Appeal No. 16-4013

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES EXCHANGE COMMISSION, Plaintiff

v.

AMERICAN PENSION SERVICES, INC. a Utah corporation, and CURTIS L. DeYOUNG, an individual, Defendants.

RICHARD SEILER, MICHELLE SEILER, and CHRISTA ZARO, Intervenors and Appellants

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Appeal from Order of the United States District Court for the District of Utah, Judge Robert J. Shelby, Civil No. 2:14-cv-309

BRIEF OF APPELLANTS

(Oral Argument Requested)

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Basis for district court's jurisdiction: The district court had subject matter jurisdiction over this matter pursuant to Sections 20 and 22 of the Securities Act of 1933 (15 U.S.C. §§ 77t and 77v) and Sections 21 and 27 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78u and 78aa).

Basis for this Court's jurisdiction: This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Timeliness of appeal: The district court's Claims Bar Order was entered on December 23, 2015. Appellants' Appendix ("**App.**") 503-505. The notice of appeal was filed on January 19, 2016. App. 506-509.

Assertion of finality: This appeal is from an order that was certified by the district court as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 497-496 at ¶ 6.

STATEMENT OF THE ISSUES

I. Did the Anti-Injunction Act, 26 U.S.C. § 7421(a), prohibit the district court from issuing a permanent injunction against third parties barring them from pursuing their own claims against a bank that is not in receivership and that is not a party in this action?

Standard of Review: The issue of whether the Anti-Injunction Act prohibits and injunction in this case is a question of law that this Court reviews *de novo*. *Ambort v. United States*, 392 F.3d 1138, 1140 (10th Cir. 2004).

Preservation of Issue for Appeal: This issue was raised in the objection filed by the appellants in the district court. *See, e.g.*, App. 406-410.

II. Even if the Anti-Injunction Act does not apply here, did the district court have any authority to bar claims that did not belong to the receiver and that third parties wish to pursue against a bank that is not in receivership?

Standard of Review: As with the previous issue, this is a legal question, and the standard of review is *de novo*. *In re Gledhill*, 76 F.3d 1070, 1083 (10th Cir. 1996).

Preservation of Issue for Appeal: This issue was raised throughout the appellants' objection. *See, e.g.*, App. 397-399.

III. Did the district court err in relying upon an unsupported factual finding regarding a bank's financial ability to satisfy claims made against it?

Standard of Review: The district court's factual findings are reviewed for clear error. *John Zink Co. v. Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001). A factual finding is clearly erroneous if it is without support in the record. *Manning v. United States*, 146 F.3d 808, 812 (10th Cir. 1998).

Preservation of Issue for Appeal: This issue was raised in the appellants' objection, s*ee, e.g.*, App. 392-393, and in the declaration of the appellants' expert witness, App. 431-437.

STATEMENT OF THE CASE

1. This lawsuit was instigated by the United States Securities and Exchange Commission (the "**SEC**") against American Pension Services, Inc. ("**APS**") and its CEO, Curtis DeYoung. *See* App. 14, Docket No. 1.

2. At the request of the SEC, the district court appointed Diane A. Thompson to serve as the receiver for APS (the "**Receiver**"). *See* App. 15, Docket No. 9.

3. During the course of the receivership, the Receiver entered into negotiations with a third party, First Utah Bank ("**First Utah**" or the "**Bank**"), regarding certain claims that the Receiver believed APS had against the Bank (the "**APS Claims**").

4. Eventually the Receiver and the Bank agreed to settle the APS Claims. As a condition of entering into the settlement agreement, First Utah required not only that the Receiver release all of APS's claims against First Utah but that the Receiver also obtain an order from the district court permanently barring *any party* from asserting claims against First Utah that are related to APS

(even if the claims are owned solely by such third parties and not by the receivership estate). *See, e.g.*, App. 161 at ¶ 62; App. 190-91 ¶ 9(d).

5. Certain account holders at the Bank, on their own behalf and as putative representatives of a class of similarly situated parties (the "**Account Holders**"), sought to intervene in the receivership action for the purpose of opposing the Receiver's motion for a permanent injunction prohibiting them from asserting their own claims against First Utah in state court.

6. Ultimately the district court denied the objection of the Account Holders and entered an injunction called the "**Claims Bar Order**." This injunction permanently enjoins the Account Holders from pursuing their own independent claims against First Utah in state court. App. 503-505.

7. The Account Holders filed a timely notice of appeal on January 19, 2016. App. 506-509.

SUMMARY OF ARGUMENT

In this case the district court took the extraordinary step of enjoining a class of parties from pursuing their own claims against a bank that is not in receivership. In so doing, the district court committed reversible error. First, the Anti-Injunction Act expressly prohibits the injunction issued by the district court in this case. Second, even if the Anti-Injunction Act does not apply, and even if the district court were not expressly *prohibited* from entering an injunction, the district court

did not have any affirmative authority to issue the injunction. Third, the undisputed evidence before the district court was that First Utah could pay more money to settle the claims against it than it was offering to the Receiver. Thus, even if the district court's ends-justify-the-means rationale were correct, there was no factual basis for the district court's finding that the Bank could not pay more money to settle claims against it (both the Receiver's claims and the independent claims of the Account Holders).

ARGUMENT

The basis for this appeal is fairly simple. Curtis DeYoung, the principal of APS, stole $25 million from the accounts held at First Utah. That money belonged to the Account Holders, not APS. The Account Holders merely seek to sue their bank (First Utah) on behalf of themselves and a class of similarly situated account holders for the liability that First Utah has to them in allowing their money to be stolen. First Utah held the Account Holders' money as a custodian, and the Account Holders have their own independent claims against the Bank. First Utah is not in receivership, and the Account Holders do not seek to sue any receivership entity. Nor do the Account Holders object to any settlement agreement that the Receiver wishes to enter into regarding her own claims against the Bank as long as the Receiver does not seek to prevent the Account Holders from pursuing their own individual claims.

As shown below, as a matter of law, the claims of the Account Holders belong to them, not to the receivership. Obviously, a federal equity receiver has authority to bring claims that belonged to the entity in receivership. But it is well settled that claims that did not belong to the entity in receivership are not receivership assets, and thus the district court did not have subject matter jurisdiction over those claims. Rather, those claims belong to the Account Holders (who were customers of the bank). As this Court held last year, "receivers may only sue to redress injuries to the entity in receivership, and not directly on behalf of the entity's creditors." *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015). It follows that if the Receiver does not own the Account Holders' claims and cannot file suit based upon them, then a district court supervising an equity receivership lacks the authority to enjoin the Account Holders from bringing those claims. *See Liberte Capital LLC v. Capwill*, 248 Fed. Appx. 650 (6th Cir. 2007) ("***Liberte Capital II***") (although a district court sitting in receivership has wide discretion in fashioning relief, that discretion is not so broad as to confer subject matter jurisdiction over third party claims which are not before the court).[1]

As shown below, the district court erred in at least three respects. First, the district court was expressly prohibited under federal law from issuing an injunction against the Account Holders. Second, even if there were no affirmative

[1] Although the Account Holders cited the *Liberte Capita II* case in the proceedings below, the district court did not discuss or even acknowledge this persuasive case.

prohibition, the district court lacked any authority to enter an injunction here, and the mere fact that an injunction might be in the best interest of the receivership estate does not confer authority on the district court. Third, the district court based its order on an unsupported factual finding. For these reasons, the Claims Bar Order entered by the district court should be reversed.

I. The Anti-Injunction Act prohibits an injunction against the claims of the Account Holders.

The Claims Bar Order, which permanently enjoins the Account Holders from going forward with their case against First Utah,[2] is an impermissible injunction against a state court action. Such an injunction is expressly prohibited by the Anti-Injunction Act, 28 U.S.C. §2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Anti-Injunction Act is "an absolute prohibition against enjoining state proceedings, unless the injunction falls within one" of the three exceptions listed in the act. *Atlantic Coast Line R.R. Co. v. Bhd of Locomotive Eng'rs,* 398 U.S. 281 (1970). Moreover, "[t]he [Anti-Injunction Act's] prohibition is jurisdictional." *LNV Corporation v. Hook*, (10th Cir, August 19, 2015), citing *Enochs v. Williams Packing & Nav. Co*., 370 U.S. 1, 5 (1962).

[2] *See* App. 495-496 at ¶ 28; App. 504.

The Anti-Injunction Act applies with particular force in this case because the Account Holders do not seek to sue an entity in receivership, but rather the bank that aided and abetted the fraud in this case. The Supreme Court has repeatedly emphasized that, as a general rule, a federal court may not enjoin a state court action against a non-party. *See, .e.g.*, *Smith v. Bayer*, 564 U.S. 299 (2011).

