



GRANTED

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	Larry J. Naves District Court Judge <small>DATE OF ORDER INDICATED ON ATTACHMENT</small>
IN THE MATTER OF THE INVOLUNTARY LIQUIDATION OF AMERICAN INTERCAPITAL HOLDING, LLC, d/b/a/ AMERICAN INTERCAPITAL DEPOSITORY & TRUST	<p style="text-align: center;">COURT USE ONLY</p> <hr/> Case Number: 07CV11222
JOHN W. SUTHERS, Attorney General CHRISTINE C. STRETESKY, *31749 Assistant Attorneys General 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5142 Facsimile: (303) 866-5395 *Counsel of Record Brian J. Spano, #17059 Joel. A. Glover, #20821 Rothgerber Johnson & Lyons LLP 1200 17 th Street, Suite 3000 Denver, Colorado 80202-5855 Phone Number: (303) 623-9000	Div.: Ctrm.:
ORDER APPROVING SETTLEMENT	

THIS COURT, having reviewed the Liquidator's Motion to Approve Settlement filed on June 24, 2009, and any response thereto, and being fully advised in the premises, it is hereby ORDERED that the Motion is GRANTED.

The terms of the Settlement Agreement between the Liquidator and the MarketXT Parties are reasonable and are in the best interests of AIDT and its creditors. The AIDT Liquidator is authorized to enter into the Settlement Agreement and compromise claims as set forth therein.

SO ORDERED this ____ day of _____, 2009.

By the Court:

District Court Judge

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: Larry J Naves

File & Serve

Transaction ID: 25807822

Current Date: Jul 22, 2009

Case Number: 2007CV11222

Case Name: AM INTERCAPITAL HOLDING LLC et al vs. BERGER, MARC et al

Court Authorizer: Larry J Naves

/s/ Judge Larry J Naves

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, Colorado 80202</p> <hr/> <p>IN THE MATTER OF THE INVOLUNTARY LIQUIDATION OF AMERICAN INTERCAPITAL HOLDING, LLC, d/b/a/ AMERICAN INTERCAPITAL DEPOSITORY & TRUST</p>	<p style="text-align: center;">▲ Court Use Only ▲</p> <hr/> <p>Case Number: 07CV11222</p> <p>Division: 6</p>
<p>ORDER DENYING MARKET MAVEN'S OBJECTION TO AMENDED SCHEDULE OF CLAIM DETERMINATIONS</p>	

This matter comes before the Court on MARKET MAVEN'S OBJECTION TO AMENDED SCHEDULE OF CLAIM DETERMINATIONS, filed January 12, 2009. This Court, having reviewed said Motion, the court file, and being otherwise advised hereby finds and orders,

On or about December 15, 2008, Richard Fulkerson, Commissioner of Banking of the State of Colorado ("Liquidator"), in his capacity as Liquidator of American Intercapital Holding, LLC doing business as American Intercapital Depository & Trust ("AIDT"), filed his Amended Schedule of Claim Determinations in this action. In the Schedule, Market Maven is classified as follows:

- Level II Depositor for the determined claim amount of \$4,297,965.43.
- Level III General Creditor for the determined claim amount of 605 shares of Remington Ventures.

Pursuant to C.R.S. § 11-103-804(8), creditors who object to the claim determinations will have their objections "heard and determined by the court upon such notice to the commissioner and interested claimants as the court may prescribe." C.R.S. § 11-103-804(8). If the Court sustains any creditor objections, the Court will direct the Schedule to be modified accordingly. *Id.*

Market Maven objects to the Schedule and argues that (1) AIDT holds fiduciary or custodial assets in the amount of \$2,378,550.34 that should be returned to Market Maven immediately; (2) its determined amount as a Level II Depositor should also include the 605 shares of Remington Ventures that the Liquidator determined to be Level

III General Creditor claims; (3) its determined amount as a Level II Depositor should also include \$68,425.62 from the Mission Trust account; and (4) it should have a determined claim for \$200,000.00 plus interest as a Level III General Creditor pursuant to a promissory note with AIDT. Market Maven's objections are addressed below.

Background

Market Maven was a customer of AIDT as reflected in various agreements between the parties.

