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Attorney for the Independent Fiduciary, Jeanne Bryant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. PEREZ, Secretary of the United
States Department of Labor,

Plaintiff,

v.

MATTHEW D. HUTCHESON, HUTCHESON
WALKER ADVISORS LLC, GREEN VALLEY
HOLDINGS LLC, and the RETIREMENT
SECURITY PLAN AND TRUST, f/k/a PENSION
LIQUIDITY PLAN AND TRUST,

Defendants.

Case No.: 1:12-CV-00236-EJL

INDEPENDENT FIDUCIARY'S INTENT TO TERMINATE

RETIREMENT SECURITY PLAN AND TRUST AND PARTICIPATING PLANS

Pursuant to the Preliminary Injunction entered on June 13, 2012 [Doc. 16], Jeanne B. Bryant, Independent Fiduciary for Retirement Security Plan & Trust (RSPT) advises this Court of her intent to terminate Retirement Security Plan and Trust and the participating plans within Retirement Security Plan and Trust.

I. ASSET RECOVERY EFFORTS

In the summer of 2012, the IF hired contingency counsel for asset recovery legal services. All administrative costs have been paid by the RSPT sponsor employers and/or the RSPT Plans' sponsoring employer owner's retirement account on an ongoing basis, pursuant to the payment submission and approval procedures previously outlined in the court's Preliminary Injunction Order entered on June 13, 2012.

SUMMARY OF COMPLETED ASSET RECOVERY ACTIONS

Note Secured by Osprey Meadows Golf Course

At the time the IF was appointed, the Note and documents related to the PCB Investment were in the possession of James ("Bill") Fletcher, an individual who also loaned funds to Hutcheson. Fletcher was asserting ownership of the Note and other documents based on an exorbitant demand for interest on the loan he had made. The IF, through contingency counsel, negotiated with Fletcher to obtain ownership of the Note and documents, so she could foreclose on the golf course property and market it for sale. The Note concerning the PCB investment was turned over to the RSPT asset recovery counsel in Idaho. A foreclosure action was filed against Green Valley Holdings, LLC West Mountain Golf, LLC, and other parties in 2013. Due to difficulties with the tenant (see discussion below regarding litigation with TMA), the foreclosure sale of the golf course property took place in December 2016. The property has now been sold and a new owner has taken control of the course. The sale of the property to the new owner closed on January 12, 2018, and as of the end of July 2018 RSPT held the proceeds of the sale of the course in a trust account. James ("Bill") Fletcher asserted a claim to virtually all of the sale

proceeds (after RSPT recovered amounts actually expended for maintaining the course). The IF pursued a judicial declaration regarding RSPT and Fletcher's various claims to the proceeds. Through federal court directed mediation, the IF and Fletcher reached a settlement and the case is now closed. The final mediated settlement resulted in RSPT receiving \$325,000 in tax payments and \$88,176.47 residual payment. Fletcher received \$760,000 plus reimbursement of \$35,000 for a property tax payment he made. The IF completed the return of all property tax reimbursements to participant accounts. The other amounts realized from the litigation recoveries less expenses will be allocated to participant accounts no later than July 15, 2019.

Surety Bond Litigation

After attempts to negotiate a settlement, on July 11, 2013, the IF initiated a lawsuit against Colonial Surety Company, which had issued a fiduciary bond policy to RSPT while Hutcheson was the Trustee. The face amount of this bond was \$500,000. After Colonial Surety Company learned about Hutcheson's actions, it declined to renew the policy. After Monty Walker learned of Hutcheson's actions, he made a claim on behalf of RSPT on the surety bond. Colonial Surety Company denied the claim asserted by RSPT alleging that the period of notice had already expired prior to notification by Monty Walker. RSPT pursued a lawsuit related to the bond, alleging, among other items, that Colonial had engaged in unfair and deceptive claims practices in bad faith. Eventually, Colonial Surety agreed to pay \$225,000.00. After the payment of contingency counsel attorneys' fees, this action netted \$150,000.00 to the Plan.

Wrongful Conversion of Assets

During the IF's investigation of Green Valley Holdings actions it was discovered that it purchased a house in Tamarack Resort and then quit claimed the house to the in-laws of

Defendant Hutcheson. The IF pursued a lawsuit against Hutcheson's in-laws related to the payments for the house. After further investigation it appeared that the in-laws may have funded most, if not all, of the purchase. This case settled with net payment to the Plan, after contingency counsel's attorney's fees, of \$40,000.00.

Claims against Tamarack Municipal Association ("TMA")

While the IF was pursuing foreclosure of the Note and Deed of Trust on the Tamarack Resort golf course, the Tamarack homeowners association was asserting a rent-free lease interest on the golf course. The IF, as the holder of the Note and Mortgage, exercised RSPT's rights to terminate the rent-free lease and demand rent payments from TMA. TMA refused to discontinue operating the golf course, asserting that RSPT did not have authority to terminate the lease. The IF, on behalf of RSPT, pursued claims against TMA related to its continued use of the golf course. The claims resulted in TMA discontinuing its alleged lease of the golf course and vacating the property. The lawsuit ultimately was settled with both parties waiving any claims for fees or costs and TMA leaving the golf course.