The Receiver argued below that the injunction is justified under the All Writs Act, which says federal courts may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. §1651(a). However, the Anti-Injunction Act and the All Writs Act are to be read together. *Burr & Forman v. Blair*, 470 F.3d 1019, 1027 (11th Cir. 2006. In fact, the language of the "necessary in aid of jurisdiction" and "re-litigation" provisions of the Anti-Injunction Act is identical to the All Writs Act and must be construed similarly. *Carlough v. Amchem Products, Inc*., 10 F.3d 189, 201 (3rd Cir. 1993).

All three exceptions to the Anti-Injunction Act are narrow and are not to be enlarged by loose statutory construction. *Smith v. Bayer*, 564 U.S. 299 (2011). Indeed, any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed. *Id.*

As shown below, the Claims Bar Order in this case does not fit within any of the three exceptions listed in the Anti-Injunction Act.[3]

A. <u>The act-of-Congress exception does not apply</u>.

Neither the Receiver nor the district court has suggested that there is any act of Congress authorizing the district court to enjoin the Account Holders' claims against First Utah, and in fact there is none. Therefore this exception does not apply.

B. <u>The necessary-in-aid-of-jurisdiction exception does not apply</u>.

Second, the Claims Bar Order is not necessary in aid of the district court's jurisdiction. "[T]he 'necessary in aid of its jurisdiction' exception provides the basis for an injunction '[w]hen *particular property* is before the district court . . . such as when it is the subject of an in rem proceeding or in the custody of a bankruptcy trustee. . . . The princip[al] focus of this exception is on parallel in rem proceedings—one in federal court, the other in state court." *Burr & Forman*, 470 F.3d 1019, 1027 (11th Cir. 2006) (citations omitted, emphasis added). In this case there was no "particular property" in front of the district court, and the district court did not need to act to protect its jurisdiction with respect to any particular

[3] In her briefs and arguments in the district court, the Receiver never identified which, if any, of the exceptions to the Anti-Injunction Act she was relying upon. In addition, the district court did not address any of the exceptions in its order. However, as a matter of law, *none* of the exceptions applies here, and this Court should reverse the Claims Bar Order.

property. As this Court held *in Denver-Greeley Valley Water Users Ass'n v. McNeil*, 131 F.2d 67, 71 (10th Cir. 1942), "the necessity does not exist which would warrant injunctive relief where the subsequent action does not create a conflict between the courts over the possession or custody of the res."

Stated differently, the "necessary in aid of its jurisdiction" exception does not apply to parallel in personam actions. See *Vendo v. Lektro Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality) ("we have never viewed parallel in personam actions as interfering with the jurisdiction of either court."); *Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").

The Receiver's claims against First Utah are in personam. None relate to any receivership res. The claims of the Account Holders are also in personam. Indeed, a contract action is a quintessential in personam proceeding. *Burr & Forman*, 470 F.3d 1019, 1027 (11th Cir. 2006). Likewise, tort claims such as aiding and abetting breach of fiduciary duty and fraudulent misrepresentation are also in personam claims. *Lefkowitz v. Bank of New York*, 538 F.3d 102 (2nd Cir. 2007). The Account Holders do not seek possession of money contained in any specified fund. They merely seek a money judgment against First Utah, and the "necessary in aid of its jurisdiction" exception simply does not apply. A lawsuit filed by the Account Holders against the Bank would not interfere with any claims

that the Receiver may wish to pursue against the Bank. It may be true that the Bank only has a certain amount of money to satisfy claims right now, but this does not mean that the district court's jurisdiction would be impeded in any way if other parties who were also wronged by First Utah are allowed to bring their own claims against the Bank. Even if the Receiver might have a collection problem at some point, it cannot be said that there is any threat to the *jurisdiction* of the district court. As stated in *Vendo v. Lektro Vend Corp*, 433 U.S. at 642, "parallel in personam actions" do not interfere "with the jurisdiction of either court." In other words, the ability or inability of a defendant to satisfy a judgment or judgments has no relevance to the issue of whether the *jurisdiction* of a court is threatened.

C. <u>The re-litigation exception does not apply</u>.

The third and final exception listed in the Anti-Injunction Act is referred to as the "re-litigation exception." The Supreme Court explained the rationale of the re-litigation exception in *Smith*. As explained by the Court, the re-litigation exception authorizes an injunction to prevent state litigation of a claim or issue "that previously was presented to and decided by the federal court." *Smith, citing, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). In applying this exception the Supreme Court "has taken special care to keep it 'strict and narrow.'" *Id*. To have preclusive effect, the issue the federal court decided must be the same as the one presented in the state tribunal and the party seeking to be

precluded must have been a party to the federal suit, or fall within one of a few discrete exceptions. *Id.*

The district court reasoned that the Receiver's claims against the Bank and the claims of the Account Holders were very similar. The district court emphasized that the claims of the Receiver and the claims of the Account Holders involved the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors. App. 492, ¶ 7. This, of course, is not unusual. Such a situation often occurs when a fraudulent actor has multiple victims.

However, the re-litigation exception applies only when a party seeks to re-litigate an *identical* claim. Here the claims cannot be identical, as required by *Smith*, because they are owned by completely different parties, and—as demonstrated above—the Receiver lacks standing to bring the claims of the Account Holders.

The proposed lawsuit of the Account Holders asserts five causes of action against their Bank. The first is breach of fiduciary duty, based on the relationship between First Utah and its Account Holders. While APS may also have had a fiduciary relationship with First Utah, it was a different relationship, and it gives rise to a different claim.

The second cause of action asserts a claim for breach of contract. It is true that APS had a contract with First Utah. But this was a separate contract, and it was only between APS and the Bank. The Account Holders had their own separate contracts with First Utah. These contracts were called "Custodial Agreements," and the Account Holders' claims are based on those separate contracts.

The Account Holders' third cause of action against the Bank is a claim for breach of custodial duties. Those duties ran from First Utah to the Account Holders, not to APS.

The fourth cause of action alleges aiding and abetting breaches of fiduciary duty. This cause of action alleges that APS owed a fiduciary duty to the Account Holders and that First Utah aided and abetted APS in its breach. The Receiver stands in the shoes of APS, not the Account Holders. In any event, the damages for this cause of action accrue to the Account Holders, whose money was defalcated, not to APS.

The final cause of action is for negligence, and it asserts that First Utah had a duty to the Account Holders, which it breached. While First Utah may also have owed a duty to APS, it was not the same duty it owed to the Account Holders. If for example, a reckless driver injuries two people, one of the victims is not precluded from filing suit merely because the driver breached a duty to the other injured party as well.

None of the five causes of action that the Account Holders wish to bring against the Bank has already been litigated. Therefore the re-litigation exception simply does not apply. Indeed, in approving the settlement between the Receiver and APS, the district court could not have decided the claims of the Account Holders against First Utah because those claims were not even before the district court. "[A]n essential prerequisite for applying the relitigation exception is that the . . . issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* (citing *Chick Kam Choo*, 468 U.S. at 148).

In *Chick Cam Choo*, the re-litigation exception did not apply because the federal court had considered the permissibility of the claim under federal *forum non conveniens* principles, but the Texas courts would apply a significantly different *forum non conveniens* analysis. "Because the legal standards in the two courts differed, the issues before the courts differed, and an injunction was unwarranted."

Chick Cam Choo illustrates that an injunction cannot issue simply because two claims involved the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors. In *Chick Cam Choo*, an injunction was unwarranted simply because the

procedural rule of *forum non conveniens* would be analyzed differently in state and federal courts even though the claims were substantively identical.

Similarly, in *Smith* the federal court denied class certification under Federal Rule of Civil Procedure 23, but the West Virginia state court was poised to consider whether the proposed class satisfied West Virginia Rule 23. The two class action cases involved the same loss, from the same entities, relating to the same conduct and arising out of the same transactions and occurrences by the same actors. Nonetheless, because the courts would apply different versions of Rule 23, the federal court lacked the authority under the Anti-Injunction Act and All Writs Act to issue an injunction. The present case goes well beyond differing applications of *forum non conveniens* or Rule 23. Thus the re-litigation exception does not apply.

In sum, the Anti-Injunction Act prohibited the district court from entering its Claims Bar Order, and the order should be reversed by this Court.

II. Even if the Anti-Injunction Act does not expressly *prohibit* an injunction here, the district court lacked any affirmative authority to issue such an injunction.

