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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% of 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 Intervenor has 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 commingled¹ 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 Reserve 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 Intervenor's 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

A handwritten signature in black ink, appearing to read 'RJS', is written over a horizontal line. The signature is stylized and cursive.

UNITED STATES DISTRICT COURT JUDGE
ROBERT J. SHELBY

EXHIBIT A
Claims Bar Order

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p>Plaintiff,</p> <p>v.</p> <p>AMERICAN PENSION SERVICES, INC., a Utah Corporation and CURTIS L. DeYOUNG, an individual,</p> <p>Defendants.</p>	<p>CLAIMS BAR ORDER</p> <p>Case No.: 2:14-CV-00309-RJS-DBP</p> <p>Judge Robert J. Shelby</p> <p>Magistrate Judge Dustin B. Pead</p>
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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