**58 pages**

**SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY**

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| **In Re:**<br><br>**AMERICAN EAGLE MORTGAGE 100, LLC; AMERICAN EAGLE MORTGAGE 200, LLC; AMERICAN EAGLE MORTGAGE 300, LLC; AMERICAN EAGLE MORTGAGE 400, LLC; AMERICAN EAGLE MORTGAGE 500, LLC; AMERICAN EAGLE MORTGAGE 600, LLC; AMERICAN EAGLE MORTGAGE MEXICO 100, LLC; AMERICAN EAGLE MORTGAGE MEXICO 200, LLC; AMERICAN EAGLE MORTGAGE MEXICO 300, LLC; AMERICAN EAGLE MORTGAGE MEXICO 400, LLC; AMERICAN EAGLE MORTGAGE MEXICO 500, LLC; AMERICAN EAGLE MORTGAGE MEXICO 600, LLC; AMERICAN EAGLE MORTGAGE I, LLC; AMERICAN EAGLE MORTGAGE II, LLC; and AMERICAN EAGLE MORTGAGE SHORT TERM, LLC.** | **Case No. 19-2-01458-06**<br><br>**ANDERSON CLASS ACTION PLAINTIFFS' OBJECTIONS TO PROPOSED SETTLEMENTS AND PROPOSED ORDER**<br><br>**Hearing Date: August 18, 2023**<br>**Time: 1:30 pm**<br>**Judge: David E. Gregerson**<br>**Place: Department No. 2** |



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## OBJECTIONS

1. The Anderson Class Action Plaintiffs[1] (who filed a Class action on behalf of "Oregon investors" making up over one-third of the investor creditors) specially appear[2] and object to the proposed settlements because they contain a condition obligating the Receiver to obtain an injunction permanently barring the Oregon investors from prosecuting the Oregon Securities Law claims now pending in the United States District Court of Oregon against Pacific Premier Bank (PPB) and Riverview Community Bank, whom the settlement agreements revealingly refer to as the "Pacific Premier Protected Parties" and the "Riverview Protected Parties." Proposed Settlements §§ 2(a), 6(a)(PPB), 5(a)(RCB).

2. By extension, the Anderson Class Action Plaintiffs object to the proposed Order because it provides that the Oregon investors "have irrevocably assigned to the Receiver all" their Oregon Securities Law claims against the "Bank Protected Parties,"

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[1] They are: Diane Anderson, trustee of the Diane L. Anderson Revocable Trust; Bonnie Buckley; trustee of the Bonnie K. Buckley IRA; Carl and Kirby Dyess, trustees of the Dyess Family Trust; Peter Koubeck, an individual and trustee of Peter L. Koubeck IRA; Michael Peterson, trustee of the Michael T. Peterson IRA; and Ed Wilson, an individual. All are investor-creditors of the receivership estate.

[2] The bases for the Anderson Class Action Plaintiffs objections include lack of personal and subject matter jurisdiction over the Oregon investors and the Oregon Class action for purposes of permanently barring the Oregon investors from prosecuting their Oregon Securities Law claims now pending in the United States District Court of Oregon against Pacific Premier Bank and Riverview Community Bank. *See below* p. 49.



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neither of which is a party in receivership. Finding and Conclusion ¶ Y. and Order ¶ 2.

3. The Anderson Class Action Plaintiffs object to the proposed Order because it "permanently bar[s] and enjoin[s]" the Oregon investors from prosecuting their Oregon Securities Law claims against the two Banks (neither of which is in receivership) in the Anderson Litigation (the Oregon Class action) before the United States District Court of Oregon, Case No. 3:20–cv–001194—AR, and in the *Beattie* Litigation before the Circuit Court of the State of Oregon, Multnomah County, Case No. 20–cv–09419. Findings and Conclusion ¶ R. and Order ¶ 3.

**SUMMARY OF REASONS FOR OBJECTIONS**

The Anderson Class Action Plaintiffs object because:

A. The Receiver does not have authority under Washington law or under the Court's Order appointing the Receiver to bargain away the Oregon Securities Law claims held by the Oregon investors against the two Banks, neither of which is in receivership. Using Chief Justice Marshall's words,[3] the Receiver does not have authority to "sport away the vested rights" of Oregon investors against third parties outside the receivership. By extension, the Court does not have authority to enter an

[3] Marbury v. Madison, 5 U.S. 137, 166 (1803) ("[W]hen the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."). Nearly all of the legal authorities cited contain hyperlinks to public sources for the Court's convenience. (The typical blue hyperlink color was removed to comply with GR 14).



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injunction at the Receiver's request barring the Oregon investors from pursuing their Oregon Securities Law claims against the two Banks in the United States District Court of Oregon and in the Circuit Court of the State of Oregon.

B. A primary bargaining chip in the settlements—the Oregon investors' Oregon Securities Law claims—was never the Receiver's to bargain away. The Receiver has repeatedly told the Oregon investors (*see below* p. 19–22) and this Court as recently as March 28, 2023, that

- they, the individual Oregon investors, and not the Receiver, are the "Holders" of the Oregon Securities Law claims against third parties, including the Banks;
- the Receiver does not have "standing" to bring such claims;[4]
- "only individual investors, who purchased AEM securities in the first place, would have the standing necessary to bring claims for securities fraud,"
- they, the Oregon investors, must "pursue" those claims on their own through the "Oregon Class Action Lawsuit" that the Receiver referred them to—which is exactly what they did; and
- "to be clear," the Receiver is not pursuing its claim against the Banks before this Court "on behalf of investors." (At the same time, the Receiver also made clear to this Court that there had been no "assignment of claims…from the members of the LLC[s]" i.e., the investors. These are the very same claims the Receiver is now asking this Court to deem to have been assigned to the Receiver at some undefined time.)[5]

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[4] For its part, in its March 20, 2023 Reply in Support of Motion for Summary Judgment, PPB told the Court that it agrees that the Oregon investors "own" their claims against the Banks and that the Receiver has no "standing" to pursue those claims. Hardiman Declaration Ex. 1.

[5] Tr. 101:7–10, 23–25, Hardiman Declaration Ex. 2.



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And consistent with those assurances, the Receiver requested the Court to adopt a distribution plan that treated the Oregon investors as "holders" of their claims against the third parties (i.e., Davis Wright Tremaine and the two Banks) and that then reduced their distributions accordingly, which the Court so ordered.

Yet, having so notified Oregon investors, having so assured this Court, and having so distributed the receivership estate, the Receiver now seeks to bargain away the Oregon Securities Law claims held by the Oregon investors against the two Banks, neither of which is in receivership, and pursuant to a process the Oregon investors were not a party to and were, in fact, excluded from.[6] To have rightly disclaimed any interest in the Oregon investors' Oregon Securities Law claims against the two Banks, and to then turn around and attempt to transfer (sell) those same investor claims to the Banks (functionally what a claims bar injunction accomplishes) is extraordinary in every sense of the word. The Receiver's and the Bank's statements to the Court and the Oregon investors and other conduct gives rise to judicial estoppel that compels denial of the Motion. The Receiver and the Banks seek to deprive Oregon investors of valuable property without due process of law.

C. The Court does not have personal jurisdiction over the Oregon investors for purposes of enjoining them from pursuing their Oregon Securities Law claims against

[6] The mediations were exclusive to the Receiver and the two Banks.



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the Banks in the District Court of Oregon. And the Court does not have jurisdiction of the subject matter of those claims for purposes of effecting a settlement of the Class action pending before the District Court of Oregon.

D. The proposed settlement is neither fair nor "reasonable" under the factors applied by Washington courts.

## I. OREGON CLASS ACTION AND THE OREGON SECURITIES LAW CLAIMS

### A. Anderson Class Action Plaintiffs

The Anderson Class Action Plaintiffs are seven parties representing a Class of over 100 investors who live in Oregon and who purchased securities in Oregon in all of the American Eagle Funds in receivership except AEM Mexico 600. According to the Receiver, 36.7% of the claims are held by Oregon investors (~90 out of 245), and those claims represent 33.7% of the investors' claims measured by book value. The Anderson Plaintiffs by themselves represent a substantial 13% of the investors by book value. Declaration of Gary N. Hardiman, Ex. 3 (Receiver's Investor Meeting (Jul. 18, 2023) Summary – last page). Pursuant to the Oregon Securities Law, plaintiffs seek to recover their losses from Pacific Premier Bank, Riverview Community Bank, Davis Wright Tremaine LLP, and others who "participate[d] and materially aid[ed] in" the unlawful sales of the AEM Fund securities. ORS 59.115(3).

The Anderson Plaintiffs filed the Oregon Class action in the Multnomah County Circuit Court for the State of Oregon on February 25, 2020, a month before the


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Quarantine began. On July 20, 2020, the Anderson Plaintiffs filed their First Amended Complaint adding Pacific Premier as a defendant. A copy of the First Amended Complaint is attached to the Hardiman Declaration, Ex. 4. That was one month before the Receiver filed his action against Pacific Premier.[7] In Summer 2020, Pacific Premier and Davis Wright removed the action to the U.S. District Court in Portland, pursuant to the Class Action Fairness Act of 2005—successfully contending that the Class of Oregon investor-victims has 100 or more members. 28 U.S.C. § 1332(d).

On March 25, 2022, and following an unsuccessful pre-filing mediation, the Anderson Class Action Plaintiffs filed their Second Amended Complaint adding Riverview Community Bank as a defendant. Hardiman Declaration Ex. 5.

Thereafter, the plaintiffs in *Beattie et al. v. Davis Wright Tremaine, LLP, Ross Miles, Maureen Wile, Pacific Premier Bank, and Riverview Community Bank*, Case No. 20CV09419 (Mult Co. Cir. Ct.) filed their Second Amended Complaint making substantially the same allegations against the two Banks that the Anderson Plaintiffs allege in their SAC. *Compare* Decker Declaration Ex. B *with* Ex. C. (The *Beattie* plaintiffs consist of a group of investors who are not members of the Oregon Class, but who have claims under the

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[7] Contrary to the timeline implied in the Edward Decker Declaration's comparison of the two complaints, to the extent there is overlap between the allegations between the operative complaints in the Oregon investor cases and the Receiver's case against the two Banks, it is because the Receiver copied his allegations from the Anderson Plaintiffs' First Amended Complaint. *See below* p. 44.