Even if the Anti-Injunction Act did not expressly prohibit an injunction in these circumstances, the Receiver did not own the enjoined claims, and a receivership court lacks authority to enjoin a party from bringing its own claims.

The Account Holders' claims belong exclusively to them and cannot be asserted by the Receiver. This Court recently joined the many jurisdictions which have held that receivers may bring only those claims that belong to the entities in receivership, not to the investors in those companies. This Court held:

> But receivers may only sue to redress injuries to the entity in receivership, and not directly on behalf of the entity's creditors. *Scholes [v. Lehmann]*, 56 F.3d at 753 (citing *Caplin v. Marine Midland Grace Trust Co.*, 406 -8- U.S. 416 (1972); see also *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013); *Marion v. TDI Inc.*, 591 F.3d 137, 147 (3d Cir. 2010); *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 798–99 (6th Cir. 2009); *Eberhard [v. Marcu]*, 530 F.3d at 132; *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005); *Goodman v. FCC*, 182 F.3d 987, 991–92 (D.C. Cir. 1999); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990).

Klein v. Cornelius, 786 F.3d 1310, 1316 (10th Cir. 2015).

The Receiver argued in the district court that she was entitled to bring claims on behalf of investors. But the law is clear that a receiver lacks standing to bring claims of investors, either on behalf of the receivership or for the benefit of investors. The decision of the Sixth Circuit in *Liberte Capital II* illustrates the principle:

> We have recognized the general rule that a receiver acquires no greater rights and powers to sue than the person or entity whose property is in receivership. *See Javitch*, 315 F.3d at 625 ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.") (citations omitted). Accordingly, when a receiver is appointed over a corporation, the receiver may only assert claims that could have been asserted by the

> corporation, and the receiver lacks standing to institute action on behalf of investors in the corporation. 13 Moore's Federal Practice §66.08[1][b](3d ed. 2005).

Because receivers do not represent class claims, it is common for receivership cases to be accompanied by class actions by investors. See, among many examples, *In re Medical Capital Securities Litigation, supra,* (refusing to approve bar order because investors had standing to pursue their claims against a bank: "In the adversarial system, the plaintiff is uniquely situated to understand the strengths and weaknesses of the case." Class plaintiffs should therefore be able to make their own decisions about the amount of settlement.)

Recently, in *Chadbourne & Parke, LLP v. Troice,* —— U.S. ——, 134 S. Ct. 1058, 188 L.Ed.2d 88 (2014), the Supreme Court held that while the federal government may prosecute the perpetrators of securities fraud, victims of the fraud may sue third parties to recover damages under state law. That case arose out of the Stanford Ponzi scheme, in which a receiver was appointed. The receiver sued Stanford's lawyers, Chadbourne & Parke and Proskauer, Rose, alleging malpractice and other claims held by the receivership. *Janvey v. Proskauer*, 13-00477 (N.D. Tx). But the Stanford investors brought their own claims against the law firms. The Supreme Court allowed the suit by the investors against entities not in receivership to go forward.

Because the Receiver in this case lacks authority to bring the Account Holders' claims against First Utah, it follows that the receivership court lacked authority to bar such claims. It is likewise true that because the receivership does not own the claims of the Account Holders, the Receiver lacks standing to bring them.

Moreover, injury in fact is an essential element of every private claim filed in federal court. Article III of the Constitution requires that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, citations, and footnote omitted). In the present case the money taken from First Utah accounts did not belong to APS—it belonged to the Account Holders. APS did not suffer an injury in fact. The Account Holders did.

Liberte Capital II considered a similar receivership issue. There, investors lost money because viatical insurance policies in which they had invested were procured through fraud. At the request of the SEC, a receiver was appointed over the company that served as escrow agent and fiduciary for companies that marketed the viatical settlements. The investors brought arbitration claims against the broker-dealers who induced them to invest. Like First Utah, the broker-dealers were not in receivership. The receiver claimed the right to pursue the arbitration

claims and add the proceeds to the receivership estate for pro rata distribution. The receivership court sided with the receiver.

The Sixth Circuit reversed. It reasoned that the appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction. The receivership entities did not suffer an injury that was "fairly traceable" to the actions of the broker-dealers. *Id*. at *5. *See, e.g. Goodman v. FCC*, 182 F.3d 987, 992 (D.C.Cir. 1999) ("We conclude that Goodman [the receiver] lacks standing to sue the Commission. He does not represent the parties who sustained the injury of which he complains, nor is there anything preventing the parties who were injured from themselves protecting their rights.")

While APS (and thus the Receiver) may have some claims against First Utah, those claims do not encompass the losses to the Account Holders. The injury in fact is traceable not to APS, but to the Account Holders. The Account Holders are uniquely situated to understand the strengths and weaknesses of their own case, and should be able to make their own decision about settlement.[4] *In re Medical Capital Securities Litigation, supra.*

The district court based its opinion on the premise that the settlement agreement with First Utah was fair and in the best interest of the estate. But,

[4] The Account Holders do not object to the Receiver's settlement with First Utah except to the extent the Receiver seeks to bar them from bringing their own claims.

fairness does not confer authority. While it may be in the best interests of a receivership to bring in claims that do not belong to it, *Liberte Capital II* teaches that this is not enough to deprive investors of the right to pursue their own claims. "The mere fact that the [receiver] *would like* to pull the arbitration proceeds into the receivership pool does not establish a 'personal stake' for the receivership entities." *Id*.

In the district court, the Receiver relied on the line of cases holding that receivership courts have wide discretion in conducting receiverships. Based on that discretion, the Receiver argues, a receivership court can issue blanket anti-litigation stays. But, that discretion is limited to the distribution of assets already within the receiver's control. It is not clear that a receiver may simply invoke equitable principles when it seeks to recover money, even if the receiver could consider those recoveries as a factor in designing an equitable distribution plan. *Wing v. Buchanan*, 533 Fed. Appx. 807 (10th Cir. 2013). A district court's equitable powers simply do not reach cases that pose no threat to the assets of the receivership.[5] *SEC v. Cherif*, 933 F.2d 403, 413-14 (7th Cir. 1991).

[5] The Account Holders acknowledge that a receivership court may issue temporary anti-litigation stays, which are designed to give a receiver breathing room to evaluate receivership assets and claims. But this rationale for a temporary stay does not support a permanent injunction barring claims against non-parties. *In Re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990).

The district court ruled that an injunction must be "in the best interest of the receivership." While that is certainly a necessary condition, it is not sufficient to grant the district court jurisdiction or authority over the Account Holders' claims. Many actions may be in the best interest of the receivership, but a receivership court lacks authority to order them. For example, it would be in the best interest of a receivership for a court to require the federal government to make investors whole out of the federal treasury. But the receivership court obviously lacks authority to enter such an order.

III. The Claims Bar Order rests on an unsupported factual finding.

In addition to the foregoing reasons, the Claims Bar Order should be reversed because it relies upon an unsupported factual finding. The district court stated: "It is also determined that all of the funds realistically available from First Utah are being paid to the Receiver and devoted to the claims." App. 483 at ¶ 56. The district court also found that "demanding a greater cash contribution from First Utah would reduce capital to an unreasonably low level for regulatory purposes." *Id.* at ¶ 57. However, the only evidence in the record, directly contradicts these two findings by the district court.[6]

The Account Holders introduced an expert report from James S. McGregor, a recently retired bank examiner who worked more than 40 years with the FDIC.

[6] The Receiver did not offer any declarations, deposition testimony, exhibits, expert reports, or other evidence in support of her motion.

App. 431-437. Mr. McGregor reviewed the call reports, which the Receiver said accurately set out First Utah's financial position. Mr. McGregor expressed the opinion that First Utah could pay much more than the $2 million it was offering without falling below regulatory requirements. Indeed, he stated that First Utah could pay an *additional* $1 to 3 million without becoming undercapitalized.

The Receiver did not submit any expert testimony (or any other evidence) to rebut Mr. McGregor's opinion or to support her own factual allegations regarding First Utah's ability to pay. While the factual findings of a district court can only be set aside for abuse of discretion, it was clear error to simply ignore the opinion of Mr. McGregor and to make a contrary factual finding with no testimony or evidence in the record to support it. As this Court has noted, "'[a] finding of fact is "clearly erroneous" if it is without factual support in the record." *Manning*, 146 F.3d at 812. Here the district court's Claims Bar Order rests on the crucial factual finding that Utah First could not pay more money to settle the claims against it. Because there is no factual support in the record for this finding, it is clearly erroneous. And without this key factual finding, there is no justification for the extraordinary relief granted here. Thus, even if the Anti-Injunction Act did not prohibit the injunction in this case, and even if the district court had authority to enter the injunction, this Court should still reverse the Claims Bar Order because it rests upon an unsupported factual finding.

