

1
2
3
4 Matthew T. Christensen
5 ANGSTMAN JOHNSON
6 3649 Lakeharbor Lane
7 Boise, Idaho 83703
8 Telephone: (208) 384-8588
9 Facsimile: (208) 853-0117
10 Christensen ISB: 7213

11 Attorney for the Independent Fiduciary, Jeanne Bryant

12 UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF IDAHO

14 HILDA L. SOLIS, Secretary of the United States
15 Department of Labor,

16 Plaintiff,

17 v.

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

23 Defendants.

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

24 **REPORT ON EARLY WITHDRAWAL PROCEDURES FOR RSPT 401K PLANS**
25 **AND FEE NOTICE OF COSTS AND EXPENSES**

26 PURSUANT TO THE Preliminary Injunction entered on June 13, 2012 [Doc. 16],
27 Jeanne B. Bryant, Independent Fiduciary for Retirement Security Plan & Trust (RSPT)
28 submits this Sixth Report and Notice for the period beginning October 1, 2012 - October
29 31, 2012.

REPORT ON EARLY WITHDRAWAL PROCEDURES FOR RSPT 401K PLANS
AND FEE NOTICE OF COSTS AND EXPENSES - PAGE 1
Matter: 8571-002

1 I. ACTIVITY REPORT

2 There have been a number of issues that have occurred with RSPT since the last
3 report of the Independent Fiduciary (“IF”). The IF informed the Employer members of
4 the current status of their individual collections involving the monthly administration fee,
5 and has requested payment from ASPIre for any delinquent amounts. Attached as
6 **Exhibit 1** is a report noting the collections and payments made from the account for
7 previously approved fees and cost through October 2012. With the collection of the
8 outstanding amounts, there are currently sufficient funds expected from the monthly
9 collections to pay the fees and costs for administration noted in this report.
10
11

12 As noted in the last report, the IF has now hired contingency counsel, and is
13 requesting payment from ASPIre for any amounts due for previously approved fees and
14 costs concerning the PCB investment from those members holding such accounts. All
15 costs will be paid by the RSPT and/or its Plans on an ongoing basis, pursuant to the
16 payment submission and approval procedures previously outlined in the court’s
17 Preliminary Injunction Order entered on June 13, 2012.
18

19 II. ANTICIPATED FUTURE ACTIVITIES AND RESOLUTION OF ISSUES

20 The IF takes this opportunity to inform the Court and the parties to this litigation
21 of the following issues, and anticipated means of resolution of same, involving the RSPT
22 Plans. The IF will post a copy of this Report and Fee Notice on its web site and will
23 inform the sponsors of the RSPT Plans of such posting as noted below after filing of same
24 with this Court.
25
26

27 1. Tax Qualification Issues. The IF has completed her review of plan
28 documents and sponsor files. It appears all required amendments to RSPT were not timely
29

1 made; however, the IF, acting in accordance with the authority granted to her by this Court, has
2 now executed amendments to bring the RSPT into compliance with all provisions of the Internal
3 Revenue Code that currently require RSPT to be amended and except for matters pending
4 before this court and/or to be addressed in a voluntary compliance program application with the
5 Internal Revenue Service or by individual employers, the RSPT Plans appear to have been
6 administered in accordance with plan documents, as amended, have been self-corrected in
7 accordance with plan documents, or will be self-corrected in the future. As stated in earlier
8 reports an early termination process has been discussed with the Department of Labor and the IF
9 has now set out that process and timing for such termination process in this Report, assuming no
10 objection by the Court.
11
12

13
14 2. Delinquent Contributions and/or Participant Loan Payments. The IF has
15 reviewed the RSPT Plans' trust records concerning these issues. No contributions or
16 participant loan payments to the RSPT Plans appear to be delinquent at the present time.
17 However, during plan year 2011, the Plans in the RSPT in the aggregate had \$140,449.19
18 in delinquent contributions and loan payments that were corrected and paid to the Plans,
19 along with \$892.63 in additional lost earnings.
20

21
22 3. Valuation for Individual Employers- Employers under the terms of the
23 RSPT Plans' Documents are required to provide an annual independent business
24 valuation to the Plans' trustee and administrator. A deadline of September 15, 2012 had
25 already been established by the previous administrator. This business valuation is
26 necessary to the valuation of qualified employer securities held in each of the RSPT
27 Plans. All but forty submitted their independent business valuations in time for use in the
28
29

1 2011 Forms 5500 filed October 15, 2012. For those that did not, the form was filed
2 utilizing last year's valuation. The Independent Fiduciary is working to receive the final
3 business valuations and is reviewing all forms for any corrections needed after discussion
4 with the Department of Labor.
5

6 4. Forms 5500 for Plan Year 2011 filed- A completed Form 5500 along with
7 audit was timely filed with the U.S. Department of Labor. Also, as now indicated by the
8 U.S. Department of Labor, Forms 5500 for each employer sponsored plan within the
9 RSPT were also timely filed. A total of 106 Forms 5500 were filed in connection with
10 RSPT as of October 15, 2012.
11
12

13 III. EARLY TERMINATION PROCEDURE AND PROCESS

14 As stated in earlier reports, the IF began a review process intended to identify
15 problem areas in addition to the transactions that concern the instant case, so as to
16 determine those items that would prevent the eventual termination of the RSPT Plans.
17 No problem significant to prevent early termination of plans has been identified other
18 than the transaction subject of the instant case.
19
20

21 A. BACKGROUND

22 As has been alleged by the Plaintiff in this case, a prohibited transaction in the
23 amount of \$3.2 million occurred whereby the former Trustee of the RSPT plans withdrew
24 funds from certain of the RSPT plans and allegedly transferred those funds to Defendant
25 Green Valley Holdings LLC. However, not all of the plans in RSPT suffered these
26 prohibited transactions: Eleven (11) RSPT plans did not have funds removed through the
27 alleged prohibited transactions. All other RSPT plans were affected by the alleged
28
29

1 prohibited transaction. The Independent Fiduciary believes there is no valid reason to
2 force the eleven (11) RSPT plans who are unaffected by the alleged prohibited
3 transactions to be forced to remain in RSPT and bear costs of litigation, collection, and/or
4 rescission of the alleged prohibited transactions. Similarly, the Independent Fiduciary
5 believes it prudent and feasible to allow employers whose plans' have a potential loss
6 associated with the alleged prohibited transaction to make a restorative payment to their
7 respective RSPT plan to make that plan whole. These two categories of RSPT plans
8 should, in the Independent Fiduciary's opinion be allowed to withdraw from RSPT once
9 it is established that all of their participants are unaffected by or have been made whole
10 for the alleged prohibited transactions.
11
12

13 This early withdrawal procedure is consistent with Plaintiff's stated position in
14 her complaint and in subsequent advisory opinions that plans like RSPT consist of a
15 number of unrelated single-employer retirement plans funded through a common trust.
16 (*See, e.g.*, United States. Dept. of Labor. Employee Benefits Security Administration.
17 Advisory Opinion No. 2012-04A).
18

19 Because each of the RSPT plans is a separate, single employer retirement plan
20 and because each of the RSPT plans bears no relationship to any other RSPT plan (other
21 than sharing a common trust and trustee), a prohibited transaction affecting only a subset
22 of those plans should not be allowed to impact the others. Accordingly, the Independent
23 Fiduciary is proposing to allow the RSPT plans in the categories above to withdraw from
24 RSPT. The Independent Fiduciary's position is congruent with the Plaintiff's position in
25 her Memorandum (Docket No. 2-1) that employers individually established a separate
26 plan for the purpose of providing pension benefits to its own employees. To the extent
27
28
29

1 that each separate plan independently satisfies the requirements of ERISA § 3(2), 29
2 U.S.C. § 1002(2), it thereby qualifies as an employee benefit plan pursuant to ERISA §
3 3(3), 29 U.S.C. § 1002(3).
4

5 **B. MECHANICS OF THE EARLY WITHDRAWAL PROCEDURE**

6 The Independent Fiduciary believes the Early Withdrawal Procedure should be
7 offered to the aforementioned categories of sponsoring employers. Each sponsoring
8 employer will be required to pay all outstanding fees, expenses, and correct tax
9 qualification defects (if any) as a condition precedent to the lifting of the freeze on its
10 RSPT plan assets and early withdrawal from RSPT.¹ Employers whose plans have had
11 assets taken in prohibited transactions may correct this defect by making a restorative
12 payment to their plans in the full amount that was misappropriated with earnings
13 (calculated using the U.S. Department of Labor, Employee Benefits Security
14 Administration web site calculator). In exchange for making this restorative payment, the
15 Employer would receive a claim on the net assets recovered to RSPT by the Independent
16 Fiduciary, to the extent of the amount paid by the employer. Should the Independent
17 Fiduciary not recover 100% of the amounts taken, the Employer claim would be paid pro-
18 rata from the available assets recovered.
19
20
21

22 Each employer will be provided information and instructions regarding necessary
23 resolutions, choices to withdraw from RSPT or terminate its RSPT plan, and make
24 distributions to participants or to transfer plan assets to a successor plan established by
25 the employer.
26

27 ¹ The procedure is called “Early Withdrawal” as the Independent Fiduciary is charged to account for all
28 plan assets, make all economically reasonable and feasible efforts to recover any missing or
29 misappropriated plan assets, and to terminate the plans. “Early Withdrawal” would apply to those plans that
do not need to wait until all asset recovery efforts have been completed.

