage an auctioneer to publicize and conduct the sale of the promissory notes from Non-complaint Accounts. The Receiver has successfully used an auctioneer in this matter to liquidate other Receivership Assets. The auctioneer will publicize a notice of sale in newspapers and online in an effort to maximize the number of potential purchasers.

The Receiver will deposit any funds from the liquidation of the assets into the respective APS accounts. Following the deposit to accounts, the Receiver will fund the loss allocation and outstanding management fees, as well as reasonable fees and costs associated with the

⁶ The Receiver will comply with any statutes applicable in the jurisdiction in which the promissory notes are sold, including any statutory timelines or additional notice requirements.

liquidation of the promissory notes from the Non-compliant Accounts. The loss allocation asset will be represented by a Contingent Repayment Agreement.⁷ (Plan of Liquidation at p. 44). As the opportunity to transfer the accounts to Equity Trust Company has expired, the Receiver will then resign as administrator of the account and distribute the Contingent Repayment Agreement and any excess funds to the client with a letter explaining the resignation and the account holder's right to rollover the account assets. The client will be issued an IRS Form 1099-R for the amount of the distribution, which would include the face value of the Contingent Repayment Agreement.

II. Due Process Has Been Afforded to the Account Holder.

“Due process requires notice and an opportunity to be heard.” *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). Due process ensures a “claimant[’s] interests [are] adequately safeguarded.” *Id.* The owners of each of the Non-compliant Accounts have been, and will be, afforded due process.

In *In re Comm’r of Banks and Real Estate*, a Receiver sought to dissolve and liquidate a custodian of investment trust assets. 764 N.E.2d 66 (Ill. App. Ct. 2001). In affirming the Receiver’s authority to liquidate assets from individual trust accounts, the Court addressed due process considerations, and found that account holders had “both actual and constructive notice . . . in the form of publication of pleadings, orders, the receiver’s recommendations, etc.” on the receiver’s website. *In re Comm’r of Banks and Real Estate*, 764 N.E.2d at 92. The Court noted that each of the account holders had been mailed notice of the receivership, which advised

⁷ The Contingent Repayment Agreement will represent only the value of the loss allocation and will not include any management fees or reasonable fees associated with the liquidation of the account assets.

account holders that “a substantial portion of cash . . . was missing and it was the priority of the receiver to determine the amount of money missing and how the beneficiaries would be affected by the missing cash,” and that notice was posted to the receiver’s website. *Id.* The Court then noted that account holders received notice of other court filings by mail and website postings, and that account holders “were afforded ample opportunity to participate in the court’s proceedings,” including the ability to “file extensive pleadings . . . including objections and suggestions . . . to the receiver’s initial recommendation[s], . . . objections and oppositions to the proposed final order,” and other filings. *Id.* at 93–94.

In addition to the initial notice of the Receivership, APS account owners were mailed notice of the Receiver’s proposed Liquidation Plan and afforded an opportunity to make suggestions and objections. APS account owners were also mailed the Court-approved Liquidation Plan. Additionally, the Receiver has posted all substantive pleadings to the Receiver’s website at www.apsreceiver.com. As to each of the Non-compliant Accounts, the Receiver has issued and served or attempted to serve subpoenas with cover letters explaining the loss allocation and the need to comply with the Court’s orders to owners of Non-compliant Accounts. The cover letter to the subpoena explicitly stated that each client was “in violation of Court orders by failing to pay [their] loss allocation.” The cover letter also stated that, pursuant to the Liquidation Plan, the Receiver may take certain actions, including “liquidat[ing] assets sufficient to meet the loss allocation.”

Furthermore, upon approval of this Motion, the Receiver will post a copy of this Motion and the Court’s order to the Receivership website. The Receiver will also send each of the respective owners of Non-compliant Accounts a copy of this Motion, the Court’s order, and

notice of the date of sale via certified mail or other verifiable delivery method to the address where each were served by subpoena. Clients seeking to redeem their promissory notes and avoid a sale may do so by paying the amount of their loss allocation and outstanding management fees no later than five days before the date of sale. A cover letter will accompany the mailing of the Court's order, this Motion, and notice of the sale date to each owner of a Non-compliant Account explaining their redemption rights and the process for handling the accounting and distribution of any excess funds. Thus, each of the account owners has been and will be afforded due process.

CONCLUSION

The Receiver requests that this Court approve the Receiver's request to liquidate promissory notes from Non-compliant Accounts through either a sheriff's sale or public auction, as authorized by statute and the Liquidation Plan.

DATED this 18th day of January, 2017.

/s/ Jeffrey D. Enquist

Mark R. Gaylord, Esq.

Melanie J. Vartabedian, Esq.

Tesia N. Stanley, Esq.

Jeffrey D. Enquist, Esq.

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

BALLARD SPAHR LLP

Attorneys for Court-appointed Receiver, Diane A. Thompson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **RECEIVER'S MOTION AND MEMORANDUM FOR AN ORDER AUTHORIZING THE LIQUIDATION OF PROMISSORY NOTES HELD BY APS FOR THE BENEFIT OF APS ACCOUNT HOLDERS** was served to the following this 18th day of January, 2017, in the manner set forth below:

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

Hand Delivery

U.S. Mail, postage prepaid

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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.