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Oregon Securities Law.) The substantial sameness is noteworthy because at the start of this year, the Multnomah County Circuit Court denied the Banks' motions to dismiss for failure to state a claim and for lack of personal jurisdiction. Opinion and Order, dated Jan. 19, 2023. A copy of the Circuit Court Opinion and Order is found in Anderson Class Action Plaintiffs' Appendix Ex. A. *See below* p. 11 for that court's description of the claims against the Banks and the reasons it denied the Banks' motions.

On September 16, 2022, following mediation, the Anderson Class Action Plaintiffs reached a settlement with Davis Wright. On October 6, 2022, the Anderson Plaintiffs filed a motion to certify a settlement Class and for the District Court to approve notice of the Class and the proposed settlement. Those motions are pending, and plaintiffs expect the court to rule soon. Separately, the Banks filed motions to dismiss for lack of personal jurisdiction and failure to state a claim. The District Court has said that, consistent with the decision of the Circuit Court Judge in *Beattie*, it intends to deny those motions. Anderson Class Action Plaintiffs' Appendix Ex. E (May 8, 2023 email from U.S. Magistrate Judge Armistead).

### B. Oregon Securities Law Is the Most Investor Protective Blue Sky Law in the Country

While the Oregon Securities Law is similar to the Securities Act of Washington (RCW 21.20.940 – WSSA), as will be seen, the Oregon Securities Law casts a broader net


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that makes third-parties who participate or materially aid in a sale jointly and severally liable to the purchaser to the same extent as the seller. The Oregon Securities Law, like the WSSA,[8] makes persons who sell securities by means of untrue statements and misleading omissions liable to purchasers. ORS 59.115(1); 59.135. "ORS 59.115(1)(b) mandates a full and truthful disclosure of material information." "[T]he Oregon Securities Law must be 'liberally construed to afford the greatest possible protection to the public.'"[9] *Marshall v. Harris*, 276 Or. 447, 453, 555 P.2d 756 (1976); *Everts v. Holtmann*, 64 Or. App. 145, 152, 667 P.2d 1028 (1983). "ORS 59.115(1)(b) imposes liability without regard to whether the buyer relies on the omission or misrepresentation."[10] *Id.* Purchasers are not required to prove scienter[11]—rather the seller must prove they "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission." ORS 59.115(1)(b). Purchasers are not required to prove "transaction" or "loss causation." Rather, a successful plaintiff is entitled to recover the "consideration

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[8] Compare RCW 21.20.010; 21.20.430(1).

[9] *Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA), LLC*, 194 Wn.2d 253, 259, 449 P.3d 1019 (2019) ("[B]ecause the purpose of the Securities Act is to protect the public, 'it is appropriate to construe the statute broadly in order to maximize the protection offered.'" Citing *McClellan v. Sundholm*, 89 Wn.2d 527,533, 574 P.2d 371 (1978).).

[10] The same rule applies in Washington. *Fed. Home Loan Bank*, 194 Wn.2d at 259.

[11] The same rule generally applies under the Washington Act. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980); RCW 21.20.430(7) contains a limited scienter provision.



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paid" for the security, together with interest, less "any amount received on the security."[12] ORS 59.115(2).

Finally—and this is where the Oregon Securities Law and the WSSA differ—in Oregon "every person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller." ORS 59.115(3).[13] Acting pursuant to this subsection, banks and other lenders have faced participant and material aider liability in numerous Oregon cases. *E.g.*, *Cox et al. v. Holcomb Family L.P., et al.*, Case No. 13–8–12201, Order on Defendants' Motions to Dismiss or Make More Definite and Certain (Mult. Co. Cir. Ct. December 14, 2015), Anderson Class Action Plaintiffs' Appendix Ex. B;[14] *Ainslie v. First Interstate Bank*, 148 Or. App. 162, 184-85, 939 P.2d 125 (1997); *White v. ITC Corp.*, 1986 WL 31586 *12 (D. Or. Aug. 5, 1986) (plaintiffs stated a claim against bank because, among other things, "in this case plaintiffs allege a special stake in the plaintiffs' investments in that the Citizen defendants aided the seller of securities for the purpose of advancing the interests of Citizens Energy."), Anderson

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[12] Same: RCW 21.20.430(1).

[13] Compare RCW 21.20.430(3), which provides in part: "every employee of such a seller …who materially aids in the transaction…is also liable jointly and severally with and to the same extent as the seller…."

[14] Jeff Manning, Banks, accountants to pay $18 million to victims in Berjac scam, OregonLive (Jan. 26, 2017) https://www.oregonlive.com/business/2017/01/oregon_banks_to_pay_16_million.html.



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Class Action Plaintiffs' Appendix Ex. F; *Adamson v. Lang*, 236 Or. 511, 514-15, 389 P.2d 39 (1964).

Most recently, and directly applicable here, the Multnomah County Circuit Court in the parallel *Beattie* action found that plaintiffs had stated a claim for relief under the Oregon Securities Law against Pacific Premier and Riverview and denied the Banks' motions to dismiss. *Beattie et al. v. Davis Wright Tremaine, LLP, Ross Miles, Maureen Wile, Pacific Premier Bank, and Riverview Community Bank*, Opinion and Order, Case No. 20CV09419 (Mult. Co. Cir. Ct. Jan. 19, 2023), Anderson Class Action Plaintiffs' Appendix Ex. A. The Court said:

> Taken in the light most favorable to Plaintiffs with reasonable inferences, the allegations are that Miles and Wile engaged in securities fraud through their various entities, that the Banks each loaned money to the enterprise, the loans allowed the fraudulent enterprise to continue, the banks weighed in on specific transactions, were aware that it was a securities enterprise, and at times were aware the enterprise was struggling and that the Banks would benefit from infusions of new securities buyers. Plaintiff need not plead that the Banks knew the securities sales were fraudulent. Plaintiff need not plead that the Banks material aid was with respect to the sale of the securities itself. Assisting in the enterprise more generally, for example by loaning money in support of the business, can be sufficient:
>
> > "It bears noting that the remedy against nonseller participants is not contingent on the nonsellers' violation of any law. As we explained in *Computer Concepts, Inc. v. Brandt*, 137 Or. App. 572, 905 P.2d 1177 (1995), *rev. den.* 323 Or. 153, 916 P.2d 312 (1996), the liability of the nonseller participant under ORS 59.115(3) is predicated on the violation of the seller. The nonseller participant becomes liable under ORS 59.115(3) because it has 'participated or materially aided' in the sale, not because it has violated any law. The statute affords such persons an affirmative defense in the event that they can establish that they did not know, or could not reasonably have known of the



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> facts on which liability is based. ORS 59.115(3). That imposes what the Supreme Court has recognized as 'a substantial burden' on nonseller participants, but, as the court also has observed, 'this legislative choice was deliberate.' *Prince v. Brydon*, 307 Or. 146, 150, 764 P.2d 1370 (1988)." *Anderson v. Carden*, 146 Or App 675, 683 (1997).
>
> In summary, Plaintiffs' allegations together with evidence submitted in opposition to these motions are that money was transferred amongst Miles, Wile and the related entities with little regard for corporate, accounting, or legal formalities, that the loans assisted in funding the enterprise and keeping it afloat, which allowed the enterprise to continue selling securities in violation of applicable law. <u>The allegations, if true, establish primary liability on the part of Miles and Wile under Oregon securities law. Plaintiffs also adequately plead secondary liability on the part of the Banks</u>.

Opinion and Order, at 8–9.

In contrast to the certitude of the Circuit Court about the strength of the Oregon Securities Law claims in *Beattie*, at the March 28, 2023 summary judgment hearing, this Court dismissed the Receiver's fraudulent transfer claim against Riverview and expressed serious concerns whether the Receiver could successfully make out a claim against the two Banks on his aiding the breach of fiduciary duty claim. The Court said:

> The remainder of the claims I'm not prepared to grant summary judgment on at this time. I will advise, however, though, that — again, it's a very close case. I'm not ruling out the possibility of post-trial relief if the Court were to hear the trial and make the determination and notwithstanding the presentation and the evidence notwithstanding the jury decision that the Court determines that there be a directed verdict or something along those lines, I would certainly take that into account.
>
> I say that only because and I'm not telling you anything you don't already know. You're the plaintiff. You have the uphill battle. I think damages is a very — is a red blinking light for me in terms the damages and the speculative nature of


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those damages that's being claimed here, which Mr. Donohue has already pointed out in his argument.

Transcript of Proceedings at 108:16–09:10, March 28, 2023, Hardiman Declaration Ex. 2.

### C. Oregon Investors Seek $33.4 Million in Oregon Securities Law Damages from the Two Banks

In its December 22, 2022 Order Reducing Allowed Amounts of Certain Investor Claims to Account for Davis Wright Tremaine LLP Recoveries, this Court (and the Receiver) recognized the separate and significant value of the Oregon Securities Law claims held by the Oregon investors. *See below* p. 23. The Oregon Securities Law, ORS 59.115(2) has a fairly mechanical measure of damages:

- the consideration paid for the security, plus
- interest from the date of payment equal to the greater of 9% per annum interest or the rate provided in the security if the security is an interest-bearing obligation, less
- any amount received on the security.

*See above* p. 9-10. Because there is no transaction or loss causation requirement,[15] the Anderson Plaintiffs are able to state the exact amount of the Oregon investors' Oregon Securities Law. As of August 18, 2023, those damages are as follows:

| As of August 18, 2023 | Oregon Securities Law Damages |
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[15] The WSSA measures damages the same way. RCW 21.20.430(1).



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|---|---|---|
| Total Class Damages | $ | 27,718,053.02 |
| Beattie Pls. Damages | $ | 5,645,342.69 |
| Total Damages | $ | 33,363,395.72 |
| DWT Settlement Total | $ | 4,500,000 |
| Class Share | $ | 3,677,000 |
| Beattie Share | $ | 823,000 |
| Receiver's Share of DWT Settlement | $ | 45,000 |
| Class Share of the $45,000 | $ | 36,770 |
| Beattie Share of the $45,000 | $ | 8,230 |

See Hardiman Declaration ¶ 14. When the Davis Wright Settlement is completed, these $33.4 million in damages will be reduced by $4,455,000 after deduction of attorney fees and costs. Id. ¶ 15. The Davis Wright settlement is good evidence of the value of the Oregon Securities Law claims held by the Oregon investors.