CONCLUSION

For the foregoing reasons, this Court should reverse the Bar Order entered by the district court so that the Account Holders may file litigation in their own names pursuing claims that belong exclusively to them and not to the receiver and that are against a party that is not in receivership.

STATEMENT REGARDING ORAL ARGUMENT

This case involves important issues regarding the authority of a court in receivership. The appellants believe that oral argument will materially assist the Court in understanding these issues.

CERTIFICATE OF COMPLIANCE

I certify that:

(1) all required privacy redactions have been made;

(2) this ECF submission is an exact copy of the hard copy of the brief that will be submitted; and

(3) this ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Endpoint Protection Version: 12.1.4100.4126 with virus definitions updated Sunday, April 10, 2016, r22 and, according to the program, is free of viruses.

DATED this 11th day of April, 2016.

RAY QUINNEY & NEBEKER, P.C.

/s/ Brent D. Wride
Brent D. Wride
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2016, the foregoing **BRIEF OF APPELLANTS** was filed with the Court by ECF and therefore served upon all parties who have entered an appearance in this case. In addition, I mailed seven true and correct copies of the brief to the clerk of the Court using first-class United States mail.

I further certify that on April 11, 2016, the foregoing BRIEF OF APPELLANTS was sent using the CM/ECF system to the following:

Daniel J. Wadley
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ATTACHMENTS

1. Findings of Fact, Conclusions of Law, and Order on Motion to: (1) Intervene (Dkt. 605); and (2) approve settlement with First Utah Bank and for a Claims Bar Order.

2. Claims Bar Order

ATTACHMENTS

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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.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON MOTIONS TO:** **(1) INTERVENE (DKT. 605); AND** **(2) APPROVE SETTLEMENT WITH FIRST UTAH BANK AND FOR A CLAIMS BAR ORDER (DKT. 618)** **Case No.: 2:14-CV-00309-RJS-DBP** **Judge Robert J. Shelby** **Magistrate Judge Dustin B. Pead**

On December 2, 2015, the following Motions came for hearing before this Court:

(1) Motion to: (1) Approve Settlement with First Utah Bank; and (2) for a Claims Bar Order, dated September 24, 2015 (Dkt. 618) ("Motion to Approve Settlement"); and

(2) Motion to Intervene for the Limited Purpose of Modifying Stay to Permit Suit Against a Non-Party and Memorandum in Support Thereof, dated August 31, 2015 (Dkt. 605) (the "Intervenors' Motion").

The Court had previously ordered that notice of the Motion to Approve Settlement be given to each IRA Account Owner, allowing them an opportunity to respond and/or object prior to the December 2, 2015 hearing, and advising each IRA Account Owner of the date, time, and place of the hearing on the Motion to Approve Settlement and the right to appear at the hearing or to file written objections or comments ("**Notice**") (Dkt. 621). The following attorneys entered an appearance at the hearing: Daniel J. Wadley for the Plaintiff Securities and Exchange Commission; Danny Quintana for the Defendant Curtis DeYoung; Mark R. Gaylord and Melanie J. Vartabedian for the Receiver Diane A. Thompson; Jeffrey T. Colemere for Michelle DeYoung; Francis M. Wikstrom, Gary E. Doctorman, and Matthew D. Cook for First Utah Bank; Edward Donohue for Everest Insurance Company; Robert Wing, Mark Pugsley, and Jared Parrish for Intervenors; and Kevin Jackson for APS client Mr. Williams. The Court:

(A) reviewed and considered the Motion to Approve Settlement and the Intervenors' Motion;

(B) reviewed the Memorandum in Support of the Motion to Approve Settlement filed by Plaintiff Securities and Exchange Commission (Dkt. 641);

(C) reviewed all seventeen (17) responses received by the Receiver to the Motion to Approve Settlement, as provided to the Court on November 9, 2015 in the Notice of Receiver's Submission of Responses to Proposed Settlement with First Utah Bank (Dkt. 649). Of the seventeen (17) responses four (4) IRA Account Owners and the SEC supported the settlement.

Defendant Curtis DeYoung objected to the settlement. Michelle DeYoung initially objected to the proposed settlement, but later withdrew her objection. (Dkt. 658). Richard Seiler, Michelle Seiler, and Christa Zaro ("**Intervenors**") concurrently objected in the settlement while filing their Reply in Support of their Motion to Intervene. (Dkt. 643). Of the remaining IRA Account Owner who objected to the Motion to Approve Settlement, four (4) responses were duplicative, while the remaining five (5) objections primarily dealt with dissatisfaction over the receivership in general and not the proposed settlement in particular. Approximately 99.98% if IRA Account Owners did not file a response to the proposed settlement;

(D) heard oral argument from all present who desired to argue, including from counsel for Intervenors, and invited any unrepresented IRA Account Owner to make arguments, but none accepted the invitation; and

(E) considered the facts in the record of the receivership, the Motion to Approve Settlement, the Intervenors' Motion, the nature and substance of the other responses and objections, numerous legal authorities, and carefully reviewed the proposed settlement terms.

INTERVENORS' MOTION

As a preliminary matter, the Court took up the Intervenors' Motion to the extent they sought to intervene in this case for the purposes of having the right to be heard to (a) oppose the Motion to Approve Settlement and (b) argue in support of the Intervenors' Motion to be granted the right to file a separate action against First Utah Bank in state court on the grounds that the Court lacks jurisdiction to deny the Intervenors the right to separately sue First Utah. Upon consideration of the Intervenors' Motion, the Court hereby concludes that: the Intervenors' Motion is granted in part—to the extent that they are entitled to intervene for the purposes of

opposing the Motion to Approve Settlement and presenting oral argument in support of their motion to file a separate action against First Utah. The Court finds that and concludes that the Intervenors have the right to be heard on these issues.

Based on the foregoing and being fully advised and good cause appearing therefore, the Court HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

Background

1. In 1982, American Pension Services, Inc. ("**APS**") was incorporated as a Utah corporation to operate as a third-party administrator for self-directed individual retirement accounts ("**IRAs**").

2. APS was in the business of administering self-directed individual retirement arrangements and 401(k) accounts (collectively "**IRA Accounts**") pursuant to Internal Revenue Code § 408, for the benefit of APS clients (collectively "**IRA Account Owners**").

3. Internal Revenue Code § 408(a) provides that a self-directed IRA or 401(k) account owner can "direct" investments but cannot "control" the ownership of the assets. The assets in an IRA account must be held and controlled by a third-party administrator and/or a custodian.

4. APS served as a third-party administrator, but did not qualify to serve as a "custodian" or "trustee" of IRA accounts.

5. First Utah Bank ("**First Utah**") is a Utah community bank who agreed to and was qualified to serve as a custodian of IRA Accounts.

6. In 1992, APS requested that First Utah act as a custodian for the IRA accounts for which APS was serving as a third-party administrator.

7. On July 13, 1992, APS as "Administrator" and First Utah as "Custodian" entered into the "APS Master Individual Retirement Trust Account First Utah Bank as Custodian Agreement" ("**1992 Agreement**") to establish the depository account titled "Master Trust Account" at First Utah and to describe APS's duties as a third-party administrator and First Utah's duties as a custodian.

8. APS, through Curtis L. DeYoung ("**DeYoung**"), opened and titled depository accounts at First Utah and named each a "Master Trust Account." DeYoung was sole signatory with authority to withdraw money from the "**Master Accounts**."

9. On September 1, 2009, APS as third-party administrator, and First Utah as custodian, entered into a Custodial Services Agreement, for First Utah to continue to provide custodial services to APS's clients ("**2009 Agreement**").

10. The 2009 Agreement included an indemnity provision which First Utah claimed entitled it (First Utah) and its officers and directors to indemnity from all claims arising or in connection with APS's performance or non-performance under the 2009 Agreement.

11. The 2009 Agreement delegated to APS the duty to provide all the accounting services to the IRA Account Owners for their individual accounts.

12. After 2009, APS provided IRA Account Owners with multiple forms to facilitate their creation of an account to be administered by APS and with First Utah as custodian. These forms include IRS Form 5305-A, Traditional Individual Retirement Custodial Account, which

was completed by the customer and returned to APS. *See* IRS Form 5305-A. This form created the customer's IRA account. Decl. of Receiver ¶ 6, July 10, 2014, (Dkt. 143).

13. APS commingled all IRA Account Owners' cash into the Master Accounts, including cash deposited by the IRA Account Owners into their IRAs to initiate their IRAs, income generated by customer investments, and the proceeds of any disposition of customer investments.