A. Mission Trust Custodial Account

At the time AIDT was placed into liquidation, one written custodial agreement was identified. The custodial agreement was for an account maintained by AIDT at Mission Management and Trust Company ("Mission Trust") for the benefit of Market Maven. Less than one month after the liquidation commenced, the Liquidator caused the custodial agreement to terminate, which resulted in Mission Trust transferring approximately \$120 million of securities from the custodial account to Market Maven's designee. The remaining cash and securities in the account were transferred to Market Maven after the outstanding trades settled.

Contemporaneous with the termination of the Mission Trust custodial account, the Liquidator retained approximately \$1.4 million as payment of a management or custodial fee as authorized under the Mission Trust custodial agreement. The agreement provides that Market Maven, as a customer of AIDT, would "utilize AIDT's services for the purpose of providing to it both management and custodial services through AIDT's correspondent relationship with Mission Management and Trust Co., Tucson, AZ ('Mission')." The agreement also provides that, "In exchange for its [sic] AIDT's services provided hereunder, MAVEN shall pay to AIDT an annual fee equal to one percent (1%) of the principal balance of the Assets as determined and paid on a monthly basis."

Further, the agreement specifically authorizes the management fee to be debited from the account, as follows: "MAVEN hereby authorizes Mission to debit MAVEN's sub-account ten business days following the end of each month and pay such amount directly to AIDT." Right up until the point of AIDT's liquidation, AIDT accounted for the management fee as income.

Market Maven claims that AIDT waived the management fee and thus, the Liquidator should not have debited the \$1.4 million from the Mission Trust account and the funds should be returned immediately to Market Maven as custodial funds under C.R.S. § 11-103-804(3). However, there is no indication in AIDT's books or records that it waived this fee.

No other custodial accounts or written custodial agreements have been identified in the books and records of AIDT. As a result, the Liquidator determined that all other assets held by AIDT for Market Maven are depositor or general creditor claims under

C.R.S. § 11-103-804(9)—not custodial or fiduciary claims under C.R.S. § 11-103-804(3).

B. CitiGroup Smith Barney Account

Market Maven authorized AIDT to open a second account, on Market Maven's behalf, located at CitiGroup Smith Barney (the "CitiGroup Account"). However, unlike the Mission Trust account, there was no new written agreement between AIDT and Market Maven establishing the terms and conditions of the CitiGroup Account. In addition, the Account was registered in the name of AIDT, not Market Maven.

Market Maven claims that it always intended the CitiGroup Account to be custodial on the same terms as the Mission Trust account, though it has failed to provide any written agreement to that effect. In the absence of a separate written agreement, the CitiGroup Account is governed by a general Pre-Opening Account Agreement between Market Maven and AIDT, which provides for the opening of non-custodial accounts at AIDT.

C. Harris Bank Account

On November 8, 2007, just prior to AIDT's liquidation, three transfers totaling \$951,000 were made into an account at Harris Bank & Trust ("Harris Bank"), including \$90,000 from the CitiGroup Account, \$86,000 from a Bankers Bank of the West account, and \$775,000 from Mission Trust.

Market Maven claims that the transfers were unauthorized. According to Market Maven, a majority of the funds transferred originated from a custodial account (Mission Trust). The remainder of the funds was transferred from what should have been established as a custodial account (the CitiGroup Account) and from a deposit account (Bankers Bank of the West), to a deposit account (the Harris Bank account). Market Maven argues that the entire \$951,000 from the Harris Bank account should be paid to it immediately as custodial funds. However, because the Harris Bank account is a deposit account, the Liquidator designated these funds as a Level II Depositor claim.

In the Liquidator's Notice of Claim to Market Maven, the Liquidator identified the \$951,162.06 at Harris Bank as a Level II Depositor claim. In its Proof of Claim, Market Maven failed to object to the Liquidator's classification of these funds.

The Liquidator disputes Market Maven's claims as to the accounts discussed above. Nonetheless, the Liquidator created a separate escrow account consisting of the \$951,162.06 (funds from Harris Bank that Market Maven claims are fiduciary) and \$1,427,388.28 (the management fee which Market Maven claims was waived by AIDT and thus is fiduciary) for a total escrow fund of \$2,378,550.34.

