No. _____

IN THE

Supreme Court of the United States

America West Bank Members, LC,

Petitioner

v.

State of Utah, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a state official seized a bank's assets of $300 million, obtained an ex parte order of possession from a state court for allegedly being undercapitalized, and immediately transferred receivership of the bank to the Federal Deposit Insurance Corporation (FDIC) representative before notifying the bank's owners so that state remedies available to stop placement in receivership or to return possession for a wrongful seizure was foreclosed. A lawsuit was initiated against the State over, *inter alia*, its denial of due process, but the Tenth Circuit held that relief was waived because the complaint sought pre-deprivation, rather than post-deprivation relief, even though the same facts supported the latter. In addition, the Tenth Circuit agreed with the district court that any relief owed now belonged to the FDIC, the actual beneficiary of the due-process violation. The Questions Presented are:

1. Whether a court is obligated to afford relief under Federal Rule of Civil Procedure 54(c), rather than be deemed waived, because it holds the relief – not the underlying facts – was not sufficiently requested?

2. Whether Petitioner's due-process rights were violated by a process that insulated state officials from accountability by permitting immediate assignment to the Federal Deposit Insurance Corporation as the receiver of a bank before even notifying the bank's owners so that the state officials faced no accountability

and the FDIC as receiver succeeded to any due-process claims that the bank's owners could have asserted?

PARTIES TO THE PROCEEDING

Petitioner America West Bank Members, LC was the plaintiff in the district court in *America West Bank Members, Inc. v. State of Utah*, Case No. 2:16-cv-326 [Pet. App. 29a and 48a, and appellants in the court of appeals, No. 23-4091 [Pet. App1a].

Respondents State of Utah, the Utah Department of Financial Institutions (UDFI), and UDFI Commissioner G. Edward Leary, were defendants in the district court and appellees in the court of appeals.

The Federal Deposit Insurance Corporation (FDIC) intervened as a defendant in the district court and was an Intervenor-Appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, America West Bank Members, LC states that it has no parent corporation and that no publicly held company owns 10% or more of Applicant's stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *America West Bank Members LC v. State of Utah,* No. 23-4091, U.S. Court of Appeals for the Tenth Circuit (August 14, 2024) (unreported but available at 2024 WL 3812451).

- *America West Bank Members LC v. State of Utah,* Civ. No. 19-13688, U.S. District Court for the District of Utah. Judgment entered June 21, 2023 (unreported but available at 2023 WL 4108352, at *3 (D. Utah June 21, 2023).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

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PETITION FOR A WRIT OF CERTIORARI

America West Bank Members LC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's decision is not reported but is available at 2024 WL 3812451 and included in the Appendix (Pet. App.) at Pet. App. 1a. The denial of Petitioner's motion for rehearing en banc is not reported (Pet. App. 134a). The district court's decisions dismissing Plaintiff's complaint in part is not reported (Pet.

App. 48a) and its granting of Defendants' motion for summary judgment is not reported (Pet. App. 29a).

JURISDICTION

The Tenth Circuit entered judgment on August 14, 2024. Pet. App.1a–28a. The court denied Petitioners' rehearing petition on December 16 2024. Pet. App. 134a. On March 12, 2025, Justice Gorsuch extended Petitioners' deadline to petition for a writ of certiorari to and including April 15, 2025. No. 24A870. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth and Fourteenth Amendments, U.S. Constitution amend. V and XIV, are reproduced at Pet. App. 136a.

The relevant provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), § 1821(d)(2)(A) and), § 1821(d)(13), are reproduced at Pet. App. 136a–138a.

The relevant portion of Utah Stat. § 1821(d)(2)(A) is reproduced at Pet. App. 139a.

The relevant portion of Utah Statute § 7-2-3 is reproduced at Pet. App. 140a.

INTRODUCTION

The decision below, in conflict with decisions of sister circuits, permitted state officials to go ex parte hand-in-hand with the Federal Deposit Insurance Corporation (FDIC) to a state judge, seize the significant assets of a bank, and transfer the property so instantaneously that a state-authorized post-deprivation hearing process, intended to provide due process, is totally foreclosed.

Then, when those denied due process attempt to call state officials to account in a lawsuit, the FDIC, armed with the preemptive effect of federal law, provides the state officials immunity from constitutional claims by arguing that it succeeded the bank owners as the claimants of the very due-process claims that benefited the FDIC as the bank's receiver, circumstances that recall Judge Frank's description of topsy-turvy world. *Dincher v. Marlin Firearms Co.,* 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

Thus, in the world that the Tenth Circuit endorsed, Utah officials can engage in a straightforward due-process violation of seizing assets and transferring them to federal authorities without accountability because only the federal receiver can be a complaining party for the resulting constitutional violation. Yet the FDIC, even in its capacity as a receiver, was not injured but was the beneficiary of Utah's denial of due process, a denial not authorized by the

federal Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") or state law.

The argument, and the decision below, is obviously flawed. The due-process rights of Petitioner America West Bank Members LC (AWBM) were never assets of the Bank transferable to the FDIC as a receiver; they are personal rights that AWBM retained and possessed both before and after bank assets were transferred.

Moreover, the violation was plainly asserted by a complete description of the underlying facts in support of the due process claim. The Tenth Circuit's ruling of waiver because the operative complaint focused heavily on the pre-deprivation due-process violation rather than sufficiently on the post-deprivation violation, even though the same facts support both, eschewed the applicability of Rule 54(c) in the manner that the vast majority of sister circuits would have held. Certiorari is warranted to harmonize the out-of-sync approach that the Tenth Circuit indulged and clarify the applicability of due process to a template invented to avoid accountability by Utah officials that may find new adherents in these uncertain economic times.

STATEMENT OF THE CASE

A. Underlying Facts.

On May 1, 2000, the Utah Department of Financial Institutions (UDFI), a "self-supported agency of state government," Pet. App. 50a, chartered America West Bank and authorized it to operate in the State. Pet. App. 51a. Evaluations of the Bank's risk

management practices relative to its size, complexity, and risk profiled were rated by the UDFI at a "2" on a scale of 1-5, with one being "sound in every respect" in 2005 and 2007. In 2008, the UDFI changed the rating to a "4," based on its view that the Bank assets included "excessive concentrations in commercial real estate" at a time when there was a "downturn in the local real estate market," affecting its level of capital. Pet. App. 51a–53a. In response, the Bank agreed to "cease and desist" certain practices banking authorities deemed "unsafe," and later agreed to correct identified violations of the law.

On February 9, 2009, the UDFI described the Bank as "insolvent" and gave the Bank a "5" rating, although the Bank still had substantial assets. Pet. App. 55a. The Bank's board responded on April 22, 2009 to request that any "court proceeding or hearing relative to bank receivership" be conducted with notice to the Bank's board so that it may be "given an opportunity to attend and present evidence." Pet. App. 60a–61a.

On May 1, 2009, the State of Utah, acting on behalf of the UDFI and its commissioner, G. Edward Leary, filed an ex parte petition in a state court to seize the assets of the America West Bank, the solely owned asset of Appellant, America West Bank Members LC (AWBM). Pet. App. 61a–63a. At an ex parte hearing the same day, Commissioner Leary testified as the sole witness that the Bank was "about to become insolvent." Pet. App.63a–65a. In addition to the Utah officials, the hearing was attended by a representative of the FDIC. Pet. App. 63a. The court

granted the requested authority. Pet. App. 65a. Commissioner Leary immediately appointed the FDIC as the Bank's receiver pursuant to 12 U.S.C. § 1821(d)(13)(D), Pet. App. 100a, and the UDFI "had no further involvement in the disposition of the Bank or its assets." Pet. App. 8a. The FDIC then "immediately began winding down the affairs of the Bank and liquidating its assets. Pet. App. 100a.

Had the FDIC not been immediately appointed as receiver, Utah Code § 7-2-3 provided that the Bank could have applied within 10 days after the seizure to the court to enjoin further proceedings and seek return of possession of the bank. The transfer to the FDIC foreclosed that remedy because the UDFI was engaged in no further proceedings and no longer had possession of the Bank's assets, the only available remedies under the Utah statute. As a result, the Bank was seized without notice and without a pre- or post-seizure opportunity to be heard.

B. Proceedings Below.

1. Utah State Courts.

On June 28, 2011, Petitioner filed an action in Utah state court against the State Respondents, alleging, *inter alia*, procedural and substantive due process violations. Pet. App. 100a. On November 8, 2011, the court granted the State's motion to dismiss in full, and Petitioner's procedural and substantive due-process allegations were dismissed with prejudice because the right to a pre-seizure hearing was not clearly established so that no due-process violation could have occurred. Pet. App. 101a–102a. Appeal was taken to the

Utah Supreme Court, which, on October 24, 2014, affirmed the dismissal of the procedural and substantive process claims but found error in dismissal of the procedural due process claim with prejudice so that it may be re-pleaded with greater specificity to make a claim for monetary damages. Pet. App. 127a.

2. U.S. District Court.

On March 23, 2016, Petitioner filed an amended complaint in state court, alleging its due-process claim in greater detail. Pet. App. 69a. On April 21, 2016, the Defendants removed the matter to the U.S. District Court for the District of Utah. Pet. App. 8a. The district court dismissed Petitioner's contract claims in an order on February 6, 2018. Pet. App. 33a. The district court denied Petitioner's motion for partial summary judgment on the basis of the *Rooker-Feldman* doctrine, holding that Petitioner's claim essentially sought review of the original state court ex parte decision authorizing seizure of the bank, which was waived as a matter of procedural due process by the Petitioner's failure to seek review in 10 days, despite the fact that such an action could not afford Petitioner relief. Pet. App. 36a. The court also denied Petitioner's substantive due process claim as insufficiently supported. *Id*.

On a motion by the State Defendants, the district court subsequently granted summary judgment, concluding that Petitioner's remaining claims were derivative in nature, were assumed by the FDIC pursuant to the Succession Clause of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

(FIRREA), 12 U.S.C. § 1821(d)(2)(A)(i), upon the FDIC's appointment as receiver for the Bank. Pet. App. 46a–47a.

The district court characterized AWBM's argument it was deprived of a post-seizure hearing, and therefore had its due process rights violated as a result of UDFI appointing the FDIC immediately after taking possession of the Bank, as a new argument that "appeared nowhere in their briefing in response to the State's motion for summary judgment and was not pleaded anywhere in AWBM's second amended complaint." Pet. App. 42a n.5. Because it characterized the crux of AWBM's as an unbriefed and unpleaded argument, the district court declined to address it. *Id.* The assertion that this argument was neither briefed nor pleaded is demonstrably erroneous. Nonethless, the district court held that the due-process and takings rights asserted by Petitioner were transferred to the FDIC when it became the Bank's receiver. Pet. App. 36a–37a. The district court then dismissed the case with prejudice. Pet. App. 48a.

3. Tenth Circuit.

In the appeal, the State of Utah filed no briefs but merely signified that it joined the brief defending the district court decisions that were filed by Appellee-Intervener FDIC. The Tenth Circuit affirmed the district court's ruling under *Rooker-Feldman* as waived, reading it to be directed to challenging the "ex parte nature of the possession proceedings and the allegedly inadequate factual foundation for the possession order." Pet. App. 16a. It found the discussion of the issue in a

footnote of Petitioner's brief that explained Petitioner's argument was not a challenge to the state court's decision, but a challenge based on the avoidance of "an opportunity to be heard in either a pre- or post-seizure hearing when the government seizes property." Pet. App. 13a n.8 (quoting opening brief). The Tenth Circuit further rejected the explanation that, to fit within Rooker-Feldman, Petitioner would have to seek "recission of the Order of Possession, which it did not." Pet. App. 18a.