14. First Utah did not maintain records reflecting individualized ownership of the IRA Account Owner funds in the commingled[1] Master Account. The record-keeping function was performed by APS.

15. The Form 5305-A contained indemnification language relating to specific aspects of the custodial and third-party administrative relationship between the IRA Account Owners, First Utah and APS.

16. Between the years of 2000 and 2014, DeYoung misappropriated approximately $24,691,699 (generally referred to as "**$24 Million**") from the Master Accounts.

17. DeYoung falsified IRA account statements to assure that the funds missing from the Master Accounts would reconcile with the cash APS reported to be in the IRA Account Owner's accounts.

18. When questioned about the missing $24 Million of customer funds from the Master Accounts, DeYoung exercised his rights against self-incrimination under the Fifth Amendment of the United States Constitution.

[1] The Code permits the commingling of assets in IRA and 401(k) accounts.

The Receivership Action

19. On April 24, 2014, the Securities and Exchange Commission ("**SEC**") instituted an action against APS and DeYoung in the United States District Court for the District of Utah, case number 2:14-cv-00309-RJS-DBS (the "**Receivership Action**") alleging, among other claims, that DeYoung, as a principal of APS, misappropriated over $24 million of assets of APS self-directed IRA Account Owners for which APS was the administrator and First Utah was the custodian.

20. Based on the Order Appointing Receiver ("**Order Appointing Receiver**"), the Court appointed Diane A. Thompson as receiver ("**Receiver**") for APS and all assets of APS and DeYoung (the "**Receivership Estate**"). Order Appointing Receiver, (Dkt. 9). The Order Appointing Receiver vests broad authority in the Receiver, including without limitation, the power to "pursue, resist and defend all suits, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates." *Id.* ¶¶ 7(I), (J), (K).

21. The Receiver was directed and authorized by the Court to seize the assets of DeYoung and APS and take over the business operations of APS, which as of April 24, 2014 consisted of over 5,500 self-directed IRA Account Owners who were being serviced by First Utah as custodian and APS as third-party administrator.

22. The Receiver was directed to gather and recover assets and liquidate claims for the benefit of all IRA Account Owners who suffered losses from DeYoung's misappropriations of custodial assets.

23. Pursuant to the Order Appointing Receiver and equitable principles governing the administration of the Receivership Estate, the Receiver, in compromising or causing the

disposition of any assets of the Receivership Estate, including choses in action, is subject to a duty to consider and obtain the realization of true and proper value in connection with any such compromise or disposition and to minimize costs in connection therewith.

24. On February 27, 2015, the Court approved the Amended Modified Plan of Liquidation ("**Liquidation Plan**") proposed by the Receiver. (Dkt. 458). The Court concluded: "The primary purpose of equity receiverships is to promote orderly and efficient administration of the receivership estate by this court for the benefit of creditors, including the adoption of a liquidation plan." The Court ordered: "The Receiver's use of the 'pro rata' approach to establish the loss allocation and any distribution is approved."

25. The Liquidation Plan provides that the Receiver shall distribute funds recovered by her to the IRA Account Owners who comply with the terms and conditions of the Liquidation Plan in accordance with their pro rata share of the losses. *Id.*

26. In seeking Court approval of the Liquidation Plan, the Receiver disclosed that she "has evaluated and is pursuing potential claims against third parties and financial institutions arising from their business relationships and dealings with APS and DeYoung, including evaluating claims against First Utah Bank, insurance companies, Michael Memmott, Sr., Michael Memmott Jr. and their related entities." *Id.*

27. The Liquidation Plan provides that certain recoveries shall be distributed to IRA Account Owners (i.e. insurance proceeds) while other recoveries (i.e. sale of APS assets) may be distributed ratably with APS clients and creditors. *Id.*

Receiver's Claims against First Utah

28. In May of 2014, the Receiver initiated discussions with First Utah regarding its liability relating for the misappropriations of $24 Million of IRA Account Owner funds from the Master Accounts.

29. The Receiver has taken depositions, has had access to records of APS, including documents, agreements, and records pertaining to the relationship among APS, First Utah, and the IRA Account Owners, and financial information regarding First Utah, including the Written Agreement with the Federal Revenue Bank of San Francisco (from which First Utah has recently been released) and insurance policies potentially insuring First Utah.

30. In anticipation of litigation, the Receiver on behalf of APS and for the benefit of the IRA Account Owners made demand on First Utah and First Utah's insurance company, Everest, alleging various claims against First Utah in connection with DeYoung's misappropriations, including negligence, professional negligence, gross negligence, breach of trust, breach of contract, principal agent liability, breach of fiduciary duties, aiding and abetting breach of fiduciary duties in connection with First Utah's role as custodian of the IRA Account Owner funds. These are claims the Receiver claims that APS has against First Utah and its insurance company, Everest.

31. In furtherance of her discussions with First Utah, the Receiver provided a draft complaint to First Utah in substantially the form attached to the Motion to Approve Settlement (Dkt. 618) as Exhibit 5, which set forth the nature of the claims she intended to pursue in an ancillary action, if necessary.

32. First Utah responded by asserting numerous defenses and counter claims which it would assert if the Receiver or any other person filed an action based on its role as custodian of APS and the IRA Accounts, including statute of limitations, fraudulent inducement, rescission, comparative negligence, First Utah's right to indemnification under the contracts (i.e. the 1992 Master Trust Agreement, the 2009 Custodial Services Agreement, the Form 5305-As and the Adoption Agreements), and counterclaims and third-party claims.

33. Extensive investigation, discovery and research were conducted regarding the claims and defenses raised by First Utah, Everest, and the Receiver on behalf of APS.

34. The Receiver has also gained direct knowledge, through the operation of APS's business, of the facts regarding the relationship and allocation of responsibilities and duties among APS, First Utah, and the IRA Account Owners.

35. The Receiver's claims on behalf of APS against First Utah are substantially identical to the claims the IRA Account Owners could assert against First Utah if filed separately. The defenses and counter claims asserted by First Utah in defense of such claims are substantially identical to the defenses and counter claims that could be asserted against the IRA Account Owners claims. The claims are all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors.

36. After several months of arm's length negotiations between the Receiver on behalf of APS and First Utah, and Everest, including three days of mediation with a professional mediator, all under plain view of the SEC, the SEC, the Receiver, First Utah and Everest determined it to be in their respective best interests, to be fair and reasonable, and in the best

interests of the Receivership Estate, to resolve the claims, defenses, and counter-claims by entering into the Settlement Agreement.

The Receiver's Authority

37. The Order Appointing Receiver vests broad authority in the Receiver, including without limitation, the power to "pursue, resist and defend all suits, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates" and "other action approved by the Court." Order Appointing Receiver ¶¶ 7(I), (J), (K).

38. The Court's primary objective is to achieve an expedient and equitable resolution so that APS clients may continue to direct their investments without court interference or intervention. Order Approving Liquidation Plan ¶ 25.

39. The Court determined that the most fair and equitable manner of allocating the loss caused by the $24 Million misappropriation of funds from the Master Accounts was on a pro rata basis among all IRA Account Owners. *Id.* ¶ 20.

40. The claims, defenses and counter claims of the Receiver, the IRA Account Owners, the Receivership Estate and First Utah are complex and so inextricably intertwined such that a determination of each party's liabilities and rights independently may be impossible or, at a minimum, impracticable without extensive litigation.

41. The Receiver asserts that First Utah's inaction (failure to have adequate audit procedures and policies that could have detected DeYoung's misappropriation of funds from the Master Accounts), negligence and/or breaches of fiduciary duty owed to APS and the IRA Account Owners contributed to APS's losses and the loss of the $24 Million.

42. APS has suffered damages as a result of the misappropriation of $24 Million by creating liabilities, mainly to the IRA Account Owners, far in excess of its assets, rendering APS insolvent and unable continue as a going concern.

43. The settlement between the Receiver and First Utah is made to further implement the Liquidation Plan which provides that the Receiver shall pursue claims against financial institutions and insurance companies. Liquidation Plan at 52.

44. Based on the Order Appointing Receiver and the Order Approving the Liquidation Plan, the Liquidation Plan and the facts, the Receiver has authority and standing to assert claims against First Utah on behalf of APS and the Receivership Estate and for the benefit of the IRA Account Owners and to enter into the Settlement Agreement, which settlement will provide a prompt and substantial benefit to the Receivership Estate and ultimately a benefit to the IRA Account Owners.