An Order of Liquidation was entered against AIDT in November 2007, and since that time, this Court has overseen the liquidation of AIDT. In January 2008, Market Maven moved to intervene in these proceedings pursuant to C.R.C.P. 24(a). The Court

denied intervention and Market Maven appealed the decision to the Colorado Court of Appeals. See Case No. 2008-CA892. The appeal was denied on July 7, 2009. Market Maven also filed a Petition Pursuant to C.A.R. 21 for Rule to Show Cause with the Colorado Supreme Court. The Petition was denied.

The priority level and amount of Market Maven's claims were the subject of a settlement agreement between the Liquidator and Market Maven. However, on November 20, 2008, the Liquidator received a seizure warrant from the United States District Court for Eastern District of Virginia purporting to seize "[a]ll funds held in the name of Market Maven Management LLC at American Intercapital Depository and Trust subject to forfeiture . . . as property constituting proceeds traceable to wire fraud, securities fraud, and money laundering." As a result, the settlement agreement between the Liquidator and Market Maven was not implemented.

I. MARKET MAVEN'S CUSTODIAL ACCOUNT HAS BEEN TERMINATED AND MORE THAN \$120 MILLION WAS TRANSFERRED TO MARKET MAVEN.

Within a month after the liquidation, the Liquidator terminated the Mission Trust account and returned to Market Maven approximately \$120 million of securities from that account that were custodial and undisputed. The remaining cash and securities in the account were transferred to Market Maven after the outstanding trades settled. To the extent there were disputes, the Liquidator advised Market Maven that it was required to utilize the statutory claims process in C.R.S. §§ 11-103-804(5-9) to resolve those disputes.

Market Maven alleges that AIDT holds additional fiduciary or custodial assets in the amount of \$2,378,550.34 (the \$1.4 million in management fees retained by the Liquidator plus the \$951,000 in the Harris Bank account). Although not delineated in its Objection, Market Maven asserts that these funds should be paid immediately to Market Maven outside of the claims process as fiduciary funds under C.R.S. § 11-103-804(3). However, because the management fees were properly retained by the Liquidator and the Harris Bank account is a depositor account, Market Maven has received all of its custodial funds. Moreover, because these funds are disputed, they are properly subject to the claims process set forth in C.R.S. §§ 11-103-804(5-9).

A. Market Maven is required to resolve its disputed claims alongside the other creditors of AIDT and is not exempted from the claims process

Market Maven argues that the \$2.4 million it claims is custodial should be returned to it immediately pursuant to C.R.S. § 11-103-804(3), and outside of the claims process set forth in C.R.S. §§ 11-103-804(5-9). However, because the custodial funds were returned to Market Maven, the specific statutory language that Market Maven invokes has already been satisfied. Section 11-103-804(3), C.R.S., provides as follows:

As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary

positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts.

Market Maven relies heavily on Section 804(3) as support for its requested preferential treatment. However, Section 804(3) has nothing to do with the resolution of disputed claims, fiduciary or otherwise. Section 804(3) simply provides that “fiduciary positions” shall be terminated and property held by the bank as a fiduciary shall be surrendered.

Section 804(3) does not provide that any person asserting a fiduciary claim is entitled to receive those assets if the claim is disputed. Section 804(3) does not say that any person asserting a claim to fiduciary assets is permitted to opt out of the statutory process for the resolution of claims against AIDT. Instead, all depositors and creditors with claims of any nature must resolve disputes in accordance with Sections 804(5-9).

The Liquidator transferred \$120 million in undisputed custodial funds to Market Maven. Market Maven now demands to be paid \$2.4 million immediately, claiming that those funds are custodial in nature. Because Market Maven’s claim to the funds is disputed, that claim must be resolved alongside all other claims pursuant to the process set forth in Sections 804(5-9).

B. AIDT properly debited approximately \$1.4 million from the Mission Account as management fees.

Market Maven argues that AIDT waived the management fee due under the Mission Trust custodial agreement, and therefore those funds are custodial in nature and should be returned to Market Maven immediately. However, the agreement expressly permits AIDT to debit the management fees from the Mission Trust account and there is no credible evidence that a waiver occurred.