The bottom line is the Oregon investors' Oregon Securities Law claims against the two Banks that the Receiver is attempting to bargain away are a very valuable asset owned by the Oregon investors and not the Receiver. With that background the Anderson Plaintiffs turn to the substance of their Objections.

## II. THE RECEIVERSHIP ACT DOES NOT GRANT THE RECEIVER THE AUTHORITY TO DEPRIVE CREDITORS OF THEIR CLAIMS (PROPERTY) AGAINST THIRD PARTIES

With the exception of voidable transfer claims (discussed below), RCW 7.60.060 expressly does not give receivers the power to assert or settle the rights and claims of creditors "of the person over whose property the receiver is appointed relating thereto."



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Rather, RCW 7.60.060(1)(c) only gives receivers the power to assert "rights, claims, or choses in action of the person over whose property the receiver is appointed relating thereto," and if and only then "to the extent that the claims are themselves property within the scope of the appointment or relate to any [such] property."

The voidable transfer exception is notable. RCW 7.60.060(f) expressly provides that receivers have the power to "pursue in the name of the receiver any claim under chapter 19.40 RCW [Uniform Voidable Transactions Act, fka Uniform Fraudulent Transfer Act] assertable by any creditor of the person over whose property the receiver is appointed, if pursuit of the claim is determined by the receiver to be appropriate," but RCW 7.60.060 does not grant the receiver any other power with respect to third-party claims held by creditors. This one single exception is not new. *Western Electric Co. v. Norway Pacific Constr. & Drydock Co.*, 124 Wash. 49, 60, 213 P. 686 (1923) ("The receiver, except as to fraudulent sales and transfers, is not vested with any higher or better right or title to the property than the insolvent had when the receiver's title accrued").

The fact that the legislature has made a specific grant of the power to receivers to pursue voidable transfer claims, but in no other case, demonstrates that the legislature knows how to grant receivers the authority to pursue claims on behalf of creditors when it wants to do so. If the legislature had intended to grant receivers the authority



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to pursue other creditors' claims against third parties, it could have done so. It is "significant." *State v. Larson*, 184 Wn.2d 843, 852–53, 365 P.3d 740 (2015):

> In all these instances, the legislature utilized appropriately broad language…. By comparison, RCW 9A.56.360(1)(b)'s language is decidedly narrower in scope. These statutes demonstrate that the legislature knows how to craft a broad statute when it wants to do so. If the legislature had intended RCW 9A.56.360(1)(b) to have a broad application, it could have used appropriately broad language, as it did in other similar statutes.

(citing *State v. Gonzales Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) ("It is significant that when the legislature wants to protect children from the harmful effects of exposure to criminal activity, it knows how to say so.")).

There were good reasons for the legislature to give receivers authority to pursue voidable transfer claims that are not present with other sorts of claims creditors may have against third parties who are not in receivership. Where inadequate consideration was paid by the third party for the voidable transfer, the receiver is recovering a loss to the estate. Where a creditor has obtained a preference over other creditors to assets of the estate, preventing preferences is one of the primary purposes of a receivership. Along those same lines, in the case of voidable transfer claims, generally all creditors would have an equal right to pursue a voidable transfer and so granting authority to the receiver to pursue the claims maintains the equitable goal of equality. None of those justifications apply to the Oregon Securities Law claims Oregon investors hold against the two Banks.



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Finally, nothing in the receivership act impliedly gives receivers any sort of direct or indirect power over any other third-party claims of creditor-victims as this Receiver is attempting to exercise here.

## III. THIS COURT'S ORDER OF APPOINTMENT DID NOT GRANT THE RECEIVER THE AUTHORITY TO PURSUE CREDITORS' CLAIMS AGAINST THIRD PARTIES—EXCEPT VOIDABLE TRANSFER CLAIMS

In its Order appointing the Receiver, the Court only granted the Receiver authority over the property of the AEM Fund LLCs, referred to as "Assignors" in the Order. The Court did not grant the Receiver any authority to take possession of or to exercise control over the claims held by some creditors against third parties. Those third-party claims are property[16] of some of the creditors of AEM Fund LLCs. Rather the Court appointed the Receiver only

> with respect to (a) all of each Assignor's property, including (without limitation) all real property, fixtures, receivables, general intangibles, bank deposits, cash, promissory notes, cash value and proceeds of insurance policies, claims, and demands belonging to the Assignor, wherever such property may be located (each, an "Estate"), and (b) all business operations of each of the Assignors.

Order Appointing General Receiver (May 10, 2019), at 2–3. The Court only granted the Receiver "possession and control over the Estate and the business of each of the Assignors" (Order, at 4), not possession and control over the claims of the Oregon investors against third parties like the two Banks.

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[16] "'A chose in action is personal property.'" *Lennar Multifamily Builders, LLC v. Saxum Stone, LLC*, 18 Wn. App. 2d 435, 446, 492 P.3d 175 (2021).



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With one exception, the Court only granted the Receiver authority to assert the "rights, claims, or interests of each of the Assignors," and to maintain actions to enforce the "right, claim, or interests…of the Assignors," and to "settle…outstanding receivables of the Assignors." Order, at 5.

The one and only exception was, pursuant to RCW 7.60.060(1)(f), the Court granted the Receiver authority "[t]o pursue in the name of the Receiver any claim under RCW 19.40 [Uniform Voidable Transactions Act] assertable by any creditor of any Assignor, if pursuit of the claim is determined by the Receiver to be appropriate." It is noteworthy here that the Receiver did pursue fraudulent transfer claims against Riverview, but that claim was dismissed by this Court. Order, dated April 11, 2023.

This is the only "property with respect to which the receiver is appointed." RCW 7.60.055. This is the only "property within the scope of the appointment." RCW 7.60.060(1)(c).

It is worth remembering that in this case the Receiver was appointed following an agreement (an "Assignment") between the Receiver and Ross Miles, the perpetrator of the AEM securities fraud scheme that gave rise to the Oregon Securities Law claims that are being maintained in the courts of Oregon by the Oregon victims of that scheme. (A copy of the Assignment is attached to the Order Appointing General Receiver.) By its terms, the Assignment only "grants, assigns, conveys, transfers, and sets over" to the Assignee (i.e, the Receiver) the "Assignor's [AEM Funds LLC] property." Assignment,



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p. 1. Nowhere does the Assignment purport to assign to the Receiver claims that some of the victims of Miles' scheme have against third parties (and Miles!), nor could it because neither Miles nor the Funds owned those claims. That the perpetrator of the scheme could enter into an assignment with a Receiver that could serve as a vehicle for depriving Oregon investors of their Oregon Securities Law claims, would simply further victimize those investors and would turn Washington's receivership act on its head. The purposes of the act, after all, are to set up procedures "for the benefit of creditors." Laws of 2004, ch. 165, § 1 – see Note following RCW 7.60.005. *Accord* *Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 183, 381 P.3d 71 (2016) ("[A] receivership's primary purpose is to protect the debtor's assets for creditors"); *Laube v. Seattle Taxicab Co.*, 132 Wash. 32, 36, 231 P. 11 (1924) ("A receiver should be one who will guard equally and impartially the rights of all.").

## IV. THE RECEIVER (RIGHTLY) DISCLAIMED ANY INTEREST IN OR ASSIGNMENT OF THE OREGON INVESTORS' OREGON SECURITIES LAW CLAIMS AGAINST THE BANKS THE RECEIVER NOW SEEKS TO TRANSFER TO THE BANKS

Until his June 30, 2023 filing, the Receiver consistently told investors as well as to this Court that he had no right or interest with respect to the Oregon investors' Oregon Securities Law claims against the two Banks.

In his Second Report filed with this Court on September 20, 2019 and posted on the Receiver's website for all creditors to review, the Receiver made clear that he had no



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standing to pursue investor securities law claims against third parties—only the individual investors did, that the "holders" of those claims were "Individual investors" and that the "Receiver [was] not specifically investigating those claims." He said:

> **PURSUIT OF CLAIMS**
> *Background and Status*
>
> As investors have come to realize that recovery from the Pools is likely to be very low, they have begun to ask questions about the potential for recovery from other parties who may share responsibility for the Pools' failure. We have been receiving many questions…
>
> Before addressing these questions in turn, we note that, as a legal matter, anyone who brings a claim against another party is required to have standing to do so. The Receiver, as the representative of the Pools, has standing to bring only certain kinds of claims. These include collection actions against those who owe money to the Pools, actions against the Management Company and those who operated and controlled AEI and AEMM for mismanagement of the Pools, and, potentially, actions against other entities or individuals whose wrongful actions helped cause the inability of the Pools to repay investors. In contrast, only individual investors, who purchased AEM securities in the first place, would have the standing necessary to bring claims for securities fraud.
>
> Table 3 provides an overview of the different categories of claims that might be available, and which party or parties would have legal standing to pursue them.
> …

**Table 3: Types and Holders of Potential Litigation Claims**

| Basis of Claim | Potentially Liable Parties | Holder of Claim | Status |
|---|---|---|---|
| Loans made by the Pools | Borrowers and other recipients of the loan proceeds | Receiver (on behalf of the Pools) | Investigation well underway |
| Mismanagement of Pools/Breach of management agreements; aiding, abetting, or participating in breaches of fiduciary duty, and like claims | AEI, AEMM, Ross Miles, Maureen Wile, and other responsible parties that materially contributed to the mismanagement of the Pools or breach of management agreements | Receiver (on behalf of the Pools) | Investigation well underway |



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| Basis of Claim | Potentially Liable Parties | Holder of Claim | Status |
|---|---|---|---|
| Violation of state or federal securities laws | AEI, AEMM, Ross Miles, Maureen Wile, AEI investor representatives, attorneys (including those who prepared offering materials), banks, IRA plan administrators, or others who participated in or materially aided transactions that violated securities laws | Individual investors | Receiver not specifically investigating but willing to share information |

Hardiman Declaration Ex. 6. That the Receiver was not investigating and did not investigate the Oregon Securities Law claims held by Oregon investors against the two Banks is noteworthy: The Receiver, unlike the lawyers representing the Anderson Plaintiffs in the Class action, does not know what he is trying to bargain away.

