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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

Plaintiff,

v.

MICHAEL D. WILLIAMS, an individual;
POWER & DATA TECHNOLOGY, INC., a
California corporation; and POWER & DATA
TECHNOLOGY, INC., 401(K) PROFIT
SHARING PLAN, an employee pension
benefit plan,

Defendants.

Case No. C-08-05643-RMW

**ORDER GRANTING MOTION TO
APPOINT INDEPENDENT
FIDUCIARY**

[Re Docket No. 49]

On January 8, 2013, plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor ("Secretary") moved under Federal Rule of Civil Procedure ("Rule") 70 for appointment of an independent fiduciary for the Power & Data Technology, Inc., 401(k) Profit Sharing Plan ("Plan"). For the reasons set forth below, this court GRANTS the Secretary's motion.

I. BACKGROUND

On December 18, 2008, the Secretary filed in this court a complaint for violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1191c. On

1 March 5, 2010, this court entered a default judgment against defendants in the amount of
2 \$39,325.62 in missing Plan assets, plus \$6,865.46 in pre-judgment interest as of January 15,
3 2010, for a total of \$46,191.08. The court additionally awarded pre-judgment interest through the
4 date of entry of judgment, post-judgment interest through the date of collection, and \$946.00 in
5 costs of service to the Secretary.

6 Following the entry of the default judgment, the Secretary obtained post-judgment
7 discovery from defendant Michael D. Williams ("Williams"). The Secretary alleges that the
8 department "further attempted to negotiate with . . . Williams to secure his cooperation and
9 voluntary compliance with the judgment; specifically, to restore the funds owed to the Plan and to
10 wind up and terminate the Plan without the Plan having to incur the cost of an [independent
11 fiduciary.]" Pl.'s Br. 2, Dkt. No. 49. According to the Secretary, the negotiations were
12 unsuccessful. The secretary now seeks to remove Williams as a fiduciary and trustee to the plan
13 and moves to appoint Victor Yaneza of the Retirement Equity Administrators Corporation
14 (currently the Plan's third party administrator), as the independent fiduciary.

15 **II. DISCUSSION**

16 Pursuant to Rule 70(a), when a party fails to act in compliance with a judgment "within
17 the time specified, the court may order the act to be done—at the disobedient party's expense—by
18 another person appointed by the court. When done, the act has the same effect as if done by the
19 party." Fed. R. Civ. P. 70. This court's March 5, 2010 default judgment provides for the
20 appointment of an independent fiduciary upon motion by the Secretary. Williams does not
21 oppose the Secretary's motion. Because Williams has failed to comply with the default judgment,
22 the court grant's the Secretary's motion.

23 **III. ORDER**

24 Having fully considered the Secretary's Motion to Appoint Independent Fiduciary, and for
25 good cause shown,

26 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:**
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1 1. The Secretary’s Motion to Appoint an Independent Fiduciary (“IF”) for the Power
2 & Data Technology, Inc., 401(k) Profit Sharing Plan is GRANTED in full;

3 2. Defendant Michael Williams is removed as a fiduciary and trustee to the Plan;

4 3. Victor Yaneza of Retirement Equity Administrators Corporation, San Francisco,
5 CA, currently the Plan’s Third Party Administrator, is appointed as the Independent Fiduciary to
6 the Plan. The Independent Fiduciary:

7 a. shall collect, marshal, pay out and administer all of the Plan’s assets and take further
8 action with respect to the Plan as appropriate, including terminating the Plan when all of its assets
9 have been distributed to all eligible participants and beneficiaries;

10 b. shall, pursuant to the procedures outlined in the Employee Benefits Security
11 Administration’s Field Assistance Bulletin 2004-02, exercise reasonable care and diligence to
12 identify and locate each Plan participant and beneficiary who is eligible to receive a distribution
13 under the terms of the Plan;

14 c. shall have all the rights, duties, discretion, and responsibilities of a trustee, fiduciary,
15 and Plan Administrator under ERISA and is ordered to file a final Internal Revenue Service Form
16 5500 for the Plan;

17 d. is authorized to delegate or assign fiduciary duties as appropriate and allowed under
18 the law and may retain such assistance as it may require, including attorneys, accountants,
19 actuaries, and other service providers;

20 e. is authorized to receive \$3,900.00 in reasonable fees and expenses, payable from the
21 assets of the Plan, with such amount added to the amount due the Plan from Defendant Williams
22 under the Default Judgment entered March 5, 2010 as set forth as follows:

23 i. As of December 7, 2012, the amount due the Plan under the March 5, 2010

24 Default Judgment is \$46,191.08, plus \$193.64 in additional pre-judgment
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1 interest through the date of entry of judgment, March 5, 2010, at the rate
2 provided by IRC § 6621(a), plus \$370.99 in post-judgment interest through
3 December 7, 2012, pursuant to 28 U.S.C. § 1961, for a total of \$46,755.71.

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5 ii. Adding \$3,900.00 to the December 7, 2012 total of \$46,755.71, the new
6 total due the Plan under the March 5, 2010 Default Judgment is
7 **\$50,655.71**, with additional post-judgment interest to accrue thereon from
8 December 7, 2012.

9 f. shall have full access to all data, information, and calculations in the Plan's possession
10 and under its control, including information and records maintained by the Plan's custodial
11 trustee or service provider;

12 g. is authorized to give instructions respecting the disposition of assets of the Plan; and

13 h. shall comply with all applicable rules and laws; and

14 i. shall not be held personally responsible for any claims against the Plan or related
15 entities which existed, arose, matured or vested prior to the appointment of the Independent
16 Fiduciary, or for any claims filed subsequent to final distribution by a Plan participant that the
17 Independent Fiduciary did not identify prior to closing of the account.
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20 It is SO ORDERED.

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22 Dated: February 8, 2013


Ronald M. Whyte
United States District Court Judge