1. The Mission Trust Custodial Account.

Contemporaneous with the termination of the Mission Trust custodial account, the Liquidator retained approximately \$1.4 million as payment a management fee as authorized by the Mission Trust custodial agreement. Per the language in the agreement, payment of a management fee by debiting the account at Mission Trust was unequivocally authorized, as follows:

In exchange for its AIDT's [sic] services provided hereunder, MAVEN shall pay to AIDT an annual fee equal to one percent (1%) of the principal balance of the Assets as determined and paid on a monthly basis. Such amount shall be based upon the market value of all assets held by Mission as determined by Mission as of the end of each calendar month. The amount due each month shall be the market value of the Assets, as determined by Mission on the last day of the month, multiplied by one-

twelfth of one percent (1/12 X 1%). Such amount shall be paid by MAVEN to AIDT no later than ten business days following the end of each month. MAVEN hereby authorizes Mission to debit MAVEN's sub-account ten business days following the end of the month and pay such amount directly to AIDT. The calculation of such fee shall be made each month net of all fees charged by Mission with respect to such Assets. In addition to the annual fee, MAVEN shall be charged a transfer fee equal to \$25 for all transfers into the Account and a transfer fee equal to \$45 for all transfers out of such Account. MAVEN hereby authorizes Mission to debit MAVEN's sub-account ten business days following the end of each month such amounts for all transfers chargeable hereunder and pay such amounts for all transfers chargeable hereunder and pay such amount directly to AIDT.

Historically, AIDT did not debit the Mission Trust account by the amount of the fee on a monthly basis. However, AIDT reflected the amount of the fee as income and reported that income to the Colorado Division of Banking in its financial reports as recently as November 2007.

2. The Nonexistent Waiver Agreement.

Market Maven claims that AIDT waived the management fee. The sole evidence that Market Maven relies upon is a single email from AIDT's compliance officer. Market Maven has argued that its obligation to pay the \$1.4 million management fee was waived by Ron Rudman, the compliance officer for AIDT, based on an email, dated January 22, 2007. In the last paragraph of the email, Mr. Rudman asks to have a \$1 million Institutional Deposit Management Account ("IDMA") agreement signed by Market Maven. In return, Mr. Rudman indicates that, after receiving the signed agreement, he would prepare a separate document memorializing the commitment to waive the management fees. Market Maven has argued that it eventually executed an IDMA agreement and deposited \$1 million and thus the fee was waived. Indeed, Market Maven has a Level II Depositor claim against AIDT for the IDMA in that amount. However, no separate agreement memorializing the waiver of the management fee was ever drafted, exchanged, or executed although ten months passed from the date of the email until the Order of Liquidation against AIDT.

Thus, it appears that the transaction being discussed in Mr. Rudman's email was never approved, finalized, or implemented. Moreover, as the Compliance Officer of AIDT, Mr. Rudman was not authorized to waive the \$1.4 million management fee. Any waiver of the management fee required a separate agreement signed by an authorized representative of AIDT.

The consideration contemplated under Market Maven's theory is nonexistent. Market Maven is arguing that AIDT waived its right to collect \$1.4 million, which it showed as income on its books. In exchange, because the money was to be placed in a deposit account, AIDT would receive \$1 million from Market Maven and would also owe

\$1 million to Market Maven as a depositor. The net effect of the agreement that Market Maven is seeking to enforce would decrease AIDT's income by \$1.4 million in exchange for what amounts to a simple deposit.

Even if Market Maven's arguments were correct, those arguments would give rise to Market Maven having a claim against AIDT for breach of contract for failure to execute an agreement. Market Maven's arguments do not permit Market Maven to enforce rights against AIDT as if the agreement had been executed. In other words, if correct, Market Maven would have a claim as a Level III General Creditor against AIDT for failure to enter into an agreement waiving the management fee.