45. Recently, three IRA Account Owners filed the Intervenors' Motion, wherein they seek to assert claims directly against First Utah, which claims closely parallel the claims the Receiver identified and notified First Utah she would pursue unless a settlement could be reached. The claims these Intervenors wish to assert are all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors.

Available Insurance

46. First Utah is a loss payee of a $1 million Hartford Fire Insurance Company Policy Number: 00 FA 0270058-13 ("**Hartford Policy**").

47. First Utah is an insured under a $3 million Everest National Insurance Company Policy No. 8100009483-131 ("**Everest Policy**").

48. The Everest Policy is a "wasting policy" and, if this case were to be litigated rather than settled, the Everest Policy would first pay defense costs incurred by First Utah and only the remainder, if any, would be available toward satisfaction of a judgment. If the Receiver's claims were litigated, the defense costs are likely to exceed the Everest Policy limits.

49. Everest has reserved its rights and has raised defenses and qualifications relating to its obligation to indemnify First Utah. Any coverage litigation would be complex and expensive and the result could be a reduction in the amount of coverage potentially available to apply toward the Receiver's claims.

50. The Receiver negotiated a settlement with Hartford to pay $405,000.

Financial Condition of First Utah

51. The Receiver undertook an analysis of the financial condition of First Utah, including reviewing publicly available financial reports and meeting with and discussing First Utah's financial condition with key bank personnel and the Receiver's independent banking consultants.

52. First Utah is a highly regulated, small Utah community bank with only seven branches, all in Salt Lake County, Utah. It has limited capital that it can use to fund its portion of the settlement amount. *See* Written Agreement; financial call reports publicly filed by First Utah with the Utah Department of Financial Institutions.

53. On February 23, 2009, First Utah became subject to a Written Agreement with the Federal Reserve under the Board of Governors Federal Reserve System, Docket No. 09-130-

WA-RB-SM. Under the Written Agreement, First Utah was required to increase its capital. While First Utah was recently released from the Written Agreement, it remains under a mandate of its federal regulators to increase its capital. Given First Utah's current capital structure, First Utah's contribution toward settlement, although limited, remains substantial ($2.0 million) in relation to or as a percentage of its total capital. The settlement contribution will also reduce its regulatory capital.

54. According to First Utah's current capital structure, as reflected in the financial call reports publicly filed by First Utah with the Utah Department of Financial Institutions, the payment of $2 million by First Utah toward the settlement will reduce First Utah's capital.

55. In reviewing First Utah's financial condition, the totals of the aggregated claims asserted by the Receiver ($24 million) and indirectly by the Intervenors and the capital available from First Utah to satisfy the maximum amount of such claims, would result in First Utah being unable to pay the claims were the Receiver to prevail.

56. It is also determined that all of the funds realistically available from First Utah are being paid to the Receiver and devoted to the claims—that is the entire $3 million from Everest and $2 million from First Utah, plus the additional consideration.

57. Further, demanding a greater cash contribution from First Utah would reduce capital to an unreasonably low level for regulatory purposes which could negatively impact First Utah's financial stability.

58. In contrast, if the Receiver were to pursue First Utah to judgment, there is a very real risk that the capital now available for the settlement payments may be exhausted and/or

substantially limited ultimately resulting in less potential recovery for the Receivership Estate and the ultimate distribution to IRA Account Owners.

The Settlement Agreement

59. The value, not counting the value of First Utah's release of its defenses and counterclaims for indemnification, is in excess of $5 million and comprises:

a. $3 Million (policy limits) to be contributed by Everest (and made possible in part by First Utah waiving right to reimbursement of defense costs incurred to-date and through the conclusion of the settlement process);

b. $2 Million cash to be contributed by First Utah;

c. Assignment of the Hartford insurance policy to the Receiver (which the Receiver negotiated a settlement with Hartford to pay $405,000);

d. Approximately $112,000 in waiver and reimbursement of rent;

e. Approximately $36,000 in waiver and reimbursement of banking fees charged in the administration of the IRAs; and

f. Approximately $70,000 consisting of the amount that First Utah's purchase price paid to the Receiver for a condominium in Sandy, Utah exceeds First Utah's appraised fair market value.

(Dkt. 618-1, Settlement Agreement.)

60. The Settlement Agreement includes appropriate mutual releases.

61. First Utah, as an insured under the Everest Policy, will relinquish and forfeit rights to any further indemnification of the defense expense they would contractually have, if any, on a priority basis under the Everest Policy and agree that they shall pay their own attorneys' fees. *Id.*

62. First Utah, Everest, and the Receiver, on behalf of APS, acknowledged upon payment of the Everest settlement payment that the Everest Policy is exhausted. *Id.*

63. The payments and releases in the Settlement Agreement are conditioned upon this Court's entry of the Claims Bar Order, permanently barring or enjoining APS, the IRA Account Owners, and their respective affiliates from commencing or continuing any judicial, administrative, arbitration, or other proceeding and/or asserting or prosecuting any claims against First Utah, Everest, and their affiliates, arising out of, in connection with, or relating to any APS self-directed IRA. *Id*.

64. The payments and releases are further conditioned upon the Claims Bar Order being final and not subject of appeal or any pending collateral challenge and the Claims Bar Order being binding on the Receiver on behalf of APS and First Utah, and Everest, the Receivership Estate, and each IRA Account Owner. *Id*.

65. First Utah shall not sue the IRA Account Owners for indemnification so long as the IRA Account Owners comply with the Claims Bar Order; if they fail to comply, after entry of the Claims Bar Order, First Utah shall have the rights of indemnification only by way of set-off.

66. Until the Claims Bar Order is final and not the subject of appeal or any pending collateral challenge, there is no binding settlement between the Receiver on behalf of APS and First Utah, and Everest.

Fairness of the Settlement Agreement

67. The Court scrutinized the proposed settlement very carefully and did not merely accept the representations of the Receiver.

68. Sophisticated parties spent the better part of one year in arm's-length negotiations under the view of the SEC.

69. The Receiver asserts that First Utah is directly liable to APS and the Receivership Estate for DeYoung's misappropriation of $24 Million from the Master Accounts. As custodian of the IRA Accounts, the Receiver alleges that First Utah had certain fiduciary and contractual duties to oversee the third-party administrator and its principals, especially DeYoung. The Receiver has asserted claims for, among others, breach of contract, breach of fiduciary duty, professional negligence, negligence, gross negligence and principal-agent liability against First Utah. If First Utah's liability were the only factor, the Receiver would vigorously pursue First Utah to attempt to recover a greater amount of the losses. However, because of the financial condition of First Utah and the very real possibility that protracted litigation may render First Utah unable to satisfy a judgment, it is in the best interest to settle rather than engage in protracted litigation, particularly in light of the wasting nature of the Everest Policy.

70. First Utah denies that it has any liability resulting from the wrongful acts of DeYoung and has asserted that if legal liability were the only factor considered, First Utah would vigorously defend this case to attempt to vindicate itself against the Receiver's claims. However, as a community bank, other important factors weigh on First Utah's defense strategy and First Utah desires to quickly and finally resolve the claims of the Receiver so it can continue as a community bank and also desires to allow benefits to flow from the settlement to the IRA Account Owners by contributing anticipated defense costs and the Everest Policy limits.

71. If the claims against First Utah were litigated or allowed to be litigated as a class-action or through multiple individual cases, First Utah would not be willing to settle this case. Moreover, the Everest Policy would be used to pay First Utah's defense costs until the Everest

policy limit was depleted and there would be little, if any, insurance proceeds available to satisfy any judgments in favor of the IRA Account Owners.

72. Based on its existing capital structure, First Utah has limited capital to satisfy multiple judgments or settlements with the Receiver and/or IRA Account Owners.

73. The federal and state regulators do not oppose First Utah's settlement payment of $2 million and the additional consideration provided by First Utah.

74. Everest issued a reservation of rights letter to First Utah and has asserted defenses to coverage. If the coverage defenses are successful, it would mean that less insurance proceeds, or no insurance proceeds, would be available to the Receivership Estate.

75. The SEC has independently approved the terms of the settlement and expressed its view that the settlement is fair and reasonable and in the best interest of the Receivership Estate and the IRA Account Owners.

76. Under the recent Utah Supreme Court case of *Graves v. N. Eastern Servs*., 2015 UT 28, 345 P.3d 619, the intentional misconduct of DeYoung could be compared with the alleged negligence of First Utah and the outcome could impair the ability of the Receiver to recover the missing $24 Million or any significant sum from First Utah.