The Tenth Circuit also found waiver of Petitioner's "remaining procedural due process and related civil rights claims," concluding that no Post-Seizure Claim was pleaded in the operative complaint because it did not specify that the "immediate appointment of the FDIC deprived AWBM of a *post*-seizure opportunity to be heard." Pet. App. 21a. It further held that raising the issue in the district court in a summary judgment motion "may properly be considered a request to amend the complaint," but the district court's refusal to accept it constituted a denial of the request. Pet. App. 22a.

Moreover, the Tenth Circuit found the arguments on the post-seizure denial of due-process claim "likely unavailing as a matter of law," because Petitioner never *tried* to use th[e] process [that permitted a challenge to the seizure within 10 days under Utah Stat. § 7-2-3]. Pet. App. 24a. It thus held that Petitioner was "in 'no position to argue that [the available procedures] are unconstitutional.'" Pet. App. 24a (quoting *Weinrauch v. Park City*, 751 F.2d 357, 360 (10th Cir. 1984). The court also was "unpersuaded … that

federal law—12 U.S.C. § 1821(j)[1]—deprived the Utah courts of jurisdiction to overrule the order of possession as soon as Commissioner Leary appointed the FDIC as receiver." Pet. App. 24a–25a. The Tenth Circuit then affirmed the district court's grant of summary judgment. Pet. App. 28a.

Petitioners timely sought rehearing en banc. Although the Tenth Circuit requested a response, it denied the petition. Pet. App. 134a–135a.

REASONS FOR GRANTING THE PETITION

The whole point of Rule 54(c) is "to eliminate the theory-of-the-pleadings doctrine and decrease the importance of the pleading stage in federal litigation." 10 Fed. Prac. & Proc. Civ. § 2662 (4th ed.) (footnotes omitted). Instead, Rule 54(c) aims to avoid the "tyranny of formalism" that once held sway and did again in the decision below. *Id.* § 2662 n.20 (citing *Rosden v. Leuthold*, 274 F.2d 747 (D.C. Cir. 1960)).

In this case, Petitioner pleaded that it was afforded no hearing to challenge the ex parte seizure of its Bank in violation of due process. *See* Second Am. Compl. (ECF No. 33, at ¶¶ 67, 98, 106-114. It further alleged the process followed by state officials foreclosed any post- deprivation relief. *Id.* at ¶¶ 138, 166-175. The district court, despite these allegations, held that AWBM failed to plead its post-deprivation claims.

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[1] The statute provides, "[e]xcept as provided in this section, no court may take any action . . . to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

Pet. App. 42a n.5. The Tenth Circuit accepted those grounds for affirmance, finding further support for calling the absence of sufficient post-deprivation allegations "waiver" because AWBM did not pursue the post-deprivation process adopted in Utah Code Ann. § 7-2-3, Pet. App. 18a–19a, despite limitations on the relief it affords so that it had no applicability where, as here, the UDFI commissioner had lacked any further role with the Bank's assets.

The Tenth Circuit's determination of waiver when the same facts and legal theory support both pre-deprivation and post-deprivation due-process violations because the court deemed the complaint to have focused on the pre-deprivation claims cannot be reconciled with Rule 54(c) or the application of that rule in sister circuits.

The Tenth Circuit further found the post-seizure claim "likely unavailing as a matter of law." In so holding and opining that AWBM should have pursued a patently inadequate route for relief under § 7-2-3 and assessing the Post-Seizure Claim (Pet. App. 24a), the panel concluded that "AWBM is in 'no position to argue that they are unconstitutional,'" while finding its argument that FIRREA foreclosed state court jurisdiction over the FDIC unpersuasive. *Id.*

As explained, the statutory provisions provide textual support for the opposite conclusions, as did the district court's conclusion that the FDIC owned all claims as of the moment it took possession, Pet. App. 37a, and the FDIC's identical argument before the Tenth Circuit. Pet. App. 25a n.14. The Tenth Circuit's

sympathetic conclusion conflicts most directly with *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998), which denied bank shareholders injunctive relief over a bank seized by the Pennsylvania Secretary of Banking and transferred to the FDIC, but held the shareholders had a right to pursue monetary redress for their alleged constitutional violation despite the preclusion of 12 U.S.C. § 1821(j).

While the Tenth Circuit regarded who controlled the claim as a standing issue, AWBM consistently argued that it was deprived of any hearing and that the deprivation violated a personal constitutional right belonging to AWBM, which could not be transferred to the FDIC, consistent with decisions in other circuits.

The bottom line, as this Court explained, is that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 321 (1987). The procedure that Utah utilized was patently inadequate to protect AWBM's due-process rights under well-established precedent and the Tenth Circuit's declaration that it was "unpersuaded" and that AWBM could pursue it "as a matter of law" stands in conflict with the overwhelming holdings of other courts. This case presents a clear opportunity to rule on that important issue.

I. THE TENTH CIRCUIT'S RULING THAT PETITIONER WAS UNTIMELY IN ADVANCING ITS POST-DEPRIVATION DUE PROCESS CLAIM CONFLICTS WITH DECISIONS IN SISTER CIRCUITS.

The Tenth Circuit held that AWBM was too late when it raised the issue of a post-deprivation hearing "for the first time" in its May 2022 summary-judgment motion. Pet. App. 11a. To reach that conclusion, the panel relied, in part, on the district court's observation that it "saw no allegation that AWBM was "precluded from objecting" to the seizure under Utah Code Ann. § 7-2-3(1)(a)," *id.* at 14, despite that procedure's inapplicability to the FDIC as receiver.[2] *See* 12 U.S.C. § 1821(j).

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[2] It is particularly odd that both the district court and the Tenth Circuit found this "allegation" fatally absent even though the supporting factual allegations were in the complaint and undisputed by the parties. Still, in essence, the ruling asks a plaintiff to plead a legal conclusion, even though "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Utah Code Ann. § 7-2-3, however, only authorizes a state court, if the aggrieved party shows the seizure to be "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law," to enjoin further proceedings by the UDFI commissioner and "to surrender possession of the institution." Utah Code Ann. § 7-2-3(1). That relief affords no remedy when the commissioner has completed the proceedings at issue (ex parte, in this instance) and no longer has possession of the institution because possession was transferred promptly after the ex parte hearing to the FDIC, which is immunized from the state court procedure. 12 U.S.C. § 1821(j).

The panel's ruling, which failed to credit several allegations in the operative complaint as sufficient on that issue, conflicts with rules, precedent, and sister circuit holdings because the identified problem was a question of law, not one involving sufficient factual allegations, and failed to consider whether relief was available on the basis of undisputed facts under Rule 54(c).

A. The Federal Rules Abandoned the Type of Pleading Rigidity Endorsed in this Case by the Tenth Circuit.

The Federal Rules of Civil Procedure adopted a "simplified notice pleading standard," devoid of "technical forms." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002). Complaints require "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2) and must meet a plausibility standard, which entails "more than a sheer possibility that a defendant has acted unlawfully," but still does not go so far as to amount to a "probability requirement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the pleading must demonstrate a right to relief that is raised "above the speculative level." *Twombly*, 550 U.S. at 555.

Rule 8(e) further specifies that "[p]leadings must be construed so as to do justice." That overarching mandate is reflected by the liberal approach to amending complaints adopted in Rule 15, which instructs courts to "freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also*

Gillespie v. United States Steel Corp., 379 U.S. 148, 158 (1964). Moreover, when a plaintiff pleads sufficient factual content, a court is obliged to draw all reasonable inferences in favor of that party for purposes of a motion to dismiss. *Iqbal*, 55 U.S. at 678. Yet, Rule 15 goes even further. It "is designed to allow amendment of a pleading when the facts proven at trial differ from those alleged in the complaint, and thus support a cause of action that the claimant did not plead." *Gilbane Bldg. Co. v. Fed. Rsrv. Bank of Richmond*, 80 F.3d 895, 901 (4th Cir. 1996).

Rule 54, which instructs courts to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," Fed. R. Civ. P. 54(c). supplements but aligns with these principles. It separates the demand in the pleading from the allegations so that the former is "not treated as binding or conclusive since by appearing defendant has an opportunity to defend against any new request for relief that may be made in the course of the action." 10 Fed. Prac. & Proc. Civ. § 2662. Rule 54(c) "authorizes recovery under any theory supported by the facts proven at trial." *Gilbane Bldg.*, 80 F.3d at 900.

In contrast, the old system of "[c]ode pleading needlessly emphasized the form of a complaint over its substance." *Id*. The adoption of notice pleading in the modern rules "eliminated code pleading's formalistic, purely factual approach" while retaining the "factual elements" as the "essence of a claim." *Id*. The result allows the claimant to err in setting "'forth any theory

or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it on any theory.'" *Id*. (quoting *New Amsterdam Casualty Co. v. Waller,* 323 F.2d 20, 24–25 (4th Cir. 1963), *cert. denied,* 376 U.S. 963 (1964)). Thus, until the decision below, courts "consistently interpreted this provision to allow a plaintiff any relief that the pleaded claim supports; requesting an improper remedy is not fatal." *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 841 (5th Cir. 1990); s*ee also Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 455 (1997) (Ginsburg, J., dissenting) ("Rule 54(c) thus instructs district courts to 'compensate the parties or remedy the situation without regard to the constraints of the antiquated and rigid forms of action.'" (quoting 10 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2662, pp. 133–34 (2d ed.1983)).

B. The Tenth Circuit's Treatment of this Pleading Issue Aligns Only with the Fifth Circuit and Conflicts with Decisions of this Court and Other Circuits, Creating a Deep and Now-Entrenched Divide.

1. The Tenth Circuit's Decision Presupposes Prejudice from a Failure to Plead the Right Legal Theory Sufficiently.

The Tenth Circuit's decision does not deny that sufficient facts were pleaded that might support a post-deprivation due-process violation. It instead supposes that, at the time of summary judgment, a "'shift in the thrust of the case'" comes too late and would

"'prejudice the other party in maintaining his defense upon the merits.'" Pet. App.23a (10th Cir 25) (quoting *Pater v. City of Casper*, 646 F.3d 1290, 1299 (10th Cir. 2011), in turn quoting *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090–91 (10th Cir. 1991)).

In the case relied upon, *Pater*, the Tenth Circuit justified denying the "late shift" through a summary judgment motion in a case that challenged certain assessments to landowners for street improvements by deciding that the plaintiffs had pleaded a procedural due-process violation, rather than an equal protection claim. The court held that equal protection "raised substantially different factual issues after the close of discovery" and would have forced the district court "to grant significant additional time for discovery." *Pater*, 646 F.3d at 1299.

In the decision below, however, both the pre- and post-deprivation issues were challenges based on procedural due process, the same legal theory supported by the identical facts. In using its entrenched precedent to support waiver for a pleading failure and deem it prejudicial, the Tenth Circuit stood in conflict with decisions of this Court, as well as the other circuits.

To be clear, the Tenth Circuit deemed insufficient to plead a post-deprivation due-process violation allegations that equitable relief could not restore the Bank to Plaintiff, that "there was no way to undo the damage … [and] make Commissioner Leary retrace its steps, properly follow statutory procedures, and

thereby protect AWBM's rights and redress its injury," and that "[i]mmediately after the seizure of the Bank, AWBM … determine[d] that to petition the court to undo the seizure would not provide meaningful relief." Second Am. Compl. (ECF No. 33), *America West Bank Members, L.C. v. State of Utah*, Case No. 2:6-cv-326, at ¶¶ 169, 172-73.