3. The October 3, 2006 Promissory Note.

Market Maven also argues that the Liquidator was not entitled to retain the management fees because of a promissory note executed by AIDT and Market Maven on October 2, 2006. In the note, AIDT promised to pay Market Maven "the sum of the current cash balance, as it may exist from time to time" in the Mission Trust account upon demand. That same day, Market Maven signed the Mission Trust account agreement. Market Maven alleges that the promissory note "was an integral part of Market Maven's decision to put funds into the Mission Trust account." Market Maven argues that the \$1.4 million retained by the Liquidator in management fees from the Mission Trust account should be paid to Market Maven pursuant to the promissory note which "effectively guaranteed repayment of the amounts the Liquidator has now retained."

Market Maven's argument is not supportable. First, the promissory note does not state that Market Maven may demand the funds in the account to the exclusion of AIDT's express right to the payment of management fees as set forth in Paragraph 2 of the agreement. Second, if Market Maven's argument is correct, Market Maven fails to explain why it signed two contradictory agreements on the same day. Market Maven claims that the promissory note guaranteed that Market Maven would not have to pay the management fee. But that same day, Market Maven agreed to the terms of the Mission Trust account agreement which expressly provide for payment of a management fee.

C. The \$951,000 in the Harris Bank Account are not custodial funds.

As mentioned above, three transfers were made into an account at Harris Bank & Trust ("Harris Bank") in early November 2007, including \$90,000 from the CitiGroup Account, \$86,000 from the Bankers Bank of the West account, and \$775,000 from Mission Trust. Market Maven claims that the transfers were unauthorized and that the entire \$951,000 from the Harris Bank account should be paid to it immediately as custodial funds. However, there is no written agreement indicating that the Harris Bank account is custodial, and Market Maven has failed to file a proper Proof of Claim for those funds.

First, the CitiGroup Account was never established as a custodial account and the

Bankers Bank of the West account was always a deposit account, as was the Harris Bank account. In the absence of a written agreement, any account would be governed by the general, Pre-Opening Account between Market Maven and AIDT that would create noncustodial accounts. Moreover, in the absence of a separate written agreement, there is no objective basis to conclude that AIDT's transfer of funds to Harris Bank somehow violated the terms of that account.

As part of the statutory claims process, the Liquidator sent Market Maven a Notice of Claim advising that it would have a Level II Depositor claim against AIDT in the amount of \$951,162.06. While Market Maven submitted a Proof of Claim disputing other portions of the Liquidator's Notice of Claim, but Market Maven failed to assert in that Proof of Claim that the \$951,162.06 was custodial in nature, rather than a Level II Depositor claim. Having failed to file a claim that the funds deposited in Harris Bank are fiduciary in nature, Market Maven cannot now make that argument.

II. THE LIQUIDATOR PROPERLY DESIGNATED THE 605 SHARES OF REMINGTON VENTURES TO BE LEVEL III GENERAL CREDITOR CLAIMS.

In its Objection, Market Maven claims that its determined amount as a Level II Depositor should also include the 605 shares of Remington Ventures that the Liquidator determined to be Level III General Creditor claims. At the time the Liquidator terminated the CitiGroup Account, it contained 605 shares of Remington Ventures. There is no market for these shares and their current value appears to be nominal. Nevertheless, the Liquidator is continuing to hold these shares.

As discussed above, there is no custodial agreement for the CitiGroup Account. In the absence of a separate written agreement, the CitiGroup Account is governed by the Pre-Opening Account Agreement between Market Maven and AIDT which provides for the opening of non-custodial accounts at AIDT. Because the account is non-custodial and, unlike a depositor account, the account is in the name of AIDT, the Liquidator properly determined that Market Maven has a claim for the shares as a Level III General Creditor.

III. THE LIQUIDATOR PROPERLY DECLINED TO RECOGNIZE THE AUGUST 15, 2006 PROMISSORY NOTE AS A SEPARATE CLAIM.

On August 15, 2006, Market Maven and AIDT executed a promissory note in which AIDT promised to pay Market Maven \$200,000 plus interest for funds that Market Maven had advanced to AIDT. As a result of the note, Market Maven asserts it should have a determined claim for \$200,000, plus interest, as a Level III General Creditor.

However, the books and records of AIDT indicate that the note was converted from a debt liability into a deposit liability as a portion of the \$2.4 million in depository account #6835711169. As a result, the Liquidator did not recognize the note on the Schedule of Claim Determinations apart from determining the \$2.4 million depository account #6835711169 to be a Level II Depositor claim.

For the foregoing reasons, this Court hereby DENIES Market Maven's Objection to the Amended Schedule of Claim Determinations.

SO ORDERED this 22nd day of July, 2009.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Larry J. Naves", written over a horizontal line.

Larry J. Naves
Denver District Court Judge

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, Colorado 80202</p> <hr/> <p>IN THE MATTER OF THE INVOLUNTARY LIQUIDATION OF AMERICAN INTERCAPITAL HOLDING, LLC, d/b/a/ AMERICAN INTERCAPITAL DEPOSITORY & TRUST</p>	<p style="text-align: center;">▲ Court Use Only ▲</p> <hr/> <p>Case Number: 07CV11222</p> <p>Division: 6</p>
<p>ORDER DENYING THE JAMESES' OBJECTION TO AMENDED SCHEDULE OF CLAIM DETERMINATIONS</p>	

This matter comes before the Court on E. Jerry James' and Susan James' OBJECTION TO AMENDED SCHEDULE OF CLAIM DETERMINATIONS, filed January 12, 2009. This Court, having reviewed said Motion, the court file, and being otherwise advised hereby finds and orders,

On or about December 15, 2008, Richard Fulkerson, Commissioner of Banking of the State of Colorado ("Liquidator"), in his capacity as Liquidator of American Intercapital Holding, LLC doing business as American Intercapital Depository & Trust ("AIDT"), filed his Amended Schedule of Claim Determinations in this action.

In the Schedule, the Liquidator classified Mr. and Mrs. James as General Creditors, Level III, according to C.R.S. § 11-103-804(7). The Liquidator determined the amount of their claims as \$0.00.

Mr. James objects to his classification and argues he is entitled to unpaid and past due compensation from AIDT for his salary at the rate of approximately \$27,729.17 per month from November 2007 through February 2008. Further, Mr. James argues he is owed additional compensation under the terms of his Employment Agreement. Mr. James asserts that the Liquidator terminated his employment in violation of the Agreement and, as a result, he may be entitled to damages, costs and attorney's fees under C.R.S. § 8-4-101, *et seq.*

Mrs. James objects to her classification and argues she is entitled to unpaid and past due compensation from AIDT for her salary at the rate of approximately \$5,000 per month from November 2007 through February 2008. Mrs. James argues the Liquidator failed to pay the wages and salary owed to her as required by Colorado law, and

therefore, she may also be entitled to damages, costs and attorney's fees under C.R.S. § 8-4-101, *et seq.*

The Jameses also argue that the Liquidator failed to return certain personal property from the offices of AIDT. Therefore, they ask this Court to order the Liquidator to provide them with a copy of the inventory and the videotape the Liquidator took of the premises of AIDT the day after AIDT was liquidated, to allow them to determine what remaining personal property is still in the Liquidator's possession.

Past due compensation

Mr. James is the founder of AIDT and served as Chairman of the Board of Managers of AIDT. Mrs. James served as a member of the Board of Managers of AIDT.

AIDT and Mr. James entered into an Employment Agreement dated October 1, 2007. Mr. James' employment duties and responsibilities included those "customary for the positions of Chairman of the Board and Chief Executive Officer." Mr. James' initial base salary was \$332,750.00. Mr. James was issued his last paycheck on November 5, 2007 in the amount of \$27,729.17. Mrs. James was issued her last two paychecks on November 5 and November 15, 2007, each in the amount of \$2,500.00. This Court entered an Order of Liquidation against AIDT on November 19, 2007. The Jameses did not perform any labor or services for AIDT after the liquidation of AIDT. Thus, they have been paid for all work performed at AIDT.

The Jameses argue that their bargained for agreements with AIDT were for the availability to perform services and, therefore, their claims for compensation and reimbursement of expenses are not barred merely because the Liquidator did not request them to perform such services. *See Peters v. Enterasys Networks, Inc. (In re Native American Systems, Inc.)*, 351 B.R. 135 (10th Cir. BAP 2006). The Jameses assert they are entitled to compensation through February 2008 because they withheld from participating in other opportunities and remained ready, willing, and able to perform their duties for AIDT following liquidation until Mr. James received a letter of termination from the Deputy Receiver of AIDT in February 2008.

However, when the Court appointed Richard Fulkerson to serve as the liquidator of AIDT under C.R.S. § 11-103-802(2)(b), he became the sole manager, officer, and/or director of AIDT and assumed the powers granted to such persons under AIDT's governing documents. On December 20, 2007, the Court enjoined, restrained and prohibited "any officers [or] directors . . . and all persons and other legal entities whatsoever" from interfering with the liquidation of AIDT. Specifically, the Court prohibited officers and directors from, among other things:

- "The exercising of any direction, control or influence whatsoever or transacting any further business of AIDT, any of its subsidiaries or their assets pending further order of the Court."

- “Interfering in any shape, form or fashion, either directly or indirectly, with the Liquidator’s operation of the liquidation of AIDT or his possession or control of title, right and interest to the property, books, computer records, domain names, records and all other assets of AIDT.”
- “Any other threatened or contemplated action that might tend to lessen the value of AIDT’s assets or prejudice the rights of its depositors, creditors or shareholders or otherwise impede the administration of the liquidation of AIDT.”

Therefore, the Jameses were fully aware that their services were no longer required or necessary and that they need not forego other opportunities in order to remain available to perform their duties for AIDT.

Colorado law only requires the payment of “wages or compensation for labor or service earned, vested, determinable, and unpaid: to be paid upon termination. *See* C.R.S. § 8-4-109(1)(a). Neither of the Jameses worked on behalf of AIDT beyond November 19, 2007, the date of the liquidation order. Therefore, they are not entitled to compensation from November 2007 through February 2008.

Additional compensation under terms of the Agreement

The Jameses also claim that “under the terms of their employments agreements,” they are entitled to reimbursement of expenses incurred by them on behalf of AIDT and to additional compensation for “cellular telephone bills, automotive expenses, and other similar compensation.” An employment agreement for Mrs. James has not been submitted to the Court, but Paragraph 5(d) of Mr. James’ Employment Agreement specifies the requirements for the reimbursement of expenses. The Jameses have failed to meet those requirements because they have not provided proof: (1) of these expenses; (2) that the expenses were incurred for AIDT business; or (3) that the expenses were reasonable and in accordance with AIDT’s policy on expenses. Therefore, the Jameses are not entitled to additional compensation.

Termination of Mr. James’ employment

Mr. James also argues that the Liquidator terminated his employment in violation of his Employment Agreement.

On February 21, 2008, the Liquidator, by and through the Deputy Receiver sent Mr. James a letter of termination which read in relevant part: “You are hereby notified that your employment with AIDT is terminated immediately for cause, and in accordance with C.R.S. § 11-103-804(2).”

Under C.R.S. § 11-103-804(2): “Within six months after the commencement of liquidation, the commissioner may, by his or her election, terminate any executory contract for services or advertising to which the state bank is a party...”

Under the Employment Agreement, Mr. James' affiliation with AIDT could be terminated for cause.

Based on the foregoing and in light of the fact that Mr. James offers no support for his assertion that he was terminated in violation of his Employment Agreement, this Court is satisfied that his termination was not improper.

Personal property

The Jameses also assert that they are still missing many personal records and personal items from their offices at AIDT.

Following the liquidation of AIDT, the Liquidator conducted an inventory of the items in the AIDT offices. The inventory is 106 pages long and contains a description of 2,569 entries. Each entry describes an individual file and includes the location of the file in the AIDT offices, what the file relates to and a description of the contents of the file. In addition, on November 20, 2007, the day after AIDT was liquidated, the Liquidator took a videotape of the premises of AIDT, including videotape of each office at AIDT, the storage area and the kitchen of AIDT.

This Court Orders the Liquidator to make available to the Jameses a copy of the inventory within 30 days of this Order so that they can determine what, if any, remaining personal property is still in the Liquidator's possession. The Jameses shall then have 60 days to identify and request the return of any of their personal items. If there is a dispute following such identification and request, the parties may seek a determination from this Court as to ownership of such property.

SO ORDERED this 22nd day of July, 2009.

BY THE COURT:



Judge Larry J. Naves
District Court Judge