**ORDER APPROVING RECEIVER'S
SECOND MOTION FOR AN ORDER
AUTHORIZING THE LIQUIDATION
OF PROMISSORY NOTES HELD BY
APS FOR THE BENEFIT OF APS
ACCOUNT HOLDERS**

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

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

Before this Court is the Receiver's Motion and Memorandum for an Order Authorizing the Liquidation of Promissory Notes Held by APS for the Benefit of APS Account Holders

(“Motion”). For good cause appearing, and for the reasons stated in the Motion, the Court hereby GRANTS the Receiver’s motion.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court approved the Receiver’s Liquidation Plan on February 27, 2015. (Dkt. 458).
2. The Receiver filed necessary notices of the Receivership in other jurisdictions pursuant to 28 U.S.C. § 754.
3. This Court has jurisdiction to authorize the sale of personal property assets pursuant to 28 U.S.C. § 754 and 1692. *See SEC v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004); *see also In re Comm’r of Banks and Real Estate*, 764 N.E.2d 66, 88 (Ill. App. Ct. 2001) (holding receiverships and liquidations are *in rem* proceedings and that funds deposited for investment with a company were within the jurisdiction of the Receivership court).
4. The liquidation of assets is authorized by statute, 28 U.S.C. §§ 754, 1692, and by the Liquidation Plan.
5. The liquidation of assets from APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 will further the purpose of the Receivership to treat all account owners equitably.
6. The liquidation of assets from APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 is fair and reasonable and necessary to allow the Receivership to be administered to a conclusion.

7. The owners of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 received notice of the Liquidation Plan by mail, e-mail, and by posting of the Liquidation Plan to the Receiver's website at www.apsreceiver.com.

8. The owners of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 have not complied with the Liquidation Plan, approved by this Court on February 27, 2015. (Dkt. 458).

9. The owners of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 were either served or the Receiver exercised reasonable efforts to serve a subpoena with a cover letter explaining that they had not complied with the Liquidation Plan. The cover letter also explained that the Liquidation Plan authorized the Receiver to liquidate assets within their accounts.

10. Account Number 5504 has a loss allocation of \$27,336.47 and owes \$0.00 in outstanding management fees.

11. Account Number 5767 has a loss allocation of \$21,493.32 and owes \$4,984.18 in outstanding management fees.

12. Account Number 6362 has a loss allocation of \$13,557.48, has made partial payments totaling \$2,322.02, and owes \$0.00 in outstanding management fees.

13. Account Number 6723 has a loss allocation of \$13,500.00 and owes \$1,940.28 in outstanding management fees.

14. Account Number 8791 has a loss allocation of \$40,605.96, has made partial payments totaling \$6,477.04, and owes \$0.00 in outstanding management fees.

15. Account Number 8841 has a loss allocation of \$15,192.83 and owes \$0.00 in outstanding management fees.

16. Account Number 9002 has a loss allocation of \$16,253.88, has made partial payments totaling \$8,459.19, and owes \$0.00 in outstanding management fees.

17. Account Number 9444 has a loss allocation of \$33,127.34 and owes \$411.95 in outstanding management fees.

18. Account Number 11131 has a loss allocation of \$8,320.00 and owes \$647.60 in outstanding management fees.

19. Account Number 11637 has a loss allocation of \$34,079.00 and owes \$1,701.19 in outstanding management fees.

20. Account Number 14854 has a loss allocation of \$49,957.00, has made a partial payment of \$4,095.86, and owes \$0.00 in outstanding management fees.

21. Proceeds from the sale of promissory notes in each of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 will be utilized to satisfy each Non-compliant Account's loss allocation, outstanding management fees, and reasonable fees and costs associated with liquidation of the asset.

22. Any excess funds available as a result of the public sale of the promissory notes be deposited to the respective Non-compliant Accounts. These excess funds, as well as any other assets, including a Contingent Repayment Agreement as described in the Liquidation Plan, will be distributed to the account owner. The Receiver will also issue appropriate documents for the purpose of tax reporting, including but not limited to an IRS Form 1099-R.

23. Statute requires that the promissory notes in possession of a receiver be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish or city in which the property is located, or on the premises of the property. 28 U.S.C. §§ 2001(a), 2004.

24. The Receiver is authorized to conduct the sale of the promissory notes held by APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 by public sale in a manner the Receiver believes will bring the highest and best value for the property, whether by sheriff's sale or through a public auction.

25. After due diligence, should the Receiver believes a public auction will bring the highest and best value, the Receiver is authorized to engage an auctioneer or auction house for the purpose of conducting a public auction.

26. The Receiver shall promptly publish a copy of this Order to the Receivership website at www.apsreceiver.com.

27. The Receiver shall also mail a copy of her Motion, this Order, and notice of the final date of the sale of the property to the owners of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 by certified mail or other verified delivery method to the address at which each of the individuals was served or attempted to be served a subpoena.

28. The Receiver is to use her best efforts to obtain the highest and best value for the promissory notes.

29. The respective beneficiaries of APS Account Numbers 5504, 5767, 6362, 6615, 6723, 8791, 9002, 9444, 11131, 11637, and 14854 shall have the opportunity to fund their loss

allocation and pay outstanding APS management fees up to five (5) days before the public sale of the promissory notes. If the beneficiary of the account fully satisfies their loss allocation for their respective account, the public sale shall not be performed and shall be cancelled.

IT SO ORDERED.

DATED this ____ day of January, 2017.

Honorable Robert J. Shelby
United States District Court