In addition, the relevant Utah statute that the Tenth Circuit chided AWBM for not pursuing, Pet. App. 24a, provided no relief. It plainly states that it is available only to enjoin further proceedings by the UDFI commissioner and to order the commissioner to return possession to the owners. Utah Code Ann. § 7-2-3(1)(b) & (c). However, by the time AWBM was notified that the Bank had been seized, it was no longer in the commissioner's possession and he had no further proceedings to undertake. Instead, it was entirely within the possession of the FDIC. Federal law preemptively displaced the Utah statute at that point because it holds that "no court may take any action … to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

After evaluating those statutes, AWBM concluded (and pleaded) it could not pursue a remedy under Utah Code Ann. § 7-2-3 and that its only available remedy was monetary damages. Second Am. Compl. (ECF No. 33), at ¶¶ 173-175. To the Tenth Circuit, these allegations were insufficient, and the complaint required an amendment about post-deprivation rights to make the

case for relief so as to avoid prejudice to the State of Utah. Pet. App. 22a–23a.

2. The Fifth Circuit Joins the Tenth in Finding Prejudice where the Relief Sought Is Not Pleaded.

It appears that only the Fifth Circuit has taken a similar stance to that of the Tenth Circuit and held that prejudice emanates from a failure to plead relief, rather than facts that might support relief. That circuit holds that a "'failure to seek a form of permissible relief in his pleadings may operate to the prejudice of the opposing party when that relief is finally sought at a much later stage of the proceedings.'" *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 (5th Cir. 2015), *cert. denied*, 578 U.S. 945 (2016) (quoting *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1242 (5th Cir.1984)). In such circumstances, the circuit declares that "'[d]enial of relief is then also appropriate." *Id.* (quoting *Engel*, 732 F.2d at 1242).

In the Fifth Circuit's view, without this limitation, the federal rules' goal of "eliminat[ing] trial by ambush and afford full and fair litigation of disputed issues would be placed at risk." *Id.* Prejudice attaches, the court holds, unless the "entitlement to relief not specifically pled has been tested adversarially, tried by consent, or at least developed with meaningful notice to the defendant." *Id.* (footnote omitted). The Fifth Circuit then stands with the Tenth in conflict with the other circuits, as well as decisions of this Court.

3. This Court's Precedents Make Clear that as Long as the Defendant Has the Opportunity to Contest the Facts that Give Rise to Relief, No Prejudice Occurs.

Nearly five decades ago, this Court held that "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65–66 (1978) (citing Rule 54(c)). The decision below does follow this instruction.

More recently, this Court explained why prejudice does not attach in the way that the Tenth and Fifth Circuits presuppose. It stated that relief outside the pleadings should only be denied "when that would somehow prejudice the defendant, such as when the defendant did not have an opportunity to contest the basis for that relief." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336, 355 (2020). The facts, usually contested, support the relief. Here, they were uncontested. Prejudice could not have attached. Even so, this Court added language from the leading civil procedure treatise to explain further, that "'a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows a right to it.'" *Id.* (quoting 10 Fed. Prac. & Proc. § 2662 (4th ed.)). Neither the Tenth nor the Fifth Circuit's approaches indulge that "little difficulty."

4. The First, Second, Third, Sixth, Eighth, and Eleventh Circuits Find No Prejudice When the Facts Pleaded and Proven Support Relief Not Pleaded.

In other circuits, the mandate of Rule 54(c) would have permitted post-deprivation relief to move forward in this case on the basis of the facts pleaded and undisputed. Where there is an opportunity to contest those facts, no prejudice occurs.

For example, the Eleventh Circuit straightforwardly holds that "[r]equesting an improper remedy is not fatal to a claim." *A.W. by & Through J.W. v. Coweta Cnty. Sch. Dist.*, 110 F.4th 1309, 1315 (11th Cir. 2024), *cert. denied sub nom. A. W., by & through J. W. v. Coweta Cnty. Sch. Sys.*, No. 24-523, 2025 WL 76482 (U.S. Jan. 13, 2025). *A.W.* states that it is error when a district court, in dismissing a complaint, "fail[s] to consider whether the [plaintiffs] might be entitled to other relief." *Id.* at 1311.

A recent Eleventh Circuit reviewed whether prejudice attached to a district court's award of damages when the plaintiff had previously disclaimed monetary damages. The defendant argued that it was prejudiced because the award of damages went beyond the pleaded claim and theory. The Eleventh Circuit, however, held that monetary damages were "embedded" and "implicit" in the request for an injunction, "came as no surprise," and was accompanied by an additional forty-five days for damages discovery. *Hunters Run*

Prop. Owners Ass'n, Inc. v. Centerline Real Est., LLC, No. 20-11800, 2023 WL 2707318, at *4 (11th Cir. Mar. 30, 2023). The key to the non-prejudicial determination was that the defendant "had a full opportunity to contest the damages and declaratory relief." *Id*.

The Sixth Circuit similarly holds that when the pleaded facts support an alternative basis for relief, Rule 54(c) affords that relief. Thus, where a complaint "sought the same damages for each of its claims, identified the nature of those damages, and requested damages for costs, expenses, and lost income in the amount of $250,000 plus amounts 'in excess' of $25,000, and the defendant had "a full opportunity to challenge the proofs at trial," the court held it was an "abuse of discretion to deny the motion to alter or amend judgment asking to enter judgment in the full amount of the jury's verdict in excess of the amount requested on that claim in the prayer for relief." *Versatile Helicopters, Inc. v. City of Columbus, Ohio*, 548 F. App'x 337, 344 (6th Cir. 2013).

The key to avoiding prejudice about an unpleaded theory of the case in the First and Third Circuits is to assure the particular theory "'was squarely presented and litigated by the parties at some stage or other of the proceedings.'" *Rodriguez v. Doral Mortgage Corp.,* 57 F.3d 1168, 1173 (1st Cir. 1995) (quoting *Evans Prods. Co. v. West Am. Ins. Co.,* 736 F.2d 920, 923–24 (3rd Cir. 1984)); *see also United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981) (finding no prejudice where the "damages award stemmed directly from the facts proved at trial concerning the validity of the leases.").

The same metric applies in the Eighth Circuit. In *Baker v. John Morrell & Co.*, 382 F.3d 816, 832 (8th Cir. 2004), the employment-discrimination plaintiff was permitted to amend her Title VII claim to add parallel claims under the Iowa Civil Rights Act, despite employer's contention that if it had known that damages would not be capped under Title VII, it might have settled the claim. The Eighth Circuit found no prejudice in that change in relief under Rule 54(c). *Id.*

Similarly, no apparent prejudice infected the district court's determination that a contract claim based on the identical facts could support damages sounding in tort and opened the door to emotional-distress and punitive damages in a Ninth Circuit decision. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318–19 (9th Cir. 1982). Nor did it deter the Second Circuit from approving of injunctive relief where it had not been pleaded because the facts pleaded necessarily required injunctive relief to effectuate the plaintiff's request to be allowed to continue her medical education. *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 86 (2d Cir.), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004). The DC Circuit has also long held that "a complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant." *Keiser v. Walsh*, 118 F.2d 13, 14 (D.C. Cir. 1941).

5. The Fourth and Seventh Circuits Occupy a Middle Ground But One that Lies Close to the Majority of Circuits.

The Fourth and Seventh Circuits generally apply the principle that Rule 54(c) permits "allegations properly pled and proven [to] support a theory and type of relief not specified in [the plaintiff's] demand for judgment." *Gilbane*, 80 F.3d at 901; *see also Kaszuk v. Bakery & Confectionery Union & Indus. Int'l Pension Fund,* 791 F.2d 548, 559 (7th Cir. 1986) (Rule 54(c) leaves "no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved.").

In fact, the Fourth Circuit in a holding that sharpens the entrenched conflict with the decision below has stated that "a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights." *New Amsterdam Casualty,* 323 F.2d at 25.

Still, both circuits put a limitation on Rule 54(c)'s scope by holding that "a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c)." *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716–17 (4th Cir. 1983); *see also Curry v. Revolution Lab'ys, LLC,* 124 F.4th 441, 452 (7th Cir. 2024) ("A substantial increase in the defendant's possible liability 'can constitute specific prejudice barring additional relief under Rule 54(c).'") (citation omitted).

II. THE TENTH CIRCUIT'S APPROACH TO PREJUDICE FORECLOSING UNPLEADED RELIEF IS WRONG.

Decisions in the other circuits explain that Rule 54(c) "'has been liberally construed, leaving no question that it is the court's *duty* to grant whatever relief is appropriate in the case on the facts proved.'" *Marin*, 651 F.2d at 31 (emphasis added) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802–03 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)) (citing *Columbia Nastri & Carta Carbone v. Columbia Ribbon & Carbon Mfg. Co.*, 367 F.2d 308, 312 (2d Cir. 1966)); *see also Old Republic Ins. Co. v. Emps. Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998) ("Under Rule 54(c) the district court has a *duty* to grant whatever relief is appropriate, including injunctive relief, even if the parties have not specifically requested it.") (emphasis added).

The Tenth Circuit does not see the "duty" that these other circuits recognize. Here, the facts alleged were undisputed: the commissioner used an ex parte process to receive an order of possession for the Bank's assets and immediately transferred that interest to the FDIC. The commissioner's involvement in the process thus came to an end so that an injunction pursuant to Utah Code Ann. 7-2-3 would be misdirected if obligatory to the commissioner. And an order to transfer the assets back to the Bank's owner would be equally ineffective against the commissioner because he no longer had possession of the assets. A lawsuit

seeking return of the assets against the new bank owner, the FDIC, would accomplish nothing as well because federal law prohibited it. *See* 12 U.S.C. § 1821(j).

On these facts, the district court and the Tenth Circuit both held that no post-deprivation claim for relief could be made because that specific request for relief from a post-deprivation action was not pleaded. Pet. App. 20a (agreeing with the district court).

In other circuits, courts focus on the facts pleaded, rather than the theory of the case. Thus, the Sixth Circuit holds that where there are "sufficient facts in the complaint to warrant a determination of the issue," a "pleader is entitled to the relief shown on the pleadings, even if his prayer has not demanded such relief." *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). Here, the relief afforded for a post-deprivation seizure of the Bank was well-within the facts pleaded.

Yet, the Tenth Circuit's ruling in this case demands more. It conflated pleading necessary facts, amply contained in the operative complaint, with the relief sought. As a result, the due-process protections otherwise afforded by Utah Code Ann. § 7-2-3(1), were no longer available because the UDFI had effectively lost any authority over the assets that were now in federal hands and immune from the reach of Utah law, thereby insulating state officials as well.

These facts were pleaded, along with a claim that this violated due process. Yet, the Tenth Circuit held that the facts alleged to have violated "clearly established law" sounded only in the requirement of a pre-seizure hearing and pre-seizure deprivation of procedural due process. Pet. App. 21a. The court added that the "complaint nowhere alleged the immediate appointment of the FDIC deprived AWBM of a *post*-seizure opportunity to be heard," (*id*.) even though the fact of that seizure and the unavailability of state due-process protections was undisputed by the parties.

The court then went on to assert that because the allegation was "absent," rather than "unclear," the "general rule" announced in *Pegram v. Herdrich*, 530 U.S. 211, 230 n.10 (2000), where this Court allowed a brief "to clarify allegations in her complaint whose meaning is unclear," was inapplicable. Pet. App. 23a. Still, the court recognized that "'[a]n issue raised for the first time in a motion for summary judgment may properly be considered a request to amend the complaint, pursuant to Federal Rule of Civil Procedure 15.'" Pet. App. 22a (quoting *Pater*, 646 F.3d at 1299). Still, contrary to Rule 15's liberality in permitting amendments to achieve justice, concluded that the district court refusal to address the issue must be construed as a denial of a request to amend the complaint and would be sustained absent an abuse of discretion. It added that "'a late shift in the thrust of the case will [] prejudice the other party in maintaining his defense upon the merits.'" (10th at 25) (citation omitted; alteration in orig.). That refusal was inconsistent with the

duty other circuits recognize and should have been applied here.