1 The Independent Fiduciary believes this procedure to be in the best interests of
2 the participants in the RSPT plans. The Early Withdrawal Procedure allows those plans
3 not impacted (or no longer impacted) by the prohibited transactions to withdraw from
4 RSPT without needlessly waiting for the Independent Fiduciary's asset recovery efforts
5 in which they have no stake. The Early Withdrawal Procedure allows participants in both
6 plans unaffected by the prohibited transactions and plans whose employers have
7 corrected plan qualification defects to have their plan assets unfrozen and to avoid further
8 administrative expenses pending the Independent Fiduciary's asset recovery efforts. The
9 Independent Fiduciary believes this proposal to be fair and equitable. If no objections are
10 noted to this Report, the IF will then proceed with this process as soon as possible.
11
12

13 14 IV. ACCOUNTINGS REGARDING THE RSPT PLANS

15 As noted in Section 18 of the June 13, 2012 Preliminary Injunction, before
16 causing the RSPT Plans to pay compensation, fees or expenses, the IF is to provide
17 written notice (the "Fee Notice") of such compensation, fees or expenses, by filing the
18 Fee Notice (such as set forth herein) with the Court, and by serving a copy of that filing
19 to the Secretary of the U.S. Department of Labor, Employee Benefits Security
20 Administration, Hutcheson and HWA. The IF intends to submit her Fee Notice and
21 Activity Report on a monthly basis. If, within fifteen (15) days after filing of a Fee
22 Notice, no objection to the Fee Notice, nor to payment by the Plan of the compensation,
23 fees or expenses described therein, is filed with the Court, such compensation, fees or
24 expenses shall be deemed reasonable expenses of the RSPT Plans and shall be paid by
25 the RSPT Plans without further action or approval of the Court. The fees and expenses
26 will be allocated as outlined above. In an effort to reduce costs, copies of this Report and
27 REPORT ON EARLY WITHDRAWAL PROCEDURES FOR RSPT 401K PLANS
28 AND FEE NOTICE OF COSTS AND EXPENSES - PAGE 7
29 Matter: 8571-002

1 Fee Notice are being posted to a website of the IF's company Receivership Management,
2 Inc. ("RMI") and the participating employers will be given notice of the filing.

3 Attached hereto as **Exhibit 2** is a schedule of the hourly rates for the Independent
4 Fiduciary and the hourly rates of any staff of Receivership Management, Inc. that might
5 be used to carry out the terms of the Court's June 13, 2012 Preliminary Injunction.
6

7 Attached hereto as **Collective Exhibit 3** are expense summaries for the period of
8 October 1, 2012 - October 31, 2012. As noted earlier in the report, the October costs
9 while substantially higher than the last two months due to the 5500 filings for 106
10 companies are still within the expected payments from the monthly amounts at this time.
11

12 Total expenses, as listed on **Collective Exhibit 3** include \$3,210.00 in IF fees,
13 \$2,403.20 in legal expenses and \$22,323.65 in contract labor expenses (which include
14 auditor fees and identified charges for other fees, postage, copies, telephone, travel, etc.)
15 for the period of October 1, 2012 - October 31, 2012. Please note that counsel have, as
16 necessary, redacted exact descriptions of litigation issues in order to protect applicable
17 privileges, and the IF may also redact the names of employers and or members as to
18 protect the companies or the members involved when responding to individual questions
19 if required. The IF believes that the remaining descriptions are sufficient for approval of
20 the charges requested. All expenses and fees are separated between those costs necessary
21 for administration and those costs necessary for asset recovery, and will be paid as noted
22 in previous reports. Upon final replacement by contingency counsel, costs for asset
23 recovery efforts are expected to be minimal.
24
25
26

27 In the absence of any objection, total reimbursement for \$3,210.00 in IF fees,
28 \$2,403.20 in legal expenses and \$22,323.65 in contract labor expenses for administration
29

1 and litigation will be paid from the Plan's expense reserve in accordance with the Court's
2 June 13, 2012 Preliminary Injunction. The exact amounts and the parties to be paid are
3 listed below:

- | | | |
|---|---------------------------------|-------------|
| 4 | | |
| 5 | 1. Jeanne Barnes Bryant | \$3,210.00 |
| 6 | 2. Moore & Elia LLP | \$1,150.70 |
| 7 | 3. Berry & Tudor | \$1,252.50 |
| 8 | 4. Mike Dunson CPA | \$5,400.00 |
| 9 | 5. Receivership Management Inc. | \$16,923.65 |
| | \$14,300.00/Contract labor | |
| | \$2,623.65/Other expenses | |

10 Pursuant to the Court's June 13, 2012 Preliminary Injunction [Doc. 16], if no
11 objection is filed with the Court within fifteen (15) days after the filing of this Notice and
12 Report, the IF will proceed to authorize payments due counsel and any other parties
13 listed.

14
15
16 DATED this 10th day of December, 2012.

17
18
19 /s/ Matt Christensen
20 MATTHEW T. CHRISTENSEN
21 Attorney for Jeanne B. Bryant, Independent
22 Fiduciary for the RSPT Plans
23
24
25
26
27
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2012, 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.

Jamila B. Minnicks	minnicks.jamila@dol.gov
Michael R. Hartman	hartman.michael@dol.gov
Michael A. Schloss	schloss.michael@dol.gov
Raymond E. Patricco	raymond.patricco@usdoj.gov
Michael J. Elia	mje@mbelaw.net
J. Graham Matherne	gmatherne@wyattfirm.com
Matthew T. Christensen	mtc@angstman.com

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

I further certify that on the 11th day of December, 2012, 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

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

DATED: November 8, 2012

/s/ Matt Christensen
Matthew T. Christensen