Appeal No. 16-4013

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND 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

PETITION FOR REHEARING

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Appellants listed in the caption above respectfully petition the Court for a panel rehearing of the decision entered by the Court in this case on March 9, 2017. As set forth below, the Appellants believe that the Court overlooked or misapprehended significant points of law and fact.

ARGUMENT

The Appellants believe that the Court overlooked the following important points with respect to the district court's "factual findings."

1. This Court held that "it was perfectly acceptable for the district court to disregard the testimony of Intervenors' expert." Opinion at 22. The holding overlooks the fact that no one objected to the expert's qualifications, no one sought to strike his declaration, and no one offered any testimony disagreeing with the expert.

2. Next, if the evidence offered by the Appellants is "disregard[ed]," then there was *no evidence* before the district court. The Receiver did not present any witnesses, declarations, deposition testimony, sworn testimony, or authenticated documents. As this Court noted in its opinion, a finding is clearly erroneous if it is "without factual support in the record." Opinion at 21. Here the findings of the district court were not supported by *any* evidence. Rather, the district court merely held oral argument and accepted the arguments of one side in

this dispute without requiring any admissible evidence or testimony.[1] It is an abuse of discretion to give no weight to admissible testimony offered by one side in litigation but then to accept as the full truth the unsupported assertions of the other side. This case should therefore be remanded to the district court for an evidentiary hearing.

In addition, in some respects the district court treated the Receiver's motion as a motion for summary judgment. However, in so doing—and before depriving the Appellants of their day in court—the district court should have construed all of the facts in the light most favorable to the Appellants, and it should have resolved all reasonable inferences in favor of the Appellants.

3. Quoting from the brief of First Utah Bank, this Court stated that "the need to preserve the assets and operational capacity *of the defendant*" is a proper consideration for a court. Opinion at 23. However, the Court has apparently overlooked the fact that the Fifth Circuit case it cites dealt with punitive damages. *Baker v. Washington Mutual Fin. Group, LLC*, 193 Fed. Appx. 294 (5th Cir. 2006).

[1] First Utah Bank argued that it could not pay more money to settle claims against it and that it would not be willing to settle without a claims bar order. These are savvy arguments, but they are just that—arguments. It is possible that these arguments constituted mere posturing for the sake of negotiations. Neither First Utah nor anyone else ever testified under oath that First Utah was not able to pay more money or that if push came to shove the bank would not be willing to enter into some kind of a settlement agreement that did not include a claims bar order.

In deciding how much Washington Mutual was able to pay *in punitive damages,* the court noted that had "already ceased operations in Mississippi." The district court therefore found that it was unlikely that "Washington Mutual's net worth would increase in the near future." *Id.* at 298. The Fifth Circuit affirmed the district court's decision the "$3.5 million was the most that Washington Mutual would be able to pay as punitive damages." *Id.* The Fifth Circuit said nothing about preserving operational capacity or ensuring that Washington Mutual could remain in business. A court may perhaps have an interest in not imposing punitive damages that are so high that a company is forced out of business, but the present case has nothing to do with punitive damages.

In addition, First Utah Bank is not even a defendant in this case—it is a third party. The Appellants allege that First Utah is a tortfeasor whose fraud cost them substantial sums of money. If First Utah was indeed a culpable tortfeasor, this Court does not necessarily have an interest in ensuring that the bank stays in business. Indeed if a party has committed torts and caused extensive damage, it might be entirely proper for the party to go out of business and for its assets to be used to pay injured parties. This Court should therefore be very cautious before ruling that courts have an interest in "preserv[ing] . . . the operational capacity of defendants." The Appellants believe that the Court overlooked the breadth and future implications of this statement.

4. For the sake of brevity, the Appellants focused on the crucial "findings" of the district court. The crucial finding in this case was that First Utah could not pay more than $5 million. If this finding is not supported, then none of the other findings matter—they simply become irrelevant. If First Utah can pay more than $5 million, then the Receiver can obtain every cent she desires, and the other parties who have also been wronged by First Utah can attempt to obtain redress from the bank. There is simply no basis to deprive the wronged parties of their property rights by barring them from pursuing *their own claims* against the bank.[2]

5. Finally, this Court apparently overlooked its own precedent establishing that when a district court's determinations are based solely on documentary submissions, this Court is in as good a position as the district court to review the written materials. In a situation similar to this case, this Court held:

> [T]he only evidence relating to the trial court's judgment appears to be documentary, and we are therefore not bound by any of the trial court's "findings," if indeed there were any, but are free to draw our own legal conclusions from the evidence before us.

Rockwood & Co. v. Adams, 486 F.2d 110, 112 (10th Cir. 1973). In addition, where "no witness testified in person," the normal standard of review does not apply;

[2] This Court held in *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015) that "receivers may only sue to redress injuries to the entity in receivership, and not directly on behalf of the entity's creditors." It does not appear to the Appellants that this Court intended to overrule *Klein*.

"[i]nstead, this court is equally capable of examining the evidence and drawing conclusions from it, *and is under the duty of doing so*." *U.S. v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 101 F.2d 156, 160 (10th Cir. 1939) (emphasis added). This Court apparently overlooked the fact that in a case like this one, the appellate court has "a duty" to examine the evidence and draw its own conclusions without affording any deference to the district court.

CONCLUSION

For the foregoing reasons, the Appellants request that this Court remand this case to the district court for an evidentiary hearing.

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;

(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 March 23, 2017, and, according to the program, is free of viruses; and

(4) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,521 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

DATED this 23rd day of March, 2017.

RAY QUINNEY & NEBEKER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, the foregoing **PETITION FOR REHEARING** was filed with the Court by ECF and therefore served upon all parties who have entered an appearance in this case, including:

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