77. The complex claims and the rights and obligations of the parties, including the IRA Account Owners and Intervenors, are so inextricably intertwined that resolution of the claims independently, as opposed to collectively, would be difficult and inefficient, would substantially increase costs to the Receivership Estate, and would likely reduce the ultimate recovery to the IRA Account Owners. Specifically, the claims involve the same parties, the same conduct, the same actors, the same transactions and occurrences, the same existence of

indemnity claims of First Utah against APS and the IRA Account Owners, and the claims are all from the same loss.

78. This settlement will allow settlement proceeds to be distributed pro rata under the Liquidation Plan, without further delay and without the costs and risks associated with litigation.

79. The settlement proceeds distributed under the Liquidation Plan results in a more equitable and efficient method of recovery than having IRA Account Owners compete for recoveries through the prosecution of duplicative suits.

80. The proposed settlement also avoids litigation costs that will reduce recovery to the IRA Account Owners because the Everest Policy is a "wasting policy" that would first pay defense costs leaving less insurance proceeds available to pay any adverse judgment.

81. Were a multiplicity of lawsuits or a single class action lawsuit to be filed against First Utah, the litigation costs could far exceed the amount of attorneys' fees incurred by the Receiver to secure relief from First Utah.

82. The settlement guarantees that a substantial and prompt recovery will be available to be divided pro rata among all IRA Account Owners and avoids the risks and costs of protracted litigation.

83. If the settlement coupled with the Claims Bar Order is not approved, there is a substantial likelihood that the IRA Account Owners will receive a smaller recovery, if any, from First Utah and Everest.

84. The Receiver, Everest and First Utah seek full and final resolution of all claims through the Settlement Agreement and the Claim Bar Order.

85. The entry of a Claims Bar Order, and it being final and not subject of appeal or any pending collateral challenge, enjoining each IRA Account Owner from asserting claims against First Utah and Everest, is indispensable and a condition of the settlement. Without it, there will be no settlement.

86. This settlement offers the highest potential recovery for the Receivership Estate and IRA Account Owners and best method to carry out the Court's mandate to efficiently and economically administer the Receivership Estate.

87. The Court finds the proposed Settlement Agreement is fair, just, and equitable and in the best interest of the Receivership Estate, including creditors of the Estate, such as the IRA Account Owners.

88. The payment of the settlement would constitute approximately twenty percent (20%) of the loss resulting from DeYoung's misappropriation and would benefit the defrauded IRA Account Owners by substantially reducing this shortfall.

89. The Court reviewed and considered all written responses and objections, along with oral comments and arguments at the fairness hearing, including those of the Intervenors.

Concessions by Intervenors

90. At oral argument, the Intervenors conceded that the Receiver has standing to assert the claims of the Receivership Estate and APS against First Utah Bank and Everest.

91. At oral argument, the Intervenors agreed that the settlement terms were fair, just, equitable and reasonable except for the Claims Bar Order.

Objections

92. The Court carefully considered the IRA Account Owners and Intervenors responses and objections and they are generally not drawn to the fairness and reasonableness of the settlement terms. The Court notes that approximately 99.98% of the IRA Account Owners did not object to the Motion to Approve Settlement or the terms of the proposed settlement.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Receiver has standing and authority to assert the claims of the Receivership Estate and APS against First Utah Bank and Everest.

2. The Receiver has standing and authority to settle the claims of the Receivership Estate and APS against First Utah and Everest.

3. "Federal courts have inherent equitable authority to issue a variety of ancillary relief in actions brought by the SEC to enforce the federal securities laws. District courts have broad powers and wide discretion in determining appropriate relief in an equity receivership." *SEC v. Kaleta*, No. H-09-3674, 2013 WL 2408017, at *6 (S.D. Tex. May 31, 2013).

4. In evaluating proposed settlements in equity receiverships, including settlements that include a bar order against further litigation, the Court should inquire whether the action to be taken is "in the best interest of the receivership." *See, e.g., SEC v. Capital Consultants, LLC*, No. Civ. 00-1290-KI, 2002 WL 31470399 (D. Ore. March 8, 2002) (approving the proposed settlement, including the bar order, and concluding that the court's "paramount responsibility is to look after the best interests of the receivership estate and creditors even if [the court's] decisions potentially affect certain defendants adversely"); *Kaleta*, 2013 WL 240817 (concluding

that the proposed settlement, including the bar order, was "fair, equitable, reasonable, and in the best interests of the Receivership Estate."); *CFTC v. Equity Financial Group*, No. 04-1512 (RBK), 2007 WL 2139399 (D.N.J. July 23, 2007) (concluding that the proposed settlement, which included a bar order, was "in the best interest of the Receivership estate, and that federal law and public policy favor the entry of the Bar Order to facilitate settlement of this matter"); *Harmelin v. Man Financial Inc.*, No. 06-1944, 05-2973, 2007 WL 4571021 (E.D. Penn. Dec. 28, 2007) (finding that a settlement agreement that included a bar order was in the best interests of the receivership).

5. "In this respect, equitable powers of the receivership court are similar to powers of the bankruptcy court to impose an automatic stay pursuant to 11 U.S.C. § 362(a). The goal in both securities-fraud receiverships and liquidation bankruptcy is identical—the fair distribution of the liquidated assets. The bankruptcy court can stay actions against any party, even a non-debtor, whenever the objective of the action is to obtain possession or exercise control over the debtor's property. Unless a case involves unusual circumstances, however, the bankruptcy court cannot halt litigation by non-debtors, even if they are in a similar legal or factual nexus with the debtor." *Ritchie Capital Mgmt., L.L.C. v. Jeffires*, 653 F.3d 755, 762-63 (8th Cir. 2011) (internal citations and quotations omitted).

6. The unusual circumstances typically arise where there is "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. . . . In other words, the automatic stay will apply to non-debtors only when a

claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Id.* (internal citations and quotations omitted).

7. There are unusual circumstances here, especially involving and relating to how intertwined the Receiver's claims are with the Intervenors' and/or IRA Account Owners' claims including, but not limited to the fact that the claims are all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors.

8. The Receivership Estate, First Utah and the IRA Account Owners claims are inextricably intertwined as the agreements between and among APS, each IRA Account Owner and First Utah contain indemnification provisions.

9. The IRA Account Owners can only collect once from First Utah, either through the Receivership Estate or through direct claims by them against First Utah. Any successful assertion of direct liability by the IRA Account Owners, or any of them, against First Utah would result in a claim for indemnification by First Utah against the Receivership Estate, thereby potentially diminishing the assets available for distribution by the Receivership Estate, to the IRA Account Owners.

10. In evaluating whether the settlement is in the best interests of the receivership, courts have considered: the uncertainty of potential claims levied against the settling party, the comparative fault of the settling entity, whether litigation would produce a higher recovery, whether insurance coverage is available and/or proceeds would be depleted, the inherent delay in pursuing claims, and whether collection of a judgment would be in doubt.

11. Both First Utah and Everest have raised possible defenses to the Receiver's claims, including the comparative fault of APS and DeYoung (*see Graves v. N. Eastern Servs.*, 2015 UT 28, 345 P.3d 619, the intentional misconduct of DeYoung could be compared with the alleged negligence of First Utah), and resolution of those defenses in the Receiver's favor is uncertain.

12. The Everest Policy is a wasting policy and will deplete through further litigation, thereby reducing the amount of funds that would likely be brought into the Receivership Estate even if the Receiver and/or Intervenors were successful in their claims.

13. Certainty of recovery and avoidance of delay and doubt are paramount when evaluating a proposed settlement in an equity receivership.

14. Granting the Intervenors the right to file a separate lawsuit in state Court against First Utah would cause substantial and immediate economic harm to the Receivership Action and Estate and almost certainly would reduce the recovery available to the Receiver on behalf of APS, which would ultimately benefit the IRA Account Owners and other creditors.

15. The Court is permitted to look at the ability of First Utah to pay the settlement. *S.E.C. v. Qualified Pensions, Inc.*, No. CIV. A. 95-1746-LFO, 1998 WL 29496, at *4 (D.D.C. Jan. 16, 1998) and the limited funds to pay the settlement. *Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 329 (N.D. Tex. 2011) and *Baker v. Wash. Mut. Fin. Grp., LLC*, 193 F. App'x 294, 297-98 (5th Cir. 2006).

16. First Utah's contribution to the Settlement Agreement is fair and reasonable given its limited current financial conditions and limited capital available to pay toward a settlement.

17. The Settlement Agreement is made to further implement the purpose and intent of the Liquidation Plan.

18. The Settlement Agreement is fair and equitable to the Receivership Estate and is approved by the Court.

19. The Settlement Agreement fully resolves all issues, disputes, claims and/or defenses by and between the Receiver on behalf of APS and First Utah, and Everest.