III. THE SEIZURE OF THE BANK'S ASSETS IN THIS MATTER FAILED TO AFFORD DUE PROCESS; AS OTHER CIRCUITS HAVE HELD, IT IS A RIGHT PERSONAL TO THE BANK'S OWNERS AND NOT TRANSFERRED IN RECEIVERSHIP TO THE FDIC.

The central issue in this case has always been whether the process Utah used violated due process. The pleaded facts demonstrate a complete absence of a meaningful opportunity to be heard, as mandated in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (requiring an adequate post-deprivation process).

The complaint alleged that an ex parte hearing with immediate transfer of bank assets to the FDIC left no post-deprivation process that could afford relief and therefore was illusory. *See* Second Am. Compl. (ECF No. 33, at ¶¶ 138, ¶¶ 172-174. Utah Code Ann. § 7-2-3 authorizes an action against the UDFI commissioner within 10 days of the taking and proffers an opportunity to enjoin further proceedings and force return of the bank. Given that the commissioner no longer possessed the bank but the FDIC did, no injunctive relief pursuant to § 7-2-3 was available to AWBM as a matter of law.

Moreover, FIRREA, the statute cited by the district court for its holding that the FDIC owns all of

AWBM's claims, including its due-process claims, denies jurisdiction to any court over "any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver." 12 U.S.C. § 1821(d)(13)(D)(1). That provision is supplemented by a prohibition on any court taking action "to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

A. Other Circuits Would Not Bar AWBM's Action to Vindicate Its Due-Process Rights.

In affirming the district court and presupposing that due-process claim was unlikely to succeed, Pet. App. 24a, the Tenth Circuit endorsed the district court's view that the FDIC succeeded to the due-process rights violated when AWBM owned the Bank. Pet. App. 27a.

FIRREA authorizes taking a failing bank into receivership, but the condition of due process is what renders it legitimate. *See Campbell v. FDIC*, 676 F.3d 615, 620 (7th Cir. 2012) ("legislative record replete with references to due-process requirements demonstrate[s] that Congress was aware of due-process concerns when drafting FIRREA."). Thus, the government action at issue here required compliance with due process – and that compliance was owed to AWBM because it had a property right at the time of the due-process violation. The FDIC did not and could not receive those rights. As illustrated by this Court's

precedent, constitutional rights do not exist for the government to assert, as it has no constitutional rights, only authority. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (holding the First Amendment does not protect government speech); *Return Mail, Inc. v. United States Postal Serv.*, 587 U.S. 618, 618 (2019) (absent an express statutory definition, this Court applies a "longstanding interpretive presumption that 'person' does not include the sovereign," and thus excludes a federal agency). This leads to the obvious conclusion that AWBM asserts its own rights here, not any that may be asserted by the FDIC.

B. The Seventh Circuit, Contrary to the Tenth Circuit, Makes Distinctions between Derivative Claims and Claims Personal or Direct to the Investors.

Unlike the decisions below that found AWBM lost standing to assert the due-process violation of its rights when the assets were transferred to the FDIC, Pet App. 27a, the Seventh Circuit makes a key and logical distinction, commonly used in other circuit courts. It recognizes that FIRREA provides that the FDIC, upon taking over a bank, acquires "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution." 12 U.S.C. § 1821(d)(2)(A)(i). It describes "this language to allocate to the FDIC not only the closed banks' rights but also any claims that investors might assert derivatively on behalf of the closed

banks." *Levin v. Miller*, 763 F.3d 667, 669 (7th Cir. 2014).

Still, reviewing the claims made by the holding company trustee, *Levin* held claims that cost the bank money were derivative and acquired along with the bank by the FDIC, which was in a position to seek recovery. *Id.* at 670-71. However, one count in *Levin* was not. It concerned giving investors of the holding company poor information about the banks' portfolios that allowed the bank to pay dividends in amounts resulting in a capital shortage when a financial crunch occurred. *Id.* at 670.

That count, the Seventh Circuit held, was not acquired by the FDIC because it was a duty owed to the investors – a direct claim. *Id.* at 671. In an analysis that equally applies to the instant case, the court noted that:

> If count 3 is dismissed, the FDIC cannot gain; it owns the Banks and all of their assets, but the Banks cannot collect from the Managers for any shortcomings in the services that they rendered to [the holding company]. Section 1821(d)(2)(A)(i) is designed to allocate claims between the FDIC and other injured parties; it is not designed to vaporize claims that otherwise exist after a business failure. Yet if count 3 is dismissed, the claim will disappear; no one will be able to pursue it. It would not be sensible to read § 1821(d)(2)(A)(i) that way.

Id. (emphasis added).

Here, the sensibility of that distinction, whether denominated as derivative versus direct, or personal and therefore not transferable versus acquired, is obvious. The FDIC can never pursue that claim or collect any form of redress for the due-process violation as it was never a claim of the Bank, but rather a claim of the aggrieved investors.

C. The Third Circuit Substantially Follows the Same Principles as the Seventh Circuit.

The Third Circuit in *Hindes*, 137 F.3d 148, established a similar principle to the one articulated by the Seventh Circuit. The *Hindes* plaintiffs were dismissed because they challenged the underlying basis by which their bank was taken into receivership and sought recission against both the state and the FDIC. While not questioning the plaintiffs' right to take up their challenge, the Third Circuit found the anti-injunction provision of FIRREA did not provide a remedy because an "adequate state procedure [was] available to challenge the appointment of a receiver by the Secretary." *Id*. at 167. The Third Circuit emphasized:

> We hold that section 1821(j) precludes the relief sought here, namely a rescission of the Secretary's appointment of a receiver, because it would wholly prevent the FDIC from continuing as receiver, where there is an adequate procedure available to challenge the appointment of a receiver. As we state elsewhere in this opinion, *this holding* is based upon section 1821(j)'s preclusion of remedies and *does not*

> *foreclose the possibility of proper constitutional claims seeking other remedies.*

Id. at 168 (emphasis added).

Although *Hindes* ruled against the plaintiffs because they sought recission of the receivership, it also warned that its holding "should not be overread." *Id.* at 161. It emphasized that:

> We do not suggest that we would reach the same result in a case in which the effect on the FDIC of an order against a third party would be of little consequence to its overall functioning as receiver. That type of situation is not before us.
>
> Our interpretation of section 1821(j) only denies appellants the declaratory and injunctive relief they now seek, but does not deny them judicial review for their constitutional claims. Courts uniformly have held that the preclusion of section 1821(j) does not affect a damages claim.

Id.

Notably, *Hindes* cites *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), which concluded that FIRREA does not extend to a damage claim, even against the FDIC as receiver, when the FDIC acts beyond the scope of its authority. *Id.* at 1155. It is difficult to see how, then, a damages claim against the UDFI offends FIRREA. Together, *Hindes* and *Sharpe* powerfully illustrate that FIRREA should only be interpreted to

preclude or enjoin claims that interfere with the FDIC's responsibilities as the appointed receiver.

AWBM is not seeking recission, injunction, or anything like what the *Hindes* plaintiffs sought, nor does it seek to interfere with the FDIC's discharge of its duties with respect to the Bank. Instead, AWBM is pursuing a claim for damages against state actors based upon Utah's use of a procedure that flaunts due process, which constitutes a "proper constitutional claim[] seeking other remedies." *Hindes*, 137 F.3d at 168; *cf. Gordon v. Norton*, 322 F.3d 1213, 1216 (10th Cir. 2003) ("equitable relief is not available to enjoin a lawful taking when a property owner can subsequently sue the government for compensation."). *Hindes* persuasively demonstrates that constitutional claims, like AWBM's claims, are outside of FIRREA's reassignment of rights provision.

D. The Fourth, Ninth, and Eleventh Circuits also Permit Investor Lawsuits under Similar Conditions.

In the Fourth Circuit, the court distinguishes between derivative claims and other personal claims, as does the Seventh Circuit. In *In re Beach First Nat. Bancshares, Inc.*, 702 F.3d 772 (4th Cir. 2012), the court upheld the dismissal of derivative claims it regarded as now belonging to the FDIC, but not a claim against the bank's directors for subordinating their equity interest in the LLC that owned real property, which constituted a direct claim for impropriety

"unrelated to any defalcation at the Bank level." *Id*. at 780.

Similarly, the Eleventh Circuit held that FIRREA did not apply to transfer claims to the FDIC for the fiduciary duty of a breach of the standard of "good faith and loyalty," which was personal and direct and not a bank asset. *Lubin v. Skow*, 382 F. App'x 866, 872–73 (11th Cir. 2010). The Ninth Circuit makes the same distinction. It recognizes that the FDIC owns any derivative claims where the "gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders." *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). However, it also recognizes that "an action may lie both derivatively and individually based on the same conduct," so "the mere presence of an injury to the corporation does not necessarily negate the simultaneous presence of an individual injury." *Id*. In its analysis "the pivotal question is whether the injury is incidental to or an indirect result of a direct injury to the corporation or to the whole body of its stock or property." *Id*. If it is, then only the derivative claim survives. *Id*.

E. The First Circuit Only Superficially Agrees with the Tenth Circuit.

Zucker v. Rodriguez, 919 F.3d 649 (1st Cir. 2019), rejected the direct/derivative dichotomy drawn by the Seventh Circuit and other circuits. *See id*. at 657. In *Zucker*, the Chapter 11 administrator of a bankrupt holding company sued the failed bank's former directors, officers, and insurer for negligence and breach of

fiduciary duties. *Id*. at 650. *Zucker* held that FIRREA "plainly encompasses the Administrator's claims" and does not limit itself to "claims that shareholders may assert derivatively under state law on behalf of the institution in receivership." *Id*. at 656.

Critically though, the First Circuit describes its ruling as a "limited one: it applies only to claims like those before us." *Id*. What were those claims? Claims "to recover [the holding company's] interest in a wholly owned subsidiary bank." *Id*. Moreover, the recovery it sought was from assets "that the FDIC also seeks in its own action related to the Bank's failure." *Id*. In other words, the holding company and the FDIC were in competition for the same funds, both having a real claim to them.

Notably, *Zucker* did not reject or even address the distinction articulated by the Seventh Circuit when funds are not at issue between the former holding company and the FDIC. Its limited holding does not rule out a claim the FDIC cannot hold. The two decisions can be read in harmony, which is further suggested by the First Circuit's endorsement of the views expressed in the *Levin* concurring opinion, which rejected the direct/derivative analysis but still concluded one claim fell outside of FIRREA's ambit because the FDIC could not act on them. *Id*. at 657 (citing *Levin*, 763 F.3d at 672-73 (Hamilton, J., concurring)). Here, too, the FDIC cannot act on AWBM's due-process claims. The Tenth Circuit's approach, then, further deepens its lonely position in conflict with other circuits.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO DECIDE THESE ISSUES.

Because the essential facts are undisputed and because the flawed process used by Utah officials is so clear, this case provides an excellent vehicle to decide both Questions Presented and resolve differences among the circuits that are likely to be further entrenched without this Court's intervention. The case cleanly presents whether Rule 54(c) permits pursuit of a post-deprivation claim when the circuit court deems it sufficient for a pre-disposition due process claim but somehow insufficient for the same claim post-deprivation, thereby "prejudicing" the defendant. It further will resolve ongoing problems in determining the extent that the FDIC acquires rights under FIRREA, a problem that continues to bedevil the circuits and is likely to become more acute during times of economic challenge like today.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2025

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APPENDIX

TABLE OF APPENDICES

Table of Appendices

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED AUGUST 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-4091
(D.C. No. 2:16-CV-00326-CW)
(D. Utah)

AMERICA WEST BANK MEMBERS,

Plaintiff-Appellant,

v.

THE STATE OF UTAH; G. EDWARD LEARY; UTAH DEPARTMENT OF FINANCIAL INSTITUTIONS,

Defendants-Appellees.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR AMERICA WEST BANK,

Intervenor-Appellee.

Filed August 14, 2024

Appendix A

ORDER AND JUDGMENT*

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

The Utah Department of Financial Institutions seized America West Bank after concluding the Bank was in financial trouble. The Department then appointed the Federal Deposit Insurance Corporation (FDIC) as the Bank's receiver. Plaintiff-Appellant America West Bank Members (AWBM)—the Bank's sole owner—sued the Department, its commissioner G. Edward Leary, and the State of Utah, contending their actions violated AWBM's state and federal constitutional rights.[1] The district court granted summary judgment for Appellees. AWBM now appeals, but most of its challenges are waived. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1. AWBM did not name the FDIC as a defendant. The FDIC intervened in the district court and in this appeal. Only the FDIC filed a response brief in this court, but pursuant to Federal Rule of Appellate Procedure 28(i), Utah, the Department, and Commissioner Leary joined the FDIC's brief urging affirmance. We refer to Utah, the Department, Commissioner Leary, and the FDIC as "Appellees."

Appendix A

I[2]

AWBM's claims implicate the process by which a bank is seized in Utah, so we begin by discussing in some detail the state-law framework for taking possession of a financial institution and appointing a receiver. We then describe the underlying factual and procedural background and turn to AWBM's appellate challenges.

A

The Bank is chartered in Utah, where the Utah Department of Financial Institutions and its commissioner oversee the Bank's activities. The Department "regularly conduct[s] examinations of banks [in Utah] to determine their safety and soundness." ECF 64 at 2. Utah law provides statutory criteria to gauge the health of a financial institution and allows the commissioner to take "supervisory actions" under certain circumstances. Utah Code Ann. § 7-2-1(1).[3]

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2. We take the facts recited here from those the district court found uncontroverted in its summary judgment orders and the record before the district court at the time of its rulings. AWBM's appellate appendix omits several relevant documents. Because these documents "are accessible from the district court docket," we may "take judicial notice of" them. *Bunn v. Perdue*, 966 F.3d 1094, 1096 n.4 (10th Cir. 2020). We do so where necessary, citing to the district court docket number and using the internal pagination of the document. *See In re Syngenta AG MIR 162 Corn Litig. (Hossley-Embry Group II)*, 111 F.4th 1095-, 2024 U.S. App. LEXIS 19853, 2024 WL 3684788, at *2 n.2 (10th Cir. 2024) (taking judicial notice of "filings on this district court's docket and on our own docket" where "necessary to inform our discussion").

3. Utah Code Ann. § 7-2-1(1) lists twelve criteria. For example, if the commissioner finds "the institution is not in a safe

One such supervisory action, relevant here, is taking "possession of [the] institution." Utah Code Ann. § 7-2-1(3)(b). To take that step, the commissioner must—either before or within a certain time after taking possession—file an action in state court, which then gives "the court supervisory jurisdiction to review the actions of the commissioner." Utah Code Ann. § 7-2-2(1). The state court may "overrule" the commissioner's actions if the court finds they were "arbitrary, capricious, fraudulent, or contrary to law." Utah Code Ann. § 7-2-2(3)(b). As we will explain, Commissioner Leary determined the Bank met criteria in Utah Code Ann. § 7-2-1(1) and filed a verified petition seeking an "Order Approving Possession" of the Bank, which the Utah court granted. R.II at 351-54.

Utah law permits challenges to a possession order. "[W]ithin 10 days after the taking," Utah Code Ann. § 7-2-3(1)(a) allows any "institution or other person . . . aggrieved by the taking" to "apply to the court to enjoin further proceedings." The court is then required to "hear[] the allegations and proofs of the parties" and may "enjoin the commissioner from further proceedings" if the commissioner's taking was "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Utah Code Ann. § 7-2-3(1)(b). At the conclusion of this process, the court can "order the commissioner to surrender possession of the institution." Utah Code Ann. § 7-2-3(1)(c).

After taking possession, the commissioner may appoint a "receiver or liquidator" to "exercise any or

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and sound condition to transact its business," Utah Code Ann. § 7-2-1(1)(a), or has "failed to maintain a minimum amount of capital," Utah Code Ann. § 7-2-1(1)(f), he may act.

all the rights, powers, and authorities granted to the commissioner" under Utah law. Utah Code Ann. § 7-2-1(4). Here, the FDIC was appointed as the Bank's receiver. The FDIC is a federal agency "created by Congress to promote stability and restore and maintain confidence in the nation's banking system." *Fed. Deposit Ins. Corp. v. Bank of Boulder*, 865 F.2d 1134, 1136 (10th Cir. 1988), *on reh'g*, 911 F.2d 1466 (10th Cir. 1990). "To achieve this objective, [the] FDIC insures bank deposits" and pays "depositors when an insured bank fails." *Id.* The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) also permits the FDIC to act as a receiver for any "depository institution" it insures. *See* 12 U.S.C. § 1821(c)(1) ("[T]he Corporation may accept appointment and act as conservator or receiver for any insured depository institution. . . ."). Once the FDIC is appointed, FIRREA grants it all "rights titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution." 12 U.S.C. § 1821(d)(2)(A)(i) (the Succession Clause).

B

The Bank was formed in May 2000, and, at all relevant times, was wholly owned by AWBM. In 2007, the Department and the FDIC raised concerns about the Bank's financial health and then conducted an examination.[4] The Department and the FDIC produced

4. Utah Code Ann. § 7-1-314(1) permits the commissioner to "examine or cause to be . . . examined every depository institution"

a report finding the Bank's condition had "deteriorated significantly" and was "deficient." ECF 64 at 2. The report concluded the Bank was overinvolved in the real estate market, lacked adequate capital, and had inexperienced and underperforming leadership. Discussions about these concerns continued with the Bank for over a year.

The Bank's last examination was in February 2009. The report that followed concluded the Bank was "insolvent," and assigned it the "lowest possible [Risk Management Composite] rating." ECF 64 at 5. The rating indicated the Bank "exhibit[ed] extremely unsafe and unsound practices or conditions . . . and [was] of the greatest supervisory concern." ECF 64 at 5.

In April 2009, the Department informed the Bank that it was considering possession proceedings. Douglas Durbano, Chairman of the Bank's board, asked to "be informed in advance of any" supervisory actions and to have "the opportunity to attend [the hearing] and present evidence." R.II at 270. Mr. Durbano acknowledged, however, "such proceedings can be ex-parte." R.II at 270.[5]

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subject to the Department's jurisdiction. The examination must include inquiries into, among other things, "the condition and resources of the institution," "the mode of conducting and managing of its affairs," and the "actions of its directors and officers." *Id.* § 7-1-314(2). Federal law directs the FDIC to conduct similar examinations. *See* 12 U.S.C. § 1817.

5. The parties seem to agree Utah law allowed *ex parte* proceedings under these circumstances. *See* Oral Arg. at 2:28 (AWBM's counsel stating the Utah court "heard the matter, as it was entitled to, *ex parte*"). However, AWBM appears to

A few weeks later, on May 1, 2009, Commissioner Leary filed an *ex parte* petition under Utah Code Ann. § 7-2-2 seeking an order "approving the taking of possession of" the Bank. R.II at 344. Commissioner Leary alleged the Bank "failed to maintain a minimum amount of capital," the Bank was or was "about to become insolvent," and the Bank's "officers or directors have failed or refused to comply with the terms of a legally authorized order of the Commissioner." R.II at 345-46.

The state court held an *ex parte* hearing the same day. The Department informed the court that Mr. Durbano had asked to attend the hearing, but the court explained he "was not entitled to notice of or presence at the [h]earing." ECF 64 at 10. The court then heard argument on the petition. Commissioner Leary was the only witness. He testified to "each action in the petition," concluding the Bank was insolvent and the "loss" from its failure was "estimated in excess of 8 million dollars." ECF 64 at 11.

At the conclusion of the hearing, the state court granted the petition. The court determined the "Bank is not in a safe or sound condition to transact business," "failed to maintain a minimum amount of capital," "is or is about to become insolvent," and "failed or refused to comply with the terms of a legally authorized order issued by the Commissioner." R.II at 351-52. These findings,

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claim that an *ex parte* proceeding constitutes in inadequate and unconstitutional pre-seizure deprivation process. The district court found this challenge barred by the *Rooker-Feldman* doctrine, and as we will explain, AWBM waived any contrary argument by inadequately briefing the issue on appeal.

the court explained, constituted "grounds for taking possession under [the] Utah Code." R.II at 351-53.

Commissioner Leary appointed the FDIC as receiver immediately after taking possession. Later that day, he provided copies of the state court petition and possession order to AWBM. It is undisputed AWBM never invoked the procedures established by Utah Code Ann. § 7-2-3 to challenge the Bank's seizure.

C

In June 2011, a few years after the FDIC was appointed as receiver, AWBM first challenged the Bank's seizure in Utah state court by suing the State of Utah, the Department, Commissioner Leary, and the Department's supervisor of banks.[6] *See Am. W. Bank Members, L.C. v. State*, 2014 UT 49, 342 P.3d 224, 227 (Utah 2014). In March 2016, AWBM filed an amended complaint in state court, this time naming as defendants only the State of Utah, the Department, and Commissioner Leary. The defendants removed to federal court shortly thereafter. About two years later, AWBM filed the Second Amended Complaint—the operative pleading before us. AWBM asserted seven causes of action, but only two relate to this appeal.

6. Relevant to the claims before us, AWBM alleged "due process required a pre-seizure hearing." *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, 342 P.3d 224, 237 (Utah 2014). The state court dismissed AWBM's claims. *Id.* at 227. The Utah Supreme Court ultimately affirmed dismissal, but ordered AWBM's pre-seizure procedural due process claim dismissed *without* prejudice because the "defect in that claim [was] a failure to plead the claim at an adequate level of detail." *Id.* at 237.

First, AWBM alleged a pre-seizure procedural due process claim under the Utah Constitution. It claimed "seizing the Bank without a basis for finding that any of the twelve statutory preconditions to seizure [under Utah law] existed" and making "false statements and material omissions" during state court proceedings deprived it of procedural due process. R.I at 132 ¶¶ 133-34, 134 ¶ 147. Second, based on the same allegations, AWBM asserted a related civil rights claim under 42 U.S.C. § 1983 against Commissioner Leary, alleging he deprived AWBM of procedural due process under the Fourteenth Amendment by seizing the Bank "without notice and a hearing." R.I at 140.

Summary judgment litigation followed. For context, we now discuss some of those proceedings and then detail the litigation history resulting in the order on appeal—the 2022 order granting Appellees' motion for summary judgment.