Breach of Duties by MG Trust

In December 2016, after a demand letter was sent and denied, the IF initiated litigation in Idaho federal court against Matrix Trust Company (formerly MG Trust) alleging breaches of MG Trust's fiduciary duties to the Plan by allowing the funds to be taken by Hutcheson. The IF was seeking damages in the amount of \$3.2 million. The Idaho federal court ordered the case be transferred to the District of Colorado (where MG Trust is headquartered). MG Trust renewed a Motion to Dismiss in the Colorado court. In March 2019 the U.S. District Court in Colorado granted MG Trust's Motion to Dismiss. The IF appealed the decision to the 10th Circuit Court of Appeals. Additionally, MG Trust pursued a claim for attorney fees and costs in excess of

\$150,000.00, to which the IF objected. After negotiations, the IF and MG Trust reached a resolution that includes dismissal of the appeal and withdrawal of MG Trust's claim for fees and expenses. While the exact terms of the settlement are confidential, essentially both parties are agreeing to dismiss and release claims against one another, with neither party paying any funds to the other. This concludes the asset recovery actions on behalf of the retirement plans and Retirement Security Plan and Trust.

II. NO FURTHER ASSET RECOVERY ACTIONS TO BE MADE

Having reviewed the potential actions beyond those taken, the Independent Fiduciary believes she has taken all economically reasonable and feasible asset recovery actions on behalf of the Plan.

Actions Against Co-Sponsoring Employers

The IF believes that actions against sponsoring employers for recovery would not be supported by the facts in this case. Based on her review of the facts and evidence it does not support that the employers failed in their fiduciary duties as co-sponsors of the plans within Retirement Security Plan and Trust. These employers contracted with reputable persons to provide the services for their Plans. They received timely reports and made timely inquiries of Hutcheson Walker Advisors. Mr. Matthew Hutcheson enjoyed a positive reputation as a fiduciary, having testified before Congress on matters supported by the U.S. Department of Labor. At his criminal trial, Mr. Hutcheson was shown to have hidden his criminal activity even when questioned numerous times by Monty Walker, his business partner and associate. Finally when confronted by counsel for Mr. Walker, Mr. Hutcheson admitted the nature of the transaction and, as a result, he was indicted, tried and convicted. Under the facts known to her,

the IF does not believe there was a failure of due diligence by the co-sponsoring employers, the IF does not believe there was a failure to monitor the fiduciaries and service providers of the retirement plans by the employers, and the IF does not believe the employers could have acted to have prevented the criminal actions of Mr. Hutcheson. The only vendor with knowledge of the transaction before it occurred that could have prevented the transaction was MG Trust, who under the U.S. District Court of Colorado's ruling, had no duty to act and in fact did not act. Based on the record in this case, the criminal case, and facts known to the IF, the IF does not believe the employers breached their fiduciary duties.

Actions Against Monty Walker

As a part of her review of responsible persons, the IF reviewed the facts and circumstances surrounding Monty Walker. It is clear from the facts established at Mr. Hutcheson's criminal trial and Mr. Hutcheson's own sworn testimony, Mr. Walker could not have prevented the wrongful transaction. Mr. Hutcheson, not Mr. Walker, had the trustee authority to invest and Mr. Hutcheson did so wrongfully. It is clear that once the wrongful transaction occurred, the monies stolen from the retirement plans were gone. Nothing post transaction could have recovered the money from Pacific Continental Bank. Under the Uniform Commercial Code, Pacific Continental Bank was a holder in due course without knowledge of the source of funds. Although the speed with which Mr. Walker made the fateful discovery may be arguably slow, his efforts to discover the true nature of the transaction began less than a month after the transaction and generally were continuous throughout the ensuing months. Mr. Walker sought and established an independent auditor and through their efforts and the efforts of Mr. Walker's counsel, caused Mr. Hutcheson in September of 2011 to reveal the true nature of the transaction and what he did. Based on these facts and circumstances, the IF has not initiated

an asset recovery action against Monty Walker.

Mr. Hutcheson's Irrevocable Trust Receipts

At his trial and in correspondence to the criminal court, counsel for the IF, and to some participants in Retirement Security Plan and Trust, Mr. Hutcheson has consistently stated that Retirement Security Plan and Trust held a beneficiary interest in Irrevocable Trust Receipts, often referred to by Mr. Hutcheson as ITRs. These ITRs state that the ITR has value drawn upon the value of the underlying trust and consequently the value of whatever the trust holds. The IF has investigated these instruments, contacted the trust company, and has attempted to locate the trustee. To the best of her investigation, the trust may hold the right to a securities trading theory or program to which the California Public Employees Retirement System might utilize. In other words, a trust with a "potential value." There is no evidence to support that California Public Employees Retirement System is utilizing this trading theory or program. A banking organization whose name has been used was confirmed by the IF not to be affiliated in any way with the purported trust. The trustee could not be located but was discovered to have been named in criminal actions involving bond fraud. Additionally, contingency counsel attempted to contact George J. Gowen, the listed registered agent and officer of First Mountain Bancorp on several occasions, but never received a call back. Additionally, while at a deposition of Matthew Hutcheson in California, his attorney inquired about potential buyers for the ITR. At one point, contingency counsel received an offer to purchase the ITR and the golf course from a company located in Canada. However, further inquiries and counter-offers to that company were never responded to. Based on conversations with the Prosecutor in Hutcheson's criminal trial, the Prosecutor believed the ITR was a sham created by Hutcheson after he was indicted as a ruse to avoid criminal liability. The IF has determined that there is a significant lack of validity to these

ITRs and they appear to be some sort of “fake” assets. As such she has concluded not to seek actions on the ITRs but has made known that if anyone is willing to purchase them, she would sell them. No one has approached the IF to purchase these ITRs without also wanting the IF to relinquish the golf course note. No offer to purchase, after the IF completed its due diligence, was ever consummated.

Actions Against Aspire Financial

Aspire Financial serves as the recordkeeper for the retirement plan. The IF’s review of Aspire coincided with her review of MG Trust. As a recordkeeper, Aspire was under a duty to report and to carry out instructions from Matthew Hutcheson, as instructed. While the IF believed that MG Trust had the authority and the duty to act, it was unclear as to what authority a recordkeeper had. It certainly could have reported the transaction to the U.S. Department of Labor had it viewed the transaction to be unusual. Based on the information it was provided by Mr. Hutcheson, later proven to be untrue, Aspire would not have found a bank fixed income fund to be out of the ordinary. What MG Trust knew was the wire transfer was not going to a bank or a mutual fund; nevertheless the U.S. District Court found that MG Trust had no duty to act. Based on what the U.S. District Court found in the MG Trust case, it would not appear that an action against Aspire Financial would be successful.

III. PLAN TERMINATION PROCEEDURES AND TIMEFRAMES

Asset Recovery Allocations

Having completed the asset recovery actions, the IF is now proceeding to the termination and distribution of the Plan. Prior to that proceeding, the IF will complete the allocation of her asset recovery. The IF's actions have netted a recovery of 10 cents on the dollar.¹ These recoveries will be allocated to participants who suffered stolen funds from their accounts and to the 22 employers who participated in the early withdrawal program.² The IF anticipates this action to be completed by July 15, 2019. During this same period, Withdrawal Forms will be issued to each employer. These Withdrawal Forms require the employer to advise the IF if the employer is terminating the sponsoring of a 401K plan or is establishing a successor 401K plan. Employers will have thirty days to advise the IF and to return completed forms and information. Upon receipt of the Withdrawal Forms, the IF will proceed to issue notices of the blackout period as required by ERISA. Once the blackout period commences, no account changes may be made. Distribution forms will be issued to applicable participants at the time of the Blackout Notice. Distributions forms will be received and processed in accordance with the Plan Document, ERISA statutes and rules, as well as the Internal Revenue Code.

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¹ Because of the limited recovery amounts, the Plan cannot cover all of the asset recovery costs and those costs are going unpaid.

² The Early Withdrawal Program allowed employers to withdraw from Retirement Security Plan and Trust if those employers funded the full amount of the stolen funds, replenished any property tax amounts taken from participant accounts, and lost earnings. In exchange for these payments the employer held a right to a recovery of the property tax amounts and any amounts recovered for stolen funds.

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Because a number of expenses will be incurred after the termination, the IF is proposing that the employer pay a fee of \$500.00 for the withdrawal process.³ If no objections are received by the Court, or the Court does not object, the IF will proceed to begin the termination process as noted.

DATED this 8th day of July, 2019.

/s/ Matt Christensen
MATTHEW T. CHRISTENSEN
Attorney for Jeanne B. Bryant, Independent
Fiduciary for RSPT Plans

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³ The 2018 audit will be funded this year, but the 2019 audit cost will not nor will the additional costs of termination of plans holding qualified employers securities which require additional processing and paperwork far beyond a participant's investment in mutual funds. This fee will be required at the time of submission of the Employer Withdrawal Form. This fee is not in lieu of any fee regularly charged by Aspire, MG Trust, or Interlake Capital Management.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the individual(s) so noted below.

D. Marc Sarata
Robert Furst

Sarata.D.Marc@dol.gov
Furst.Robert@dol.gov

All others as listed on the Court's ECF Notice.

I further certify that on the 8th day of July, 2019, I served a copy of the foregoing notice on the following individuals or entities via US Mail, postage prepaid.

Matthew D. Hutcheson
33 Pinnacle Court
Donnelly, ID 83615

Matthew D. Hutcheson 14620-023
FCI Lompoc
Federal Correctional Institution
3600 Guard Road
Lompoc, CA 93436

Matthew D. Hutcheson
14076 Morell Road
McCall, Idaho 83638

Monty W. Walker
c/o R. Bradford Huss
Trucker Huss, APC
One Embarcadero Center, 12th Floor
San Francisco, CA 94111

DATED: July 8, 2019

/s/ Matt Christensen

Matthew T. Christensen