20. The Court approves the Claims Bar Order attached hereto as **Exhibit A** permanently barring and enjoining APS, DeYoung, and each of the IRA Account Owners, and anyone acting in concert with, or on behalf of, them from commencing or continuing any judicial, administrative, arbitration, or other proceeding and from asserting or prosecuting any claims against First Utah, Everest, or their Affiliates, arising out of, in connection with, or relating to any IRA Accounts established with APS, as administrator, and First Utah, as custodian.

21. But for this settlement, multiple lawsuits may be filed against First Utah, which will substantially impair the Receiver from maximizing the value of the Receivership Estate and will likely leave the IRA Account Owners with less than the settlement amount.

22. The allowance of other actions and/or claims to be asserted against First Utah and/or Everest either by individual IRA Account Owners and/or by class action and/or by the Intervenors, will effectively void the Settlement Agreement and result in the increase of litigation costs to the detriment of the Receivership Estate and IRA Account Owners.

23. The Intervenors' Motion, to the extent it seeks to lift the litigation stay so that Intervenors may sue First Utah, will be denied. The Court's Order approving the Receiver's settlement with First Utah and Claims Bar Order preclude lifting the stay of litigation and enjoin "any lawsuit, action, claim, arbitration, or administrative proceeding of any kind, in any

jurisdiction, whether arising under statute or common law, in contract or in tort, at law or in equity against First Utah Bank or its present or former directors, officers, employees, servants, attorneys, insurers or against Everest National Insurance Company, a Delaware corporation or its present or former officers and directors, employees, attorneys or agents."

24. The Court concludes that this Order, along with its entry of a Claims Bar Order, should be immediately appealable.

25. The Claims Bar Order operates as an injunction. Under 28 U.S.C. § 1292(a)(1), interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" are appealable.

26. Further, the Court has considered as a result of the parties' briefing and oral argument whether this Order, with its entry of a Claims Bar Order, should be certified as a final, appealable judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure. The Court concludes that such certification is appropriate.

27. Rule 54(b) authorizes the Court to enter a final, appealable judgment as to fewer than all of the claims or parties if the Court expressly determines there is no just reason for delay. FED. R. CIV. P. 54(b). The Rule helps "avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available." *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001) (citations omitted).

28. This Order and the Claims Bar Order fully dispose of all claims and/or defenses by and between the Receiver on behalf of APS and First Utah, and Everest; and they enjoin claims by others—including the Intervenors—against First Utah and Everest. Those claims are

separable from any remaining in this case, as none of the issues still to be resolved to finalize the administration of the Receivership Estate overlaps factually with the Receiver's settlement with First Utah and its insurer, Everest, and the claims resolved or enjoined.

29. Each of the remaining claims, to the extent there are any claims remaining (as opposed to issues to be resolved to finalize the administration of this Estate), are separate from the relief obtained in this Order and in the Claims Bar Order.

30. The Settlement Agreement is expressly conditioned upon the Claims Bar Order being final and not subject of appeal or any pending collateral challenge and the Claims Bar Order being binding on the Receiver on behalf of APS and First Utah, and Everest, the Receivership Estate, and each IRA Account Owner.

31. The Settlement Agreement will not become binding upon the parties thereto unless and until, the appeal rights of any interested party expire or the Tenth Circuit upholds this Order and the entry of the Claims Bar Order on appeal, if any.

32. Thus, the Court concludes that no just reason for delay exists. Rather, equity is furthered by certification of its Orders pursuant to Fed. R. Civ. P. 54(b).

33. Not only is there no just reason for delay, but the expediency and efficiency of the administration of this Receivership Estate will be furthered by certification of the Court's Orders pursuant to Fed. R. Civ. P. 54(b) as final and appealable, as opposed to finalizing the administration of the Receivership Estate and then waiting 30 days or until the resolution of an appeal to determining whether the conditions precedent to the effectiveness of the Settlement Agreement have been met.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court **ORDERS, ADJUDGES AND DECREES:**

1. The Intervenors' Motion (Dkt. 605) is GRANTED IN PART AND DENIED IN PART. It is GRANTED for the limited purpose of allowing the Intervenors to be substantively heard and argue the Intervenors' Motion and their objection to the Motion to Approve Settlement and settlement; but insofar as Intervenors seek a lift of the stay against litigation and/or to file a separate lawsuit in state court, the Intervenors' Motion is DENIED.

2. The Motion to Approve Settlement with First Utah Bank and for a Claims Bar Order (Dkt. 618) is GRANTED and the Settlement Agreement is approved.

3. The Claims Bar Order attached hereto as Exhibit A is approved and shall be entered.

4. The Receiver shall promptly serve a copy of these Findings of Fact, Conclusions of Law, and Order and the Claims Bar Order by posting a copy on the Receiver's website, www.apsreceiver.com.

5. The Court shall retain jurisdiction to enforce the terms and conditions of the Settlement Agreement and the Claims Bar Order.

6. This Order and the Claims Bar Order are certified as a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure. Pursuant to the Court's certification and the reasons more fully discussed above, the Orders are immediately appealable, as no remaining claims seek the same relief and there is no factual overlap with any remaining claims or issues. To the extent that there remain any unresolved claims for relief, the Court finds that there is no

just reason to delay entry of a final judgment approving the Settlement Agreement and the Claims Bar Order pursuant to Federal Rule of Civil Procedure 54(b). Indeed, certification pursuant to Rule 54(b) furthers the expedient and efficient administration of this Receivership Estate.

DATED this 23rd day of December, 2015.

BY THE COURT

UNITED STATES DISTRICT COURT JUDGE
ROBERT J. SHELBY

EXHIBIT A
Claims Bar Order

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Attorneys for 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.**	**CLAIMS BAR ORDER** **Case No.: 2:14-CV-00309-RJS-DBP** **Judge Robert J. Shelby** **Magistrate Judge Dustin B. Pead**

The Court has (1) reviewed and considered the Motion to Intervene (Dkt. 605); (2) reviewed and considered the Motion and Memorandum to Approve Settlement with First Utah Bank and for a Claims Bar Order (Dkt. 618); (3) ordered that notice be given to each person who could be affected by the Settlement Agreement and Claims Bar Order, permitting responses and/or objections prior to the fairness hearing, and advising of the date, time, and place of a fairness hearing on the motion and the right to appear and be heard at the fairness hearing

("**Order of Notice**") (Dkt. 621); (4) held a fairness hearing on December 2, 2015, at which the Court heard arguments regarding the Motion to Intervene and proposed Settlement Agreement and Claims Bar Order; (5) considered all responses and objections filed in accordance with the Order of Notice; and (6) entered Findings of Fact, Conclusions of Law, and Order on the Motion to Intervene and the Motion to Approve Settlement with First Utah Bank and for a Claims Bar Order, and being fully advised in the premises and good cause appearing, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

American Pension Services, Inc., ("**APS**"), Curtis L. DeYoung, Michelle DeYoung and each person, trustee, entity, or other legal person who created a self-directed IRA or a 401(k) and other persons who are or were in active concert or participation with such persons, trustees, entity or agents who's benefit an IRA was created where First Utah Bank was at any time the custodian and APS was the third-party administrator (collectively "**IRA Account Owners**"), are enjoined from bringing any lawsuit, action, claim, arbitration, or administrative proceeding of any kind, in any jurisdiction, whether arising under statute or common law, in contract or in tort, at law or in equity against First Utah Bank or its present or former directors, officers, employees, servants, attorneys, insurers or against Everest National Insurance Company, a Delaware corporation or its present or former officers and directors, employees, attorneys or agents.

IT IS FURTHER ORDERED that within ten business days of the entry of this Claims Bar Order, the Receiver shall provide written notice of this Claims Bar Order to all APS IRA

Account Owners, in the Receiver's database, and that the Claims Bar Order shall be posted on the Receiver's website **http://www.apsreceiver.com.**

IT IS FURTHER ORDERED that the Receiver, within fifteen days of the entry of this Order, shall file with the Court a Notice that she has complied with the above Order giving notice of this Claims Bar Order.

This Claims Bar Order is entered this _____ day of December, 2015.

UNITED STATES DISTRICT COURT JUDGE
ROBERT J. SHELBY

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IT IS FURTHER ORDERED that the Receiver, within fifteen days of the entry of this Order, shall file with the Court a Notice that she has complied with the above Order giving notice of this Claims Bar Order.

This Claims Bar Order is entered this 23rd day of December, 2015.

BY THE COURT

UNITED STATES DISTRICT COURT JUDGE
ROBERT J. SHELBY