1

In early 2019, AWBM moved for partial summary on its pre-seizure procedural due process claim and the related § 1983 claim against Commissioner Leary.[7] Both claims were based on the allegedly inadequate process used to seize the Bank. AWBM insisted Commissioner Leary's petition "contained nothing more than conclusory statements that were completely devoid of factual support

7. AWBM also moved for partial summary judgment as to its substantive due process claim, which is not at issue in this appeal.

or evidence" to support taking possession. ECF 45 at 16. That, in "combination with an ex parte hearing in which the Commissioner simply regurgitated the same conclusory statements, resulting in [the state court] rubber stamping the conclusions of the Commissioner," meant AWBM's "due process rights, as well as [its] civil rights, were violated." ECF 45 at 16.

Appellees opposed the motion, maintaining there was no deprivation of procedural due process. Appellees also argued AWBM impermissibly sought "to have this federal court review an order of the state court." ECF 62 at 45-46; *see also* ECF 62 at 58 ("Did [J]udge Morris make a mistake signing the order? That's really not a proper question before [the court]. . . . It's inappropriate . . . in federal court [to] second guess a state court's ruling."). Appellees did not reference the *Rooker-Feldman* doctrine, but, as we explain, that is how the district court understood their argument.

The "*Rooker-Feldman* doctrine," the district court explained, "establishes, as a matter of subject-matter jurisdiction, that only the United States Supreme Court has appellate authority to review a state-court decision." ECF 64 at 18 (quoting *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074-75 (10th Cir. 2004)). According to the district court, AWBM's procedural due process challenge based on the *ex parte* nature of the state court possession proceedings and the sufficiency of the evidence supporting the seizure were attacks on the state court's possession order and thus barred by the *Rooker-Feldman* doctrine. But to the extent AWBM's

procedural due process claim rested on Commissioner Leary's alleged misrepresentations and omissions during the possession hearing, the district court reasoned, those allegations were "independent from the [state court] Order itself" and thus were not barred by *Rooker-Feldman*. ECF 64 at 22. The district court denied summary judgment on that aspect of the claim because, viewing the evidence in favor of the non-movant at that procedural stage, the possession order was based on the 2009 Report concluding the Bank was failing—and not on Commissioner Leary's statements. ECF 64 at 32 & n.14.

Litigation continued in the district court for several years, with both parties engaging in extensive discovery.

2

In May 2022, AWBM again moved for summary judgment on its procedural due process claim and related § 1983 cause of action. This time, AWBM appeared to renounce its challenge to the allegedly "flawed examinations process employed by Defendants to seize the Bank." R.II at 199. "Instead," said AWBM, its "motion and memorandum focus exclusively on Defendants' violation of procedural due process and deprivation of civil rights for failing to provide notice and a meaningful opportunity to be heard either before *or after* the seizure of the Bank, as is clearly required by the due process clauses of the United States and Utah Constitutions." R.II at 199-200 (emphasis added). AWBM contended, for the first time, the immediate appointment of the FDIC "terminated any meaningful opportunity for *post-seizure* relief." R.II at 200 (emphasis added).

In their opposition, Appellees insisted AWBM "completely abandoned the premise of its original" summary judgment motion. ECF 284 at 18. AWBM's second motion for summary judgment, Appellees explained, was "devoid of evidence or argument of any fraud upon the state court." ECF 284 at 18. Instead, "AWBM present[ed] a new legal argument," ECF 284 at 22, that the *post-seizure* appointment of the FDIC foreclosed its ability to "challenge the Utah court's decision ordering possession of the Bank to [the Department] and [the] FDIC." ECF 284 at 24 (quoting ECF 258 at 13-14 (AWBM's second partial motion for summary judgment)). We will refer to this challenge as AWBM's Post-Seizure Claim.

Appellees moved for summary judgment a few weeks later. Relevant here, they contended AWBM lacked "standing" because its claims belonged to the FDIC under FIRREA's Succession Clause. R.III at 501-02.

The district court scheduled oral argument limited to the standing issue. At the hearing, AWBM focused only on its standing to pursue the *Post-Seizure Claim*. *See, e.g.*, R.III at 646 ("[T]his complaint is about the harm they caused at the moment of seizure."). "[O]nce the FDIC [was] appointed receiver," AWBM argued, the "state court ha[d] no jurisdiction" to review the Utah court's possession order, depriving AWBM of a post-seizure opportunity to be heard. R.III at 649. AWBM insisted this claim was not covered by the Succession Clause.

In a colloquy with AWBM's counsel, the district court asked "[w]here do you plead this [Post-Seizure Claim] in

your complaint?" R.III at 650. AWBM identified several paragraphs discussing Appellees' actions before, and during, the state court proceedings.[8] But the district court saw no allegation that AWBM was "precluded from objecting" to the seizure under Utah Code Ann. § 7-2-3(1)(a). R.III at 656. In response, AWBM maintained its claim "is inherent in the complaint if it's not directly stated in there." R.III at 657. The district court raised the same issue with Appellees, stating "[w]hat I'm struggling with . . . is the [post-seizure] theory that counsel have argued doesn't seem to be the theory that's argued in the complaint." R.III at 663. Appellees' response was unequivocal: "[i]t is not [in the complaint]," and "it is also not the basis on which [AWBM has] been litigating this case for the past several years." R.III at 663.

The district court granted Appellees' motion for summary judgment and dismissed the case with prejudice.[9]

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8. AWBM specifically relied on paragraphs "133, 134 through 136, 178, 192, 234, 251, et cetera"—to establish the Post-Seizure Claim. R.III at 656. But paragraphs 133 through 136 allege a *pre-seizure* deprivation. R.I at 132 ¶ 133 ("Commissioner Leary and UDFI violated this clearly established law by seizing the Bank without a basis for finding that any of the twelve statutory preconditions to seizure existed."); R.I at 132 ¶ 134 ("[T]he false statements and material omissions made by Commissioner Leary and UDFI to the court would constitute a violation of procedural due process."); R.I at 140 ¶ 192 ("Commissioner Leary acted intentionally and deliberately in depriving AWBM of its property without notice or a hearing."). Paragraphs 178, 234, and 251 do not relate to the procedural due process or § 1983 claims.

9. The district court denied as moot AWBM's cross-motion for summary judgment.

The district court made three rulings relevant to the issues on appeal.

First, the district court reiterated its prior conclusion that the *Rooker-Feldman* doctrine barred AWBM's challenge based on the *ex parte* nature of the state court possession proceedings and the sufficiency of the evidence supporting the possession order.[10] But the district court determined *Rooker-Feldman* did not bar AWBM's procedural due process and related civil rights claims insofar as they challenged "Commissioner Leary's purported failure to disclose material information to the state court judge" during the possession hearing. R.III at 696.

Second, the district court declined to consider AWBM's Post-Seizure Claim, reasoning it was not found "anywhere in AWBM's second amended complaint." R.III at 695 n.5.

Third, the district court ruled AWBM lacked prudential standing to advance any remaining pre-seizure deprivation claim. "While the State couches its argument in terms of standing," the district court explained, "the argument concerns what is sometimes referred to as 'prudential standing,' which 'encompasses various

10. We understand AWBM, in its second motion for summary judgment, abandoned its procedural due process challenge based on the evidentiary foundation for the possession order. R.II at 199-200 ("This motion and memorandum are without regard to Defendants' motives and/or the assertedly flawed examinations process employed by Defendants to seize the Bank."). This claim is therefore not relevant to the issues before us on appeal.

limitations, including the general prohibition on a litigant's raising another person's legal rights.'" R.III at 691 n.3 (quoting *Brumfiel v. U.S. Bank*, 618 F. App'x 933, 936 (10th Cir. 2015)). The district court concluded AWBM's claims based on Commissioner Leary's misrepresentations—which survived the *Rooker-Feldman* dismissal—"f[ell] within the scope of FIRREA's succession clause and thus were assumed by the FDIC upon its appointment as receiver." R.III at 696.

This timely appeal followed.

II

AWBM urges reversal on three grounds. First, AWBM attempts to argue against the district court's application of the *Rooker-Feldman* doctrine. Second, AWBM insists the district court erroneously refused to consider the Post-Seizure Claim. Third, AWBM maintains it has prudential standing to advance its Post-Seizure Claim, insisting the district court's contrary ruling is based on an erroneous application of FIRREA's Succession Cause. None of these arguments is availing, as we explain.

A

We begin with AWBM's arguments about the dismissal of its claims based on the *Rooker-Feldman* doctrine. Appellees contend AWBM waived the issue by failing to brief it adequately on appeal. We agree.

"The *Rooker-Feldman* doctrine precludes a losing party in state court who complains of injury caused by

the state-court judgment from bringing a case seeking review and rejection of that judgment in federal court." *In re Miller*, 666 F.3d 1255, 1261 (10th Cir. 2012). "[T]he type of judicial action barred by *Rooker-Feldman* [] consists of a review of the proceedings already conducted by the 'lower' tribunal to determine whether it reached its result in accordance with law." *Bolden v. City of Topeka, Kansas*, 441 F.3d 1129, 1143 (10th Cir. 2006). "We review the application of the *Rooker-Feldman* doctrine de novo." *In re Miller*, 666 F.3d at 1260.

Recall, the district court found the *Rooker-Feldman* doctrine barred AWBM's procedural due process challenges to the *ex parte* nature of the possession proceedings and the allegedly inadequate factual foundation for the possession order. These claims, the district court reasoned, "complain[] of injuries caused by the state proceedings granting" Commissioner Leary's petition, and the *Rooker-Feldman* doctrine thus applied. ECF 64 at 20. The "*only* claim [the court] has jurisdiction to hear," the district court explained, "is the claim that AWBM's rights were violated as a result of Commissioner Leary's purported failure to disclose material information to the state court judge that would have prevented entry of the order of possession." R.III at 696 (emphasis added). The district court explained these claims were "not barred under *Rooker-Feldman*" because they challenge "the actions of the Defendants—not Judge Morris' Order." ECF 64 at 22; *see also* R.III at 696.

On appeal, AWBM's challenge to the district court's *Rooker-Feldman* ruling appears only in a footnote in its opening brief. AWBM's argument states, in full,

> AWBM wishes to further clarify that despite the district court having surmised that AWBM is seeking to have a federal court review of the state court decision leading to the Order of Possession, such is not the case. AWBM emphatically asserts that the *Rooker-Feldman* doctrine as discussed in the district court Memorandum Decision and Order is not applicable in this case. AWBM's action is not seeking to challenge the state court's decision to issue an order authorizing [the Department] to take possession of Bank. Instead, AWBM's action is for violation of its procedural due process rights and is based upon the fundamental and unchallenged premise that procedural due process requires notice and an opportunity to be heard in either a pre-or post-seizure hearing when the government seizes property.

Opening Br. at 29 n.8. Our law is clear: "Arguments raised in a perfunctory manner, *such as in a footnote*, are waived." *United States v. Berry*, 717 F.3d 823, 834 n.7 (10th Cir. 2013) (emphasis added) (quoting *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (*en banc*)). And this argument appears in a section of the opening brief dedicated to a different issue.[11] We have no

11. AWBM did not include the district court's *Rooker-Feldman* order and most of the relevant district court briefing on the issue in its appellate appendix. "A party who seeks to reverse the decision of a district court must provide an adequate record for this court to determine that error was committed." *Travelers*

trouble concluding, on the record before us, AWBM did not adequately present on appeal the issue it contends warrants reversal.

In its reply brief, AWBM invites us to overlook the waiver. AWBM is correct that, mostly, "whether issues should be deemed waived is a matter of discretion." *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1182 (10th Cir. 2023) (quoting *United States v. Walker*, 918 F.3d 1134, 1153 (10th Cir. 2019)). Here, AWBM contends "the interests of justice" support excusing its waiver because it "did not intentionally abandon its issues" and "the issues are fully briefed." Reply Br. at 26. We are not persuaded.