Similarly, in his Third Report filed with this Court on February 26, 2020, the Receiver directed that investors with claims under the Oregon Securities Law should contact the lawyers representing the Class plaintiffs. He said:

> **CLASS ACTION LAWSUIT**
>
> Portland attorneys Chris Kayser and Bridget Donegan (https://lvklaw.com/) and Mike Esler (http://www.eslerstephens.com/) talked with a number of investors last fall in relation to a potential lawsuit against third parties that might be liable for participating or materially aiding the sales of the AEM securities. On February 25, two lawsuits were filed on behalf of AEM investors. One lawsuit, in which class action certification will be sought, concerns investors who currently live in Oregon and whose investments are covered by the Oregon Securities Law because they were offered the security or agreed to purchase the security while in Oregon. The other lawsuit concerns investors who do not currently live in Oregon. Investors who believe they may qualify and would like to participate in these lawsuits, and any investors who were offered or agreed to purchase their



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> security while in Oregon, should contact Christine Ortez or Gary Hardiman at Esler Stephens by calling 503-223-1510.

Hardiman Declaration Ex. 7.

Finally, during his oral argument on the motions for summary judgment on March 28, 2023, in response to Pacific Premier's argument that "the Receiver is pursuing claims for the individual investors" (Tr. 67:5–6), the Receiver disclaimed any notion that the Receiver was pursuing the Banks on behalf of investors:

> We're not, to be clear, because this has been confused by Pacific Premier Bank. The Receiver is not bringing the claim on behalf of the investors. The Receiver is bringing it on behalf of the pools.

Tr. 101:7–11, Hardiman Declaration Ex. 2. The Receiver's lawyer went on, also making it clear to the Court there had been no assignment to the Receiver of the Oregon investor claims against the Banks. The Receiver's lawyer said:

> And then we cited several others and many other cases that make it very clear that in this context, the Receiver has to — not in — regardless of the assignment of claims. You don't have to have an assignment from the members of the LLC in order for you to have a claim on behalf of the pools.

*Id.* at 101:20–02:1.

What is more, PPB also does not believe the Receiver has the authority over the claims of Oregon investors either, yet now PPB is trying to get a claims bar based upon a purported receivership power PPB agrees the Receiver does not have. In its Reply memorandum to this Court on its motion for summary judgment, PPB contended "the



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Receiver lacks standing to bring tort claims against Pacific Premier that belong to the investors because the Receiver 'cannot pursue claims owned directly by the creditors,'" citing *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306 (11th Cir. 2020). PPB Reply in Support, p. 20 (Mar. 20, 2023). PPB is now trying to get a claims bar based upon what PPB agrees would be an error of law.

## V. RECEIVER'S DISCLAIMER OF THE OREGON INVESTORS' OREGON SECURITIES LAW CLAIMS AGAINST THIRD PARTIES CONFIRMED IN THE COURT APPROVED DISTRIBUTION PLAN – JUDICIAL ESTOPPEL AND DUE PROCESS

Finally, and perhaps most significantly, at the Receiver's request, this Court has entered two orders that, taken together, recognize that the Oregon investors are the "holders" of valuable claims that make them separate and distinct from other investors. First, this Court's Order adopting the distribution plan sought by the Receiver provides that allowed "Investor Claims"

> are subject to adjustment from time to time for recoveries realized by the holders of such claims [i.e., not the Receiver] from third-party sources after May 10, 2019. The allowed amounts of Investor Claims shall be reduced by the amounts of such recoveries, and future distributions made by the Receiver on such claims shall be adjusted, in each case, to take into account all amounts previously distributed on account of such claim and the reduced claim amount. The holders of Investor Claims shall, from time to time promptly following receipt of such third-party recoveries, report and certify their recoveries to the Receiver.

Order (1) Fixing Allowed Amounts of Investor Claims and (2) Authorizing Interim Distribution on Allowed Investor Claims, dated July, 2, 2021. Second, putting the July


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2, 2021 Order into action, in its December 22, 2022 Order Reducing Allowed Amounts of Certain Investor Claims to Account for Davis Wright Tremaine LLP Recoveries, this Court expressly recognized the separate and significant value of the Oregon Securities Law claims held by the Oregon investors by reducing their distributions from the receivership estate. *See also above* p. 13.

As already raised in the opening Objections section, when a court-appointed receiver tells the Court and the investors for whose benefit he is supposed to act that he, the receiver, has no interest in the Oregon investors' Oregon Securities Law claims against the Banks and that they must pursue those claims on their own, and then when the Oregon investors act accordingly and pursue those claims in the Oregon Class action, he attempts to use purported receivership powers to take those claims away from the Oregon investors and to transfer them to the Banks the Oregon investors are suing (functionally what the receiver and the Banks seek to accomplish by the claims bar injunction), it gives rise to a judicial estoppel applicable to the Receiver (and the Banks)—each of the "three core factors" being present here:

> "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." [Citation omitted]. The doctrine seeks "'to preserve respect for judicial proceedings,'" and "'to avoid inconsistency, duplicity, and ... waste of time.'" [Citations omitted]. …
>
> Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is " 'clearly inconsistent' with its earlier position"; (2) whether "judicial acceptance of an



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> inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

*Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007).

It also gives rise to a deprivation of property without due process of law—both procedurally (no notice) and substantively (a taking of property). *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) (*see below* p. 56).

## VI. RECEIVERS HAVE NO GENERAL POWER TO DEPRIVE CREDITORS OF THEIR CLAIMS AGAINST THIRD PARTIES

### A. BANKRUPTCY TRUSTEES HAVE NO GENERAL POWER TO PURSUE OR SETTLE CLAIMS OF CREDITORS AGAINST THIRD PARTIES

In evaluating settlements made by receivers, the Court of Appeals has turned to the Bankruptcy Code for guidance. In *Charter Private Bank v. Sacotte*, 181 Wn. App. 1032 *5 (2014) (unpub. – also relied upon by Receiver, Motion, p. 8–9),[17] the court said:

> RCW 7.60.060 provides the general powers and duties of a receiver. There are no reported decisions in Washington that interpret the power of a state court receiver under either RCW 7.60.060 or related statutes to settle claims of a debtor. Consequently, the parties agree that we should look to case authority under the Bankruptcy Code for guidance. We do so here.

Turning to the Bankruptcy Code is meaningful because the U.S. Supreme Court has expressly held that trustees in bankruptcy do not have authority to assert securities

[17] The Anderson Plaintiffs have not located any published Washington cases that bear on the matter before the Court.



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law claims on behalf of creditors. Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416 (1972) is similar to this case. Caplin, a Chapter X bankruptcy trustee, sued the indenture trustee of certain debentures (a bank) for failing to disclose that the debtor had submitted grossly inflated appraisals of real property, thus enabling the debtor to misrepresent that it was in compliance with a covenant of the trust indenture—a violation of the federal securities laws. The Court determined the Bankruptcy Act (by its terms) provided no authority for a Chapter X trustee to pursue securities claims on behalf of creditors. *Id.* at 428–29. The Court was persuaded by the fact that the general law applicable to receiverships provides for no such authority (*id.* at 429), and it made no sense to suppose that the debtor, in whose shoes the trustee stood, could have made out a securities law claim against the indenture trustee for aiding the debtor's violation of the securities laws. *Id.* at 429–31.

The same is true here, and in fact, Oregon trial courts have held that a receiver does not have authority to assert Oregon Securities Law claims on behalf of creditor-victims. *Mitchell v. Bittner & Hahs, PC*, Case No. 17CV21162, Order on Defendants' Rule 21 Motions (Mult. Co. Cir. Ct. Oct. 21, 2017) ("The claims belong[] to the investors, not to the Receiver. And ORS 59.115 grants the right to the non-seller claims [i.e., claims against persons who materially aided in the sales] to be brought by the buyers."), Anderson Class Action Plaintiffs' Appendix Ex. C.



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This rule was applied by the Ninth Circuit in *Rochelle v. Marine Midland Grace Trust Co. of N.Y.*, 535 F.2d 523 (9th Cir. 1976) (Chapter X bankruptcy trustee could not assert federal securities claims "on behalf of Sunset's creditors and its debenture purchasers. …[A] reorganization trustee has no standing to maintain the action on the part of any person or entity other than his debtor corporation."). Other courts have extended this result, including holding that a bankruptcy trustee does not have authority to serve as a Class representative plaintiff on behalf of a Class made up of creditors. *In re D.H. Overmyer Telecasting Co., Inc.*, 56 B.R. 657 (N.D. Ohio 1986).

**B. RECEIVERS HAVE NO GENERAL POWER TO PURSUE OR SETTLE CLAIMS OF CREDITORS AGAINST THIRD PARTIES – *DIGITAL MEDIA SOLUTIONS***

The preceding cases are all in the context of a bankruptcy trustee, but the courts around the country apply the very same rule with respect to receivers, with the most recent U.S. Court of Appeals decision being *Digital Media Solutions, LLC v. S. Univ. of Ohio, LLC*, 59 F.4th 772 (6th Cir. 2023)—a case not cited by the Receiver. There, the Sixth Circuit held the receiver did not have the authority to pursue student-creditors' claims against third parties, and therefore, the district court did not have the equitable power to enter an order that barred students' claims against third parties. *Digital Media* provides the appropriate rule of decision to apply here.

In *Digital Media*, Dream Center, a California nonprofit, bought three for-profit universities from Education Management Corp., a for-profit that had been required to


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enter into consent judgments with state attorneys general over its student recruiting tactics. Dream Center's operation of the universities proved unsuccessful, and contended that as a part of the sale, Education Management had overstated revenues and underestimated expenses. Within the year, Dream Center was forced to close campuses. Defrauded Art Students commenced a Class action against Dream Center and its directors and officers. Separately, Digital Media, a recruiter Dream Center hired, had not been paid. Digital Media sued Dream Center and, among other things, asked the district court to appoint a receiver. Comprehending its precarious position, Dream Center consented to the appointment of a receiver. *Id.* at 774–75.

Dream Center had two insurance policies with National Union that protected its directors and officers, but not Dream Center. The receiver believed Dream Center had a claim against the directors and officers and sent them a demand letter. Months of negotiation ensued, and the receiver struck a settlement with the directors, officers, and National Union whereby they would pay the receiver $8.5 million, the remaining amount on the policies. *Id.* at 776.

"Critically," as in this case, the settlement was conditioned upon the district court's entry of a bar order barring the Art Students—in the same position as the Oregon investors—from "pursuing their claims against not just Dream Center (the entity whose property was in receivership), but also…the directors and officers of Dream Center…and National Union" (all "individuals and entities wholly outside the


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receivership."). *Id.* Here, of course, as in *Digital Media*, the Oregon Securities Law claims the Oregon investors hold against the two Banks are "wholly outside the receivership."

The Art Students intervened in the receivership case, and, because the settlement would prohibit them from litigating their Class action against parties outside the receivership, they objected to the proposed Bar Order. The district court overruled their objections. The Art Students appealed, and the Sixth Circuit reversed. *Id.* at 776, 777.

The Sixth Circuit held that the district court did not have the (equitable) power to enter a Bar Order that enjoined the Art Students' claims against third parties who were "outside the receivership." It did not matter that the receiver otherwise had claims against the directors and officers or that the settlement was otherwise reasonable or that in the district court's judgment the settlement was in the interest of the estate. *Id.* at 777.

The court noted that in a receivership, a court must have jurisdiction over both the "corporate debtor and its property"—that it must have both *in personam* and *in rem* jurisdiction, which the court referred to as *quasi-in-rem* jurisdiction. "By doing so, the court obtained exclusive jurisdiction over the debtor's res (the property) and sole authority to determine who should possess it." *Id.* at 778–79. "The receiver" then "stood in the shoes of the corporate debtor, taking possession of all its property and becoming its manager." *Id.* at 779. (This was important to the ultimate decision because a receivership does not give the court jurisdiction over the claims or other property of



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the creditors of the debtor.) The "stand in the shoes doctrine" meant that the receiver could only pursue claims of the debtor, not the claims of a different party. A receiver, for example, "lacked the power to pursue claims that a debtor's customers held against third parties." *Id.* at 780.[18]

With respect to the receivership court's power, these principles meant that a court can issue "a variety of injunctions to protect its exclusive jurisdiction over the debtor's property," but it cannot issue an injunction that "extended so far as to protect assets outside the receivership." *Id.* In other words, while the receiver may stand in the shoes of the debtor, it cannot also stand in the shoes of the debtor's creditors, except with respect to the limited exception for voidable transfers, which are not involved here.

The court then applied those principles to the case at hand. The court concluded the receiver did not have the authority to settle the Art Students' claims "because the Art Students, not Dream Center, "owned" the claims that they sought to raise." *Id.* at 781. This personal ownership meant the receiver lacked the authority to litigate the

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[18] Washington courts apply the "stand in the shoes doctrine." *Morse Electro Prods. Corp. v. Benefit Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978) ("[T]he receiver stands in the shoes of the insolvent." citing *Western Electric Co., Inc. v. Norway Pacific Constr. & Drydock Co.*, 124 Wash. 49, 213 P. 686 (1923)); *Western Electric Co. v. Norway Pacific Constr. & Drydock Co.*, 124 Wash. 49, 60, 213 P. 686 (1923) ("The receiver, except as to fraudulent sales and transfers, is not vested with any higher or better right or title to the property than the insolvent had when the receiver's title accrued…).



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claims and, more importantly, lacked the authority to "'to settle them' without the consent of the claims' owners." *Id.* at 783. The defrauded Art Students' claims, like those of the Oregon investors here, "allege[d] injuries directly incurred by the Art Students, not injuries that they incurred indirectly as a result of a harm that the directors and officers caused Dream Center." *Id.* The court explained:

> The Art Students allege that Dream Center itself participated in the fraud. Under the Receiver's view, then, a joint tortfeasor could sue an accomplice for the harms that they caused a third party and then "settle" with the accomplice to eliminate their liability to the third party. That is quite wrong.

*Id.* at 784. That is exactly what the Receiver and the Banks seek to do here.

Finally, with respect to the receivership court, the Sixth Circuit concluded that in enjoining "all personal-liability claims against Dream Center's directors and officers," the district court's Bar Order had gone "far beyond" an acceptable, "narrow property-protective injunction," and that the court had exceeded "'the accepted principles of equity' in granting this order." *Id.* at 786–87.

## C. CASES CITED BY RECEIVER ARISE OUT OF FACTS NOT PRESENT IN THIS CASE

The cases cited by the Receiver arise out of peculiar factual circumstances easily distinguishable here.

### 1. *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883 (2019).

Unlike in this case, near the outset of the SEC's Stanford receivership (it began in



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2009), the district court, at the recommendation of a court-appointed examiner, appointed an "Official Stanford Investors' Committee" (OSIC). The OSIC had seven members "representing a cross-section of the Stanford Investors," was chaired by the court-appointed examiner, and the order creating the OSIC provided that the members "owe[d] fiduciary duties to Stanford investors." *SEC v. Stanford Int'l Bank Ltd.*, Order, (N.D. Tex. Aug. 10, 2010).[19] Most importantly for our case here, the district court expressly authorized the OSIC to "prosecute (either directly, or through one or more of its members or designees), claims on a class and/or contingency fee basis…against:

> a. Stanford's pre-receivership professionals (including but not limited to accountants, insurance brokers, and attorneys) that are in the nature of malpractice, professional negligence, breach of fiduciary duty, breach of contract, or similar claims arising out of such professionals' rendition of professional services to any of the Stanford entities prior to February 16, 2009; and
>
> b. Any officer, director, or employee of any Stanford entity for fraud related claims, breach of fiduciary duty, breach of contract, unjust enrichment, or other claims that arose prior to February 16, 2009….

*Id.* No one objected to this order, and for the next six years, the OSIC did exactly what the district court authorized it to do: It pursued claims against the pre-receivership professionals, and particularly two insurance brokers, Willis and BMB. Class action plaintiff Samuel Troice joined the OSIC and the receiver as a plaintiff. (Troice's participation is notable because as a class action representative, he chased one of the

[19] A list of Examiner-related orders can be found at Examiner – Stanford Financial Group (lpf-law.com).



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law firm defendants, Chadbourne & Parke LLP, all the way to the Supreme Court. (*Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014).) Together, they made common law and state securities law claims against Willis and BMB on behalf of all the investors the OSIC and Troice represented. *Zacarias*, 945 F.3d at 892–93 & n.16. Finally, in 2016, the OSIC (along with the receiver and with no objection from Troice) had reached a settlement on behalf of Stanford investors with the insurance brokers, Willis and BMB.[20] That was the settlement that was before the court for approval in *Zacarias*. In addition, in *Zacarias* all investors were similarly-situated—the court dismissed supposed differences as "hypothetical" and mere "word play." *Id.* at 899–900. In this case, of course, only the Oregon investors have claims under the Oregon Securities Law, the value of those claims is significant, the Anderson plaintiffs are the only parties who represent those Oregon investor interests, and the Anderson plaintiffs were not invited or a party to the mediation. Also, while the Stanford receivership case was not a formal Rule 23 Class action, the court noted its "kinship" (945 F.3d at 904),[21] and, it is clear

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[20] Willis was "suppose[ed]" to be a "deep-pocketed defendant," but BMB assets were understood to be the "limited funds" that were being eaten away from "its 'wasting' insurance policy." 945 F.3d at 901.

[21] Class actions, notably, existed in equity before the adoption of Fed. R. Civ. P. 23 in 1938. *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940):

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is



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from the opinion, the OSIC had discharged its "fiduciary duties" to adequately represent the entire "cross-section of the Stanford Investors."

Notably, in the SEC Stanford receivership, in those underlying cases brought against third parties where the court-appointed OSIC did not represent the interests of a particular person (i.e., a non-investor), the Fifth Circuit did not permit their claims to be barred as a part of a receivership settlement. *Compare* SEC v. Stanford Int'l Bank, Ltd. (Lloyds), 927 F.3d 830, 841 (5th Cir. 2019) (district court and receiver lacked authority to bar claims of Stanford managers and employees (i.e., not Stanford investors) against underwriters who were co-insureds with Stanford International on same policies[22]) *with*

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impracticable. …In such cases, where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

[22] The court in *Lloyds* (*Stanford*) said:

"Neither a receiver's nor a receivership court's power is unlimited, however. …The second limitation, arising from the district court's *in rem* jurisdiction, is that the court may not exercise unbridled authority over assets belonging to third parties to which the receivership estate has no claim." 927 F.3d at 840, 841.

"The prohibition on enjoining unrelated, third-party claims without the third parties' consent does not depend on the Bankruptcy Code, but is a maxim of law not abrogated by the district court's equitable power to fashion ancillary relief measures." *Id.* at 842.

"The district court and Receiver lacked authority to dispossess claimants of their legal rights to share in receivership assets 'for the sake of the greater good.'" *Id.* at 846.



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Rotstain v. Mendez, 986 F.3d 931, 941 (2021) ("even if there were some prejudice [arising from the court's denying a late-in-the day attempt by certain investors to intervene] it would be mitigated by OSIC's role in this litigation. OSIC was created for the purpose of representing the interests of Stanford investors.").

Finally, *Zacarias* is not a case like this one where the Receiver repeatedly took the position that he had no interest in the Oregon investors' Oregon Securities Law claims against the Banks, that they must pursue those claims on their own, and then after the Oregon investors acted accordingly and pursued those claims in the Oregon Class action, he attempts to use purported receivership powers to take those claims away. *See Rotstain*, 986 F.3d at 938 ("It might be different if OSIC had repudiated its intention to bring investor claims.").

**2. *SEC v. DeYoung*, 850 F.3d 1172, 1179 (10th Cir. 2017)**

In *DeYoung*, three out of 5,500 IRA Account Holders objected to a claims bar. They said they wanted to assert their own state court claims although none of them had done so. As the Sixth Circuit noted in *Digital Media*, in *DeYoung*, (and for that matter,

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> "No matter the euphemism, a permanent bar order is a death knell intended to extinguish the claims, which are a property interest, however valued, of the Appellants." *Id.* at 848.

By contrast, the court in *Lloyds* (*Stanford*) held a bar order against the Louisiana Retirees was proper, but again, as the court noted, the "court-appointed Examiner" mediated the dispute "on behalf of Stanford investors," and "supported" the settlement. 927 F.3d at 837–38.



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*Zacarias* and *Lloyds* (*Stanford*)) the Tenth Circuit made the mistake of conflating the issue whether the receiver had "standing" to assert the claims of the Stanford investors with the issue whether the receiver had Article III Case or Controversy "standing." Confusing one with the other, the Tenth Circuit had concluded (wrongly) that the receiver had "standing" to assert the claims of the IRA Account Holders because the receiver had sustained an "injury in fact." 59 F.4th at 781.

That said, there was no indication that the three account holders were not identically situated with all other IRA Account Holders, a key distinction from this case. *DeYoung*, 850 F.3d at 1175. What is more, the receiver had successfully asserted misappropriation claims against First Utah, the custodian of the IRA accounts—the "substantially identical" legal claim that the three dissenting IRA Account Holders could have asserted. *Id.* at 1176.[23] Finally, the evidence showed that First Utah was a small bank and that it would "fail" if it paid any more than it did. *Id.* at 1184. As with BMB in *Zacarias*, *DeYoung* was a "limited fund" case. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (dealing generally with the subject of limited fund Class actions).[24]

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[23] In re Bernard L. Madoff Inv. Securities LLC, 740 F.3d 81 (2d Cir. 2014) is the same effect. There, defrauded customers were asserting what amounted to the same fraudulent conveyance theory against the Picower defendants as the Trustee (those defendants had withdrawn billions from their accounts), and there is no indication that the defrauded customers were not all similarly-situated.

[24] This case is not a limited fund case. The proposed Settlement Agreements expressly provide they were not driven by limited fund concerns: "In any proceeding…, the



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Summarizing, and as the Fifth Circuit noted in *Lloyds* (*Stanford*):

> The Appellees emphasize the recent decision *SEC v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017), as supporting their argument that an equity court's permanent bar order against third parties is appropriate when tied to a settlement that secures receivership assets. Like many of their arguments, however, this assertion proves too much. *DeYoung* is a narrow and deliberately fact-specific opinion. *See DeYoung*, 850 F.3d at 1182–83. The court approved a bar order preventing three defrauded IRA Account holders (out of over 5,500 victims) from pursuing claims against the depository bank in which the accounts had been illegally commingled. Notably, however, the court demonstrated that (1) the claims of the barred investors precisely mirrored claims that had been asserted and settled by the receiver; (2) averted a duplicative lawsuit whereby the bank could have asserted its contract right to indemnity from the receivership assets; and (3) provided the account holders with a claim against the receivership estate. The court simply channeled redundant claims into the receivership while preventing diminution of receivership assets.

*Lloyds* (*Standford*), 927 F.3d at 843–44 (5th Cir. 2019). Here, the evidence is that both Banks could fully pay both the Oregon investor claims and the receiver's settlement amounts. Hardiman Declaration ¶ 16.

**3. *SEC v. Kaleta*, 530 Fed. Appx. 360, 362 (5th Cir. 2013) (unpub.)**

In *Kaleta* (Exhibit A to the Receiver's Appendix), unlike in *Digital Media*, the court did not consider whether the receiver had any right or interest in the claims of creditors against third parties who were not in receivership that might permit the receiver to seek an order barring those claims. Basically, the extent of the court's analysis did not go

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Receiver will not contend that [the Bank] is insolvent, or make any argument based on [the Bank's] ability to pay or financial condition…." Proposed Settlements §§ 6(d)(PPB), 5(d)(RCB).



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deeper than to say courts in SEC receiverships have "broad powers and wide discretion."[25] Furthermore, unlike this case, nothing in the opinion suggests the investors were not all similarly-situated and did not all hold similar claims against the third party. Here, of course, only Oregon investors have claims under the Oregon Securities Law. Finally, nothing in *Kaleta* suggests the receiver in that case had previously and repeatedly taken the position that he had no interest in the investors' claims against the third parties, that he had told investors they must pursue those claims on their own, and then when they acted accordingly and pursued those claims

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[25] Even the Fifth Circuit does not think much of *Kaleta*. In Lloyds (*Stanford*), 927 F.3d 830 (5th Cir. 2019), the Fifth Circuit distinguished *Kaleta* noting:

> Rather than reckon with the limits on the Receiver's standing and the court's equitable power, the district court here cited an unpublished Fifth Circuit case, *SEC v. Kaleta*, No. 4:09–cv–3674, 2012 WL 401069, at *4 (S.D. Tex. Feb. 7, 2012), *aff'd.*, 530 F. App'x. 360 (5th Cir. 2013), to support both the settlement and bar orders. Importantly, *Kaleta* is an unpublished, non-precedential decision of this court. Not only that, but reading it as the district court and Appellees here advocate would mean investing the Receiver with unbridled discretion to terminate the third-party claims against a settling party that are unconnected to the res establishing jurisdiction. That is unprecedented. But *Kaleta* is in any event distinguishable and not inconsistent with the above-stated principles. In *Kaleta*, the bar order prevented defrauded investors from suing parties closely affiliated with the entity in receivership after the parties had agreed to make good on their guarantees to the receiver. Moreover, the settling parties would have been codefendants with receivership entities, leading to the possibility of their asserting indemnity or contribution from the estate. The court was forestalling a race to judgment that would have diminished the recovery of all creditors against receivership assets. That bar order protected the assets of the receivership estate, whereas the bar orders before us extend beyond receivership assets.



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on their own, he turned around and attempted to use purported receivership powers to take those claims away.

**4. *SEC v. Sunwest Management, Inc.*, Order (D. Or. May 24, 2011)**

*Sunwest* is similar to the SEC Stanford Int'l Bank receivership—the two receiverships occurred at about the same time.[26] The Sunwest receivership began March 2, 2009. Sunwest Management, Inc. was an Oregon corporation doing business in Salem, Oregon. Sunwest Management, Inc., Oregon Secretary of State, Corporation Division; Sunwest Management, Inc., Articles of Incorporation. As a consequence, all the investors who had purchased Sunwest securities had essentially the same Oregon Securities Law claims against Sunwest and against the nonsellers who participated and materially aided in the sales. ORS 59.335, .345, ORS 59.115(3). There was no substantial group of investors who had distinct and separate valuable claims not held by other investors.

Second, near the outset of the receivership (June 2009), similar to the OSIC in *Stanford*, the district court entered an order (1) noting that individual actions and a Class action had been filed on behalf of investors against third parties; (2) temporarily authorizing the receiver to "participate in the mediation of third party claims on behalf of those investors not already represented by any of the [other] counsel"; and (3)

[26] The undersigned lawyers were very involved in the Sunwest receivership and so are familiar with what happened.



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authorizing the receiver to "employ Esler Stephens & Buckley…as special litigation counsel to assist the Receiver in the mediation of third party claims." Order Temporarily Authorizing Receiver to Participate in Mediation of Claims Held by Investors Against Third Persons on Behalf of Investors Not Currently Represented by Other Counsel (D. Or. Jun. 23, 2009), Anderson Class Action Plaintiffs' Appendix Ex. D.

Third, soon thereafter—again near the outset of the receivership and before any investor claims had been made in the receivership[27] (October 1, 2009)—the district court adopted a distribution plan expressly providing that the "right to receive Plan distributions shall be deemed to be made in exchange for an assignment to the Receivership Estate of a Claimant's right…to assert a claim against" various parties and third parties "that the Receiver also has a right to pursue." Distribution Plan, at 29, Anderson Class Action Plaintiffs' Appendix Ex. G. The Plan provided that recoveries on third-party claims would go into a Litigation Trust (*id.* at 9), and that distributions to Claimants from the Trust would be based upon the relative value of the Claimant's claim. See *id.* at 29–30. The Plan also recognized different classes of creditors who held different claims, including TIC Investors, Preferred Members Investors, LLC Members Investors, Bare Land Investors, various Unsecured Creditors, and various Secured Creditors. *Id.* p. 17–20, 23.

[27] Order Adopting Distribution Plan, Distribution Plan at 25–26, Anderson Class Action Plaintiffs' Appendix Ex. G.



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Fourth, these provisions of the district court's orders were never tested before the Ninth Circuit.

The circumstances in *Sunwest* are completely different from the circumstances here. First, the Oregon investors have substantial claims against third parties that are distinct and separate from other creditors. Second, here, the Receiver never sought and the Court never entered an order at the outset of the receivership authorizing the Receiver to represent Oregon investors in the pursuit of their claims against third parties. To the contrary (and rightly in the view of the Anderson Plaintiffs), the Receiver took the position that only Oregon investors owned those claims against third parties under the Oregon Securities Law and that the Receiver had no standing to pursue them. Third, here, the Receiver never sought and the Court never adopted a distribution plan that provided that Oregon investors assigned to the Receiver their Oregon Securities Law claims against third parties in exchange for their right to receive distributions from the receivership estate. To the contrary (*see above* p. 23), the approach provided in the distribution plan sought by the Receiver and adopted by this Court provides that allowed "Investor Claims"

> are subject to adjustment from time to time for recoveries realized by the holders of such claims [i.e., not the Receiver] from third-party sources after May 10, 2019. The allowed amounts of Investor Claims shall be reduced by the amounts of such recoveries, and future distributions made by the Receiver on such claims shall be adjusted, in each case, to take into account all amounts previously distributed on account of such claim and the reduced claim amount. The holders



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of Investor Claims shall, from time to time promptly following receipt of such third-party recoveries, report and certify their recoveries to the Receiver.

Order (1) Fixing Allowed Amounts of Investor Claims and (2) Authorizing Interim Distribution on Allowed Investor Claims, dated July, 2, 2021.

The Receiver's now proposed Order, and particularly the part deeming there to have been an assignment, is simply an after-the-fact attempt by the Receiver to rewrite the rules that have governed this receivership over the last two years, and, for that matter, the two years before that.

**5. Rule of Decision from these cases**

Setting aside for the moment the significant fact addressed in *Digital Media* that creditors own their claims against third parties, that a receiver does not have the authority to pursue creditors' claims against third parties, and that, therefore, a court does not have the equitable power to enter an order that bars creditor claims against third parties, and focusing on the essential facts and holdings of these decisions, there is a clear rule of decision from the cases cited by both the Receiver and the Anderson plaintiffs. It is:

In deciding whether a receiver can obtain an injunction barring receivership creditors from pursuing their claims against a third party, a court will consider:

- Are all the receivership creditors similarly situated? Do all the receivership creditors have essentially the same rights and the same claims vis-à-vis the third party? (Not true here.)


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- Does the third party have limited funds available to satisfy the claims of the receivership creditors as well as any claims the receiver may have against the third party? (Not true here.)

And, the rule of decision critical here is:

1. Where a sub-group of creditors has a valuable claim against a third party that is distinct from the claims of the creditors as a whole, a receiver cannot obtain an injunction barring the sub-group from pursuing their claims against the third party. That is true even where the receiver also has a claim against the third party and there is a limited fund to satisfy those claims. Receivers cannot deprive creditors of their property interest against third parties who are not in receivership. Doing so has due process implications.

2. In cases where no sub-group of creditors has a valuable claim against a third party that is distinct from the claims of the creditors as a whole, then the rule that applies to voidable transfer claims can fairly be applied. The receiver (or other representative of the creditors) may be given authority by the court appointing him or her to pursue the claim against third parties on behalf of creditors as a whole and no one creditor—none of whom has any distinct right or interest—is permitted to unfairly get ahead of another. In addition, if there is a limited fund, typically in the form of a wasting insurance policy, permitting the receiver to so act helps prevent the policy from "wasting" and thereby providing more for everyone.

These factors and this rule of decision perfectly explain *Digital Media*, *Lloyds* (*Stanford*), *Zacarias*, *DeYoung*, *Kaleta*, *Sunwest*, and *Madoff*.

**6. Other cases**

From a review of *SEC v. Adams*, 2021 WL 8016843 (S.D. Miss. Feb. 25, 2021) (Receiver's Appendix Ex. B), it is unclear what claims the receiver was making against the Butler Snow Parties and whether the "victims represented by attorney John Hawkins" were making any claims at all. In any event, there is no evidence the victims


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were not all similarly situated and no indication they were making claims that were distinct from the receivers. Essentially all this Court has to go on is a holding with no essential facts.

The Washington cases that the Receiver cites do not add any answers to any of the questions before this court. Most of them simply stand for the proposition that a receiver's powers are "broad." But saying powers are "broad" or for that matter "limited,"[28] begs the question of what those powers are—the critical issue before the Court.

The Receiver also cites *Puget Sound Energy v. Certain Underwriters at Lloyd's*, 134 Wn. App. 228, 138 P.3d 1068 (2006), but *Puget* involved a court's barring purely derivative contribution claims in the same action and involving the same parties before the court. *Puget* did not involve barring different parties from pursuing a different action involving different claims in a different state. Not surprisingly, none of the receivership bar order cases the Receiver cites rely upon contribution bar order cases.

### D. RES JUDICATA PRINCIPLES PROVIDE GUIDANCE FOR THE COURT'S DECISION ON THE RECEIVER'S MOTION

The Receiver incorrectly contends that because there is some overlap between the Oregon investors' allegations in their Oregon complaint against the two Banks and the

[28] *Cf.* *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) ("[T]he Government of the Union, though limited in its powers, is supreme within its sphere of action").



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allegations the Receiver then copied into his complaint against the two Banks, that overlap somehow justifies the Receiver's attempt to bargain away the Oregon investors' valuable Oregon Securities Law claims against the two Banks.

Res judicata principles provide helpful guidance here. It is never enough to point to some overlap in facts alleged in the two complaints—and it is most certainly not enough to give a Receiver authority to bargain away the Oregon investors' Oregon Securities Law claims against the two Banks. The Supreme Court "has held that the same subject matter is not necessarily implicated in cases involving the same facts." *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004) (citing cases and so holding); *Matter of Leaf*, 17 Wn. App.2d 1029 (2021) (unpub.) ("While overlap exists, the two petitions have different subject matter").

Washington courts "determine pragmatically" whether two claims are the same, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Sound Built Homes v. Windermere*, 118 Wn. App. 617, 629–31 & n. 23, 72 P.3d 788, (2003).

Here, the two claims are not the same. In the Oregon complaints, the Oregon investors allege a claim under the Oregon Securities Law against third persons who "participated and materially aided" in the sales of securities in Oregon, and are,



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therefore, "jointly and severally liable to the same extent as the seller. ORS 59.115(3). This claim is unique to Oregon investors. ORS 59.335, .345. Liability of a nonseller under the Oregon Law "does not depend on one's knowledge of the facts that ma[d]e [the sale] unlawful," and damages do not depend upon "causation." Damages are restitutionary in nature and easily calculated. *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370 (1988); ORS 59.115(2).

By contrast, the Receiver's case against the two Banks depends upon the Banks' aiding in the breach of a fiduciary duty, not in the sale of securities in Oregon. Restatement (Second) of Torts § 876(b), which the Washington courts follow, provides that for the two Banks to be "subject to liability" for "harm resulting" to the Funds from AEM's breach of fiduciary duty, the Receiver must prove the Banks "[knew] that the other's conduct constitute[d] a breach of [fiduciary] duty" and then "[gave] substantial assistance or encouragement to the other so to conduct himself." *Martin v. Abbott Labs.*, 102 Wn.2d 581, 596, 689 P.2d 368 (1984); *Wash. Constr., Inc. v. Sterling Sav. Bank*, 163 Wn. App. 1027, n.8, 2011 WL 4043579 (2011) (unpub.).

And then there is proving damages. Here, at the end of oral argument, this Court said the Receiver had "the uphill battle," that the Court thought "damages is a very – is a red blinking light for me in terms the damages and the speculative nature of those damages that's being claimed here, which Mr. Donohue has already pointed out in his argument." Tr. 109:5–10, Hardiman Declaration Ex. 2.



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It is notable that the Multnomah County Circuit Court has already expressly found that the Oregon investor action against the Banks and the Receiver's action against the Banks are not "somehow duplicative or unnecessary." In denying PPB's motion to dismiss in Beattie, Judge Bottomly said:

> The Court rejects the assertion that the ongoing litigation in Washington makes this case somehow duplicative or unnecessary. The cases involve many of the same underlying facts but the claims and potential recoveries could be very different. Plaintiffs represent that there are procedures in place in the Receivership case to avoid any double recovery by Plaintiffs in this case.
>
> Furthermore, even where the subject matter of two actions is the same, the parties must be in privity with one another, and the one party, here the receiver, must have been in a position to pursue the claims of the other.

Order and Opinion on Motions to Dismiss, p. 7, Anderson Class Action Plaintiffs' Appendix Ex. A.

Cases illustrating these principles: In *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), Dolan filed a Class action on behalf of four indigent defense organizations contending they were arms and agencies of the county and therefore eligible for PERS enrollment. King County argued the Dolan's Class claim was barred because in a separate action, a court had determined that a person named Ted White was not a county employee for purposes of wrongful termination claim. The Supreme Court rejected the argument deciding the "cases are not comparable" and that White was "not, as the county asserts, a 'member of the class,' and there is no privity." *Id.* at 321.



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In *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 764–65, 887 P.2d 898 (1995), the Supreme Court held that a federal court consent decree that Fred Meyer had entered into with the EEOC in a case that arose out of Loveridge's complaint to the EEOC, did not bar Loveridge's own lawsuit against Fred Meyer because she was not in privity with the EEOC. The court explained:

> The consent decree entered on April 11, 1990 was executed by John F. Stanley, attorney for the EEOC plaintiff, and James R. Dickens, attorney for defendant Fred Meyer. Neither Respondent Loveridge nor her lawyer signed the document. Although Fred Meyer had earlier insisted it would not settle the case unless Ms. Loveridge's claims were dismissed, no agreement was obtained from her to that effect. Fred Meyer obtained an agreement only from the EEOC. Respondent did not exercise control or participate in the litigation. She was thus not in privity with the EEOC and should not then be bound by the terms of the consent decree.

The same applies here. The Banks obtained no agreement from the Oregon investors to settle their Class action and the Oregon investors did not exercise control or participate in the Receiver's litigation or in the mediation.

In *Stevens County v. Futurewise*, 146 Wn. App. 493, 503–07, 192 P.3d 1 (2008), the court held that an association's petition challenging a county's "critical habitat" code section was not barred as a consequence of a prior unsuccessful petition filed by a county resident. The parties were not in privity, the subject matter of the petitions was not identical and notable here, the causes of action were not identical, despite the fact that "one key piece of evidence" was the same. *Id.* at 506–07. The same is true here for the reasons described above.



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Cases from other jurisdictions apply these same principles in the contexts of receiverships and the outcome is the same. E.g., *Zayed v. Associated Bank, N.A.*, 2015 WL 4635789 *4 (D. Minn. August 4, 2015).

## VII. THIS COURT DOES NOT HAVE PERSONAL JURISDICTON OVER OREGON INVESTORS TO ENTER AN INJUNCTION BARRING THEM FROM PURSUING THEIR OREGON SECURITIES LAW CLAIMS AGAINST THE TWO BANKS IN THE CLASS ACTION PENDING IN OREGON DISTRICT COURT

The Receiver has not established that the Court has jurisdiction over the person of the Oregon investors. The party seeking relief, here the Receiver, "has the burden of establishing that the trial court has personal jurisdiction." *Im Ex Trading Co. v. Raad*, 92 Wn. App. 529, 533–34, 963 P.2d 952 (1998).

While the Court has jurisdiction to decide the claims made by the Oregon investors against the receivership estate in the receivership, that does not mean the Court has jurisdiction over the Oregon investors to enter judgments enjoining them from pursuing their Oregon Securities Law claims pending in the U.S. District Court for the District of Oregon against the two Banks, neither of which is in receivership. In *Great Am. Ins. Co. v. 1914 Com. Leasing, LLC*, 22 Wn. App.2d 1020 (2022) (unpub. – relied upon by Receiver, Motion, p. 10), the Court of Appeals held that although the filing of a claim in a receivership gives the court personal jurisdiction (based on a consent theory) with respect to a creditor's claim in the receivership, the filing of a claim does not give the court personal jurisdiction over the creditor to decide other claims. In that case, the


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court held the receiver did not establish that a Spokane County Superior Court had personal jurisdiction over an out-of-state landlord to decide a breach of commercial lease case involving a mixed commercial/residential property in Chattanooga, Tennessee, despite the fact the landlord had filed a claim for unpaid rent in the receivership.

Likewise, in *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007), the Ninth Circuit held that while an SEC receiver has the authority to seek disgorgements from non-parties, disgorgements cannot be done by a summary proceeding within a receivership. The receiver must commence an action against the non-party and establish the court's subject matter and *in personam* jurisdiction. *Id.* at 1140–41, 1144–45. "If the Receiver had played the game straight-up, named Bustos as a defendant, and served him with a complaint and summons pursuant to Rule 4, Bustos could have objected to personal jurisdiction in the district court, including in any appeal to this court." *Id.* at 1150.

Here, the Receiver has not played the game straight-up. The Receiver attempts to use purported receivership powers to obtain an injunction against Oregon investors prosecuting cases pending in Oregon without first filing and serving them with a complaint and summons and establishing personal jurisdiction over them. As in *Great Am. Ins. Co.* and *Ross*, doing so violates due process.



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## VIII. THIS COURT DOES NOT HAVE JURISDICTION OF THE SUBJECT MATTER

Likewise, the Receiver has not established that this Court has jurisdiction of the subject matter. This is a court of general jurisdiction, but this is not a typical case. Here, the Anderson Plaintiffs have filed a Class action in the United States District Court of Oregon against the two Banks. Here, the Receiver (who is not a party to the Oregon Class action) and the two Banks, which are parties to the Oregon Class action, are attempting to effect a functional settlement of the Oregon Class action (over the objection of the Class representatives and their lawyers, all of whom have a duty to adequately represent the Class). Federal Rule of Civil Procedure 23(e) is clear that Class action settlements must be approved by the District Court where the action is pending: "The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." It is before the U.S. District Court in Oregon that the Banks must seek the relief they have requested here.

## IX. THE SETTLEMENT IS NOT "REASONABLE" UNDER THE FACTORS APPLIED BY WASHINGTON COURTS

Aside from the fact the Receiver did not have the authority to bargain away the Oregon Securities Law claims against the two Banks held by Oregon investors, the proposed settlement made by the Receiver, for many of the same reasons, is not "reasonable" and should not be approved by the Court.



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In determining whether the proposed settlement should be approved, it is appropriate for the Court to consider the same factors that a court considers when determining whether a settlement is "reasonable" under the Tort Reform Act. *Chaussee v. Md. Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (used factors to decide whether a settlement not subject to the Tort Reform Act was "reasonable"). Those factors are listed by the Supreme Court in *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 523–24, 901 P.2d 297 (1995) (quoting *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), namely:

> [1] the releasing person's damages; [2] the merits of the releasing person's liability theory; [3] the merits of the released person's defense theory; [4] the released person's relative faults; [5] the risks and expenses of continued litigation; [6] the released person's ability to pay; [7] any evidence of bad faith, collusion, or fraud; [8] the extent of the releasing party's investigation and preparation; and [9] the interests of the parties not being released.

The settling party (i.e., the Receiver) has the burden to prove reasonableness under the relevant factors. *Wood v. Milionis Constr., Inc.*, 198 Wn.2d 105, 121, 492 P.3d 813 (2021). The trial court is called upon to consider each relevant factor, but "[n]o one factor controls and the trial court has the discretion to weigh each case individually." *Green v. City of Wenatchee*, 148 Wn. App. 351, 199 P.3d 1029 (2009); *Chaussee*, 60 Wn. App. at 504.

## A. DAMAGES OF CLASS MEMBERS

The Oregon investors' Oregon Securities Law damages that the Receiver is



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attempting to bargain away total $33.4 million as of August 18, 2023. *See above* p. 13.

**B. MERITS OF CLASS MEMBERS' LIABILITY THEORY**

The two Banks face substantial liability on the Oregon investors' Oregon Securities Law claim. *See above* p. 8–14, 45–46. The Oregon Circuit Court has determined that

> Taken in the light most favorable to Plaintiffs with reasonable inferences, the allegations are that Miles and Wile engaged in securities fraud through their various entities, that the Banks each loaned money to the enterprise, the loans allowed the fraudulent enterprise to continue, the banks weighed in on specific transactions, were aware that it was a securities enterprise, and at times were aware the enterprise was struggling and that the Banks would benefit from infusions of new securities buyers.
>
> …
>
> In summary, Plaintiffs' allegations together with evidence submitted in opposition to these motions are that money was transferred amongst Miles, Wile and the related entities with little regard for corporate, accounting, or legal formalities, that the loans assisted in funding the enterprise and keeping it afloat, which allowed the enterprise to continue selling securities in violation of applicable law. The allegations, if true, establish primary liability on the part of Miles and Wile under Oregon securities law. Plaintiffs also adequately plead secondary liability on the part of the Banks.

*Beattie et al. v. Davis Wright Tremaine, LLP, Ross Miles, Maureen Wile, Pacific Premier Bank, and Riverview Community Bank*, Opinion and Order, Case No. 20CV09419 (Mult. Co. Cir. Ct. Jan. 19, 2023), Anderson Class Action Plaintiffs' Appendix Ex. A. U.S. Magistrate Judge Armistead has indicated he will recommend denial of the similar motions brought by the Banks in the Class Action. *See above* p. 8. Added to this, the Court can see from a quick review of the Second Amended Complaint in the Class action (¶¶ 14–



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15, 18–19, 42–43, 54–55, 57–58, 60–61, Hardiman Declaration Ex. 5) that the allegations are well supported by citations to credit memoranda and other documents produced by the Banks.

The Oregon Securities Law provides that the nonseller Banks are "jointly and severally liable to the same extent as the seller." ORS 59.115(3)

**C. MERITS OF THE BANKS' DEFENSE THEORY**

Once participation or material aid are proved, the defenses available to a nonseller under the Oregon Securities Law are limited. A nonseller can "sustain[] the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based" (ORS 59.115(3)), but as the Oregon Supreme Court noted in *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370 (1988), that defense places on the Banks "a substantial burden to exonerate themselves from liability for a resulting loss."

**D. OREGON INVESTORS' RELATIVE FAULTS**

Contributory fault on the part of the purchaser is not a defense. *Towery v. Lucas*, 128 Or. App. 555, 876 P.2d 814, 819 (1994) ("The statute imposes no such obligation [of inquiry] in buyers who were induced to purchase securities on the basis of those untruths.").

**E. RISKS AND EXPENSES OF CONTINUED LITIGATION**

The Oregon Class action is being handled on a contingent fee basis. Reasonable


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attorney fees are available to the Oregon investors, but not to the Banks in the Oregon Class action. ORS 59.115(10), (11).

**F. THE BANKS' ABILITY TO PAY**

The proposed settlements both provide that the Receiver will not contend the Banks are insolvent or "make any argument based on [the Bank's] ability to pay or financial condition." Proposed Settlements §§ 6(d)(PPB), 5(d)(RCB); *see above* p. 36 fn. 24. In other words, the ability of the Banks to pay more is not an issue. In addition, the most recent SEC Form 10–K for PPB indicates its holding company has shareholder's equity of $2.8 billion and the most recent SEC Form 10–K for Riverview indicates its holding company has shareholder's equity of $155 million. Hardiman Declaration ¶ 16. The Receiver's wasting limits argument is a red herring.

**G. EVIDENCE OF BAD FAITH, COLLUSION, OR FRAUD**

To have (rightly) disclaimed any interest in the Oregon investors' Oregon Securities Law claims against the two Banks, and to then turn around and attempt to transfer (sell) those same investor claims to the Banks is evidence of bad faith or collusion. *See above* p. 19–23; *see* *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 595, 216 P.3d 1110 (2009) (trial court did not err where it was "clearly bothered by the overall structure of the settlement here; that of a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor.").



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## H. RECEIVER SAID HE WAS NOT INVESTIGATING THE OREGON INVESTORS' OREGON SECURITIES LAW CLAIMS

The Receiver told the Oregon investors right at the outset that "Receiver [was] not specifically investigating those claims." Hardiman Declaration Ex. 6; *see above* p. 19-20. Nothing in the pending Motion provides a basis for concluding that the Receiver conducted an investigation of the Oregon investors' Oregon Securities Law claims or had any basis to determine the value or merit of those claims before trying to bargain those claims away.

The Receiver has not carried his burden of proving the settlement agreements are "reasonable."

## X. THE PROPOSED SETTLEMENT WOULD DEPRIVE OREGON INVESTORS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

Finally, it is important to note that Due Process issues lurk everywhere on the Receiver's motion. Where, as here, the Receiver, using purported receivership powers, undertakes to bargain away the Oregon investors' valuable Oregon Securities Law claims against the two Banks, it has the effect of depriving those investors of their property without due process of law. In *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940), the Supreme Court recognized just that:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements



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> of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. [Citation omitted].
>
> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. 714; [Citation omitted]. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, [citations omitted], and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.

In *Hansberry*, the Court said an exception to that principle applies where the prior action was a Class action, but that in the case before the court, "the plaintiffs in [the prior] suit were not representing the petitioners here whose substantial interest is in resisting performance. *Id.* at 45–46. The same is true here. In attempting to bargain away the Oregon investors' valuable Oregon Securities Law claims against the two Banks, the Receiver was not representing the Oregon investors whose substantial interest is in pursuing and recovering on those valuable Oregon Securities Law claims against the Banks.



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## XI. CONCLUSION

For the foregoing reasons, the Receiver's motion should be denied and the settlement agreements should not be approved.

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