According to AWBM, it "argued against the *Rooker-Feldman* doctrine [in its opening brief] regardless of the labels or nomenclature used" by contending it did "not seek recission of the Order of Possession." Reply Br. at 24-25. But this is not sufficient. AWBM does not explain the district court's ruling, why it was wrong, the claims affected, or even the standard governing our review. "[T]his court is not in the business of filling in the gaps" made by "insufficient arguments." *United States v. McBride*, 94 F.4th 1036, 1045 (10th Cir. 2024); *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th at 1203 ("Where litigants do

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Indem. Co. v. Accurate Autobody, Inc., 340 F.3d 1118, 1119 (10th Cir. 2003). And our local rules require an appellant to include "the order from which the appeal is taken," 10th Cir. R. 10.4(C)(6), "pertinent . . . opinions [and] orders of [the] district judge," 10th Cir. R. 10.4(C)(4), and "the motion," "relevant portions" of "supporting documents," and the parties' briefing, 10th Cir. R. 10.4(D)(2).

not advance a meaningful theory of error, we 'will not go hunting' for it." (quoting *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1265 (10th Cir. 2023))); *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1227 (10th Cir. 2001) ("This court will not make arguments for [appellant] that he did not make himself.").

Next, AWBM maintains we should review the *Rooker-Feldman* challenge because it was discussed in the reply brief. An appellant typically cannot raise an argument "in cursory fashion in his Opening Brief and then develop[] [it] in his Reply Brief." *United States v. Martinez*, 92 F.4th 1213, 1233 n.4 (10th Cir. 2024). And we are disinclined to address appellate arguments untested by the adversarial process. *Hill v. Kemp*, 478 F.3d 1236, 1251 (10th Cir. 2007) (explaining our waiver rules do not "compel us to undertake . . . self-directed research or pursue late and undeveloped arguments, and we exercise caution in doing so, especially in complex cases where (as here) highly competent counsel have represented the parties throughout all stages of the proceedings"); *see id.* (explaining "without the benefit of a response from appellee to an appellant's late-blooming argument, [we] would run the risk of an improvident or ill-advised opinion, given our dependence . . . on the adversarial process for sharpening the issues for decision" (quoting *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994))).

Accordingly, we must conclude AWBM has waived any appellate challenge to the district court's *Rooker-Feldman* ruling by failing to brief it adequately on appeal.

Appendix A

B

AWBM next challenges the grant of summary judgment to Appellees on its remaining procedural due process and related civil rights claims. We generally review a decision granting summary judgment "de novo, applying the same standard as the district court." *E.W. v. Health Net Life Ins. Co.*, 86 F.4th 1265, 1294 (10th Cir. 2023). Here, AWBM's allegation of error is that the district court refused to consider its Post-Seizure Claim.[12] When discussing the Post-Seizure Claim, the district court explained it would "not address the merits of AWBM's new argument where it was never properly pleaded or briefed in response to the State's motion." R.III at 696 n.5. In support of reversal, AWBM makes two arguments. First, AWBM insists it pled the Post-Seizure Claim in the operative complaint, and second, to the extent its allegations were unclear, its summary judgment briefing "sufficed to preserve the issue and tee it up for decision by the district court." Opening Br. at 30. We discern no error.

1

AWBM first insists it pled a Post-Seizure Claim, and the district court erroneously concluded otherwise. We disagree.

Federal Rule of Civil Procedure 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant

12. Recall, the Post-Seizure Claim alleges the immediate appointment of the FDIC deprived AWBM of a post-deprivation opportunity to be heard.

fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Generally, "to state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's action harmed him or her; and, what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cnty. Just. Ctr.*, 492 F.3d 1158, 1163 (10th Cir. 2007). "After all, these are, very basically put, the elements that enable the legal system to get weaving—permitting the defendant sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits." *Id.*

Guided by these principles, we agree with the district court that AWBM failed to allege the Post-Seizure Claim. AWBM claimed Appellees violated its procedural due process rights by "seizing the Bank without a basis for finding that any of the twelve statutory preconditions to seizure existed," in violation of "clearly established law" requiring a pre-seizure hearing. R.I at 132-133. The focus of the complaint was on a *pre*-seizure deprivation of procedural due process. R.I at 131 ¶ 126 ("[O]ne of the fundamental . . . premises of allowing seizure without a prior hearing is that the seizing official strictly adheres to the statutory requirements."); R.I at 134 ¶ 145 ("No reasonable Commissioner would believe that he or she could, without notice and a hearing and without strictly complying with statutory requirements, brazenly seize a financial institution."). The complaint nowhere alleged the immediate appointment of the FDIC deprived AWBM of a *post*-seizure opportunity to be heard.

We thus agree with the district court that AWBM's Post-Seizure Claim was never alleged.

2

AWBM next insists, even if its complaint is deficient, the district court should have considered statements in its summary judgment briefing to "clarify allegations in [the] complaint whose meaning is unclear." Opening Br. at 30 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 230 n.10, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)). In support, AWBM relies on *Pegram v. Herdrich*, where the Supreme Court noted, in a case involving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "we may use [plaintiff's] brief to clarify allegations in her complaint whose meaning is unclear." 530 U.S. at 230 n.10. This general rule does not apply here, where the allegations are not unclear but absent.

Rather, "[a]n issue raised for the first time in a motion for summary judgment may properly be considered a request to amend the complaint, pursuant to Federal Rule of Civil Procedure 15." *Pater v. City of Casper*, 646 F.3d 1290, 1299 (10th Cir. 2011). We "construe the district court's refusal to address [a] new issue as a denial of plaintiffs' request" to amend the complaint. *Id.* In this posture, we generally "will not reverse the court's decision [not to consider a new issue advanced at summary judgment] absent an abuse of discretion." *Id.* (quoting *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204-05 (10th Cir. 2006). The parties do not cite this authority—neither did the district court—but in the interest of fully

adjudicating AWBM's appellate challenges, we discuss these more relevant legal principles here.

Rule 15, governing the amendment of pleadings, provides district courts should grant leave to amend "when justice so requires." Fed. R. Civ. P. 15(a). "As a general rule, a plaintiff should not be prevented from pursuing a claim merely because the claim did not appear in the initial complaint." *Pater*, 646 F.3d at 1299. However, a court properly denies leave to amend when "a late shift in the thrust of the case will [] prejudice the other party in maintaining his defense upon the merits." *Id.* (alteration in original) (quoting *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991)). Indeed, "untimeliness alone is a sufficient reason to deny leave to amend . . . when the party filing the motion has no adequate explanation for the delay." *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1365-66 (10th Cir. 1993). And when "the party seeking amendment kn[ew] or should have known of the facts upon which the proposed amendment is based but fail[ed] to include them in the original complaint," a court appropriately denies leave to amend. *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *State Distrib., Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 416 (10th Cir. 1984)). A district court may also "withhold leave to amend if the amendment would be futile." *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1218 (10th Cir. 2022). Amendment is futile if "the complaint, as amended, would [still] be subject to dismissal." *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013) (quoting *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004)). We review futility determinations

de novo. *Cohen v. Longshore*, 621 F.3d 1311, 1314-15 (10th Cir. 2010).

Applying these standards, we discern no reversible error in the district court's refusal to consider the Post-Seizure Claim.

First, AWBM's Post-Seizure Claim, at least on the arguments before us, is likely unavailing as a matter of law. It is undisputed Utah law provided a post-seizure process to seek the Bank's return. Utah Code Ann. § 7-2-3 (explaining a person "aggrieved by the taking" may challenge it, and, if successful, the court must "order the commissioner to surrender possession of the institution"). Indeed, AWBM affirmatively alleged "a post-seizure injunction is available to one whose financial institution has been seized." R.I at 137 ¶ 168. There is no question AWBM never *tried* to use this process. AWBM simply decided, "[i]mmediately after the seizure of the Bank," that to "petition the court to undo the seizure would not provide any meaningful relief." R.I at 138 ¶ 173; *see also* R.I at 137 ¶ 168 (alleging the return of the Bank "would not restore the public's confidence in the Bank which had been wrongfully destroyed by Commissioner Leary's actions"). "Having ignored the available procedures," AWBM is in "no position to argue that they are unconstitutional." *Weinrauch v. Park City*, 751 F.2d 357, 360 (10th Cir. 1984). We are likewise unpersuaded by AWBM's argument that federal law—12 U.S.C. § 1821(j)—deprived the Utah courts of jurisdiction to overrule the order of possession as soon as Commissioner Leary appointed the FDIC as

receiver.[13] We are aware of no court applying § 1821(j) in the manner AWBM suggests, and AWBM cites no authority to support its position.[14]

Second, AWBM raised the Post-Seizure Claim eleven years after first challenging the Bank's seizure in state court, four years after the operative complaint was filed, and two years after the district court ruled on AWBM's partial summary judgment motion. We have affirmed the denial of leave to amend even when the request was made much earlier. *Las Vegas Ice & Cold Storage Co.*, 893 F.2d

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13. That statute provides, "[e]xcept as provided in this section, no court may take any action . . . to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

14. As Appellees point out, at least one of our sister circuits has rejected AWBM's interpretation. Resp Br. at 52-54; *Hindes v. F.D.I.C.*, 137 F.3d 148, 168 (3d Cir. 1998) (finding § 1821(j) barred *a federal court* from removing the FDIC as receiver because "there is an adequate procedure available" under *Pennsylvania law* "to challenge the appointment"). Moreover, AWBM appears to suggest appointing the FDIC as receiver somehow "dispossess[ed] the UDFI of the Bank and its assets and preempt[ed the] application of Utah Code § 7-2-3." Opening Br. at 3; *see also* Oral Arg. at 3:00-3:06 (suggesting the Department foreclosed post-seizure relief by "transferring" the Bank to the FDIC). AWBM cites no authority supporting this assertion, and Utah law appears to refute it directly. *See* Utah Code Ann. § 7-2-1(4) ("Upon taking possession of an institution . . . the *commissioner* is vested by operation of law with the title to and the right to possession of all assets. . . . While in possession of an institution . . . the commissioner or any receiver . . . may exercise any or all of the rights, powers, and authorities granted to the *commissioner* . . . ." (emphasis added)).

at 1185 (denying a motion to amend filed "approximately a year and a half after the complaint was filed, 9 months after partial summary judgment was entered and only a few months before the case was scheduled for trial"). Finally, AWBM has never suggested the Post-Seizure Claim relies on previously unavailable information. Instead, it appears the theory of the case shifted from a pre-seizure deprivation to a post-seizure deprivation. *Pater*, 646 F.3d at 1299 (explaining a plaintiff cannot simply wait until "the last minute to ascertain and refine the theories on which they intend to build their case" (quoting *Evans*, 936 F.2d at 1091)).

The district court thus did not err by declining to consider AWBM's Post-Seizure Claim, advanced for the first time at summary judgment.

C

Finally, AWBM challenges the district court's grant of summary judgment based on FIRREA's Succession Clause. As we will explain, waiver forecloses this appellate challenge.

Appellees moved for summary judgment arguing, under the Succession Clause, the FDIC inherited the right to bring AWBM's claims.[15] Because AWBM attempted to

15. When the FDIC is appointed as a receiver, FIRREA's Succession Clause grants it "all rights, titles, powers, and privileges of the [Bank], and of any stockholder . . . of such [Bank] with respect to the [Bank] and the assets of the [Bank]." 12 U.S.C. § 1821(d)(2)(A)(i). Because we find AWBM waived any challenge to

assert a claim belonging to the FDIC, Appellees contended AWBM lacked "standing." R.III at 691.

The district court held AWBM's claims based on Commissioner Leary's alleged misrepresentations during the state court possession proceedings were covered by FIRREA's Succession Clause. Those claims, in the district court's view, sought to assert rights of AWBM as the Bank's "stockholder" with respect to the Bank and the Bank's assets—and thus succeeded to the FDIC. R.III at 696. The district court thus concluded AWBM lacked prudential standing. "Under the prudential standing doctrine, a party may not 'rest its claims' on the rights of third parties where it cannot 'assert a valid right to relief of its own.'" *Hill v. Warsewa*, 947 F.3d 1305, 1309-10 (10th Cir. 2020) (quoting *Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1170 (10th Cir. 2011) (*en banc*)).

On appeal, AWBM insists it has prudential standing to bring the *Post-Seizure Claim*. Opening Br. at 16 ("[T]he right of AWBM to seek redress for the violation of a constitutional right, and specifically here, the right to a *post-seizure hearing* after the seizure of its property, must be regarded as beyond the scope of § 1821(d)(2)(A)." (emphasis added)). But AWBM's appellate challenge is based on a fundamental misunderstanding of the district court's ruling.

According to AWBM, the district court held it "lacked 'prudential standing' to assert *any* of its claims"—which

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the district court's Succession Clause analysis, we do not discuss this statute, or its proper interpretation, further.

AWBM takes to include the Post-Seizure Claim. Opening Br. at 4 (emphasis added). But recall, the district court determined AWBM did not even *allege* a Post-Seizure Claim. R.III at 696 n.5 (district court stating it "will not address the merits of [the Post-Seizure Claim] where it was never properly pleaded or briefed in response to the State's motion [for summary judgment]"). When it comes to prudential standing, the district court considered only whether AWBM's claims challenging Commissioner Leary's alleged misrepresentations succeeded to the FDIC. And as Appellees persuasively argue, "nowhere in its opening brief does AWBM mention *that* claim." Resp. Br. at 46.

By failing to address the only prudential standing ruling the district court made—that the claim concerning Commissioner Leary's alleged misrepresentations succeeded to the FDIC—AWBM has waived any appellate challenge to it. *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1050 n.18 (10th Cir. 2011) ("Because [appellant] has failed to present any argument or authority in support of this particular . . . claim, we decline to further consider it on appeal.").

III

We AFFIRM the district court's grant of summary judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED JUNE 21, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:16-cv-326
Judge Clark Waddoups

AMERICA WEST BANK MEMBERS,

Plaintiff,

v.

THE STATE OF UTAH, *et al.*,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is Defendants' motion for summary judgment, (ECF No. 280), which argues, among other things, that the each of the claims asserted by Plaintiff America West Bank Members (hereinafter "AWBM" or the "Holding Company") in this action were assumed by the Federal Deposit Insurance Corporation ("FDIC"), pursuant to 12 U.S.C. § 1821(d)(2)(A), upon the FDIC's appointment as receiver for America West Bank (hereinafter the "Bank"). For the reasons set forth herein, the court agrees and grants Defendants' motion for summary judgment.

Appendix B

Background[1]

AWBM is a Utah limited liability company that was the sole owner of America West Bank. In or around 2007, the Bank allegedly came up with a novel business plan, referred to by AWBM as the "member banking concept," whereby the Bank would be organized in a manner that combined the best aspects of the banking and credit union models. Under the new model, the Bank would have the ability to distribute earnings to its member owners, like a bank, while avoiding the corporate level taxes that a traditional bank would normally have to pay. (2d Am. Compl. at ¶¶ 21-24, ECF No. 33.)

In late 2007, the Bank received confirmation from the Federal Reserve that it could move forward with its first proposed private placement and issuance of preferred member equity shares in order to implement the plan. (*Id.* at ¶ 25.)

In early 2008, however, AWBM alleges that the FDIC and the Utah Department of Financial Institutions

1. Because determining whether AWBM's claims were assumed by the FDIC pursuant Section 1821(d)(2)(A) depends on the nature of the claims asserted by AWBM in its operative complaint, the background facts described herein are derived from the allegations of AWBM's second amended complaint. (ECF No. 33.) The court recognizes that several of the allegations summarized herein are disputed by Defendants. Those factual disputes, however, are not material to the outcome of this motion. Indeed, the only facts that are material to the outcome of this motion are (1) the undisputed fact that the FDIC was appointed as receiver of the Bank on May 1, 2009 (Notice of Appointment, ECF No. 280-41) and (2) the undisputed fact that the claims described herein were alleged by AWBM in its second amended complaint (2d Am. Compl., ECF No. 33).

("UDFI") "temperament" towards the bank suddenly changed and, according to AWBM, both institutions became aggressive and hostile against the Bank. (*Id.* at ¶ 27.) According to AWBM, the change in temperament by the FDIC and UDFI was the result of the FDIC changing its mind about whether the Bank's member banking concept should be allowed to be implemented, which led to the FDIC deciding to "kill the Bank in order to put an end to the new concept." (*Id.* at ¶ 31.)

AWBM alleges that the UDFI and FDIC accomplished their goal of "killing" the bank by changing their methodology for valuing the Bank's assets in an unreasonable way in order to "manufactur[e] a supposedly data-driven excuse to justify a decision that had already been made to shut down the Bank." (*Id.*at ¶ 46.) According to AWBM, the methodology used to value the Bank's assets was different than the one used to evaluate any other bank, and AWBM claims that any bank would appear to be failing if the same methodology was applied to it. (*Id.* at ¶¶ 47-48.)

After several months of back and forth between the Bank and regulators about the condition of the bank, Defendant G. Edward Leary, the commissioner of UDFI, filed an ex parte petition in Utah state court on May 1, 2009 seeking an order granting UDFI possession of the Bank. (*Id.* at ¶ 67.) The state court held a hearing on the same day, without the attendance of the Bank or AWBM. AWBM alleges that Commissioner Leary failed to disclose material information to the state court at the hearing, including the amount of additional capital that would have been required to meet the Bank's minimum

capital requirements. (*Id.* at ¶¶ 100-103.) At the conclusion of the hearing, the petition was granted, without notice to AWBM or the Bank, despite the Bank's previous request that it be given notice of any action taken by the UDFI. (*Id.* at ¶¶ 106-107.) The FDIC was appointed as receiver for the Bank on the same day. (*Id.* at ¶ 108.) The FDIC "immediately and publicly announced the failure and seizure of the Bank and began liquidating assets of the Bank." (*Id.* at ¶ 109.) The depositor accounts were taken over by Cache Valley Bank. (*Id.* at ¶ 114.)

According to AWBM, the Bank's assets were liquidated at values that exceeded the regulator's estimates, giving the purchasers of the assets "significant profits from their resale" that could have been realized by the Bank if it had not been seized. (*Id.* at ¶¶ 116-119.)

Procedural History

Utah Code § 7-2-3 provides that a person or institution that the commissioner of UDFI has taken possession of, and that considers itself aggrieved by the taking, may apply to the court within 10 days of the taking to enjoin further proceedings.

Rather than asking the state court to enjoin the taking within the 10-day statutory period, however, AWBM waited more than two years to challenge the UDFI's possession of the bank, bringing a separate action in state court in 2012 (the "2012 Action"). The 2012 Action raised several of the same claims and allegations that have been asserted in this suit. The 2012 Action was dismissed without prejudice under Rule 12(b)(6) of the Utah Rules

of Civil Procedure for failing to allege sufficient facts. The Utah Supreme Court upheld the dismissal in 2014.[2] *See Am. West Bank Members, L.C. v. Utah*, 2014 UT 49, 342 P.3d 224.

AWBM subsequently initiated the current action, initially in state court, on March 23, 2016. (ECF No. 2-1.) AWBM's initial complaint asserted claims against the State of Utah, UDFI, and Commissioner Leary (collectively, the "State") for breach of contract, violation of due process, a violation of the Takings Clause of the Utah Constitution. (*Id.*) The State then removed the action to this court on April 21, 2016. (ECF No. 2.)

On February 5, 2018, the court partially granted a motion to dismiss filed by the State, dismissing AWBM's contract claims on statute of limitation grounds, and permitted AWBM to file an amended complaint to plead its taking claims with more particularity. (ECF No. 29.) Thereafter, AWBM filed its second amended complaint, which is now the operative complaint in this action, on April 6, 2018, (ECF No. 33).

The second amended complaint asserts seven causes of action: (1) violation of procedural due process, (2)

2. The district court in the 2012 Action apparently dismissed AWBM's procedural and substantive due process claims with prejudice on the grounds that AWBM did not have a clearly established constitutional right to a pre-seizure hearing. The Utah Supreme Court reversed that decision, holding that the dismissal should have been without prejudice because determining whether a pre-seizure hearing was constitutionally required involved a fact-dependent inquiry. *See Am. West Bank Members, L.C.*, 2014 UT 49 at ¶¶ 37-44, 342 P.3d 224.

violation of substantive due process, (3) violations of § 1983 and § 1985 by Commissioner Leary, (4) physical takings claim in violation of the Utah Constitution, (5) regulatory takings claim in violation of the Utah Constitution, (6) physical takings claim in violation of the U.S. Constitution, and (7) regulatory takings claim in violation of the U.S. Constitution. (ECF No. 33 at ¶¶ 120-263.)

In its procedural due process claim, AWBM alleges that it had a clearly established constitutional right to pre-seizure notice and a hearing because Commissioner Leary knew or should have known that the grounds relied on to obtain the seizure order were false. According to AWBM, the allegations about the Bank's status that were included in the seizure petition could not have been made in good faith in light of facts that Leary was or should have been aware of.

AWBM's substantive due process claim alleges that the Utah statute authorizing UDFI to seize the bank without a hearing is unconstitutional as applied to the Bank to the extent it permitted such a seizure on the grounds relied on by Commissioner Leary.

AWBM's §§ 1983/1985 against Commissioner Leary is based on largely the same allegations underlying the due process claims—that Leary violated AWBM's constitutional rights by seizing the bank without a pre-seizure hearing.

AWBM's takings claims allege that the seizure of the bank constitutes either a physical or regulatory taking of AWBM's property interest in "the profitable use and

enjoyment of its rights under the [Bank's] charter and the valuable and marketable assets (including notes, trust deeds, accounts, investments, going concern, and good will) which AWBM had acquired and developed in operation of the Bank." (*Id.* at ¶ 234.)

As remedies, the second amended complaint seeks "an order requiring UDFI to issue a corrected press release with terms approved by the court; an order requiring UDFI to reissue the Bank's charter and provide the Bank with the minimum capital required for operation; and an order requiring UDFI to correct its files and records consistent with the findings of the court." (*Id.* at ¶ 175.) The complaint also seeks monetary damages, including damages in amount that would "put AWBM in the position it would have occupied but for the [taking of its property interests]." (*See, e.g., id.* at ¶ 238.)

On February 9, 2019, AWBM filed a motion seeking partial summary judgment and a declaration on the grounds that it was undisputed that its due process rights had been violated. (ECF No. 45.) The court denied AWBM's motion on April 20, 2020. (ECF No. 64.) In doing so, the court concluded that it lacked subject matter jurisdiction, under the *Rooker-Feldman* doctrine, over AWBM's claims to the extent they challenged the state court's decision to issue an order authorizing UDFI to take possession of the bank without providing the Bank or AWBM with a pre-seizure hearing. (*Id.* at 18-24.) The court also concluded, however, that the *Rooker-Feldman* doctrine did not bar the court from considering AWBM's claims to the extent they were based on the allegation that the state court's order of possession was obtained

as a result of Commissioner Leary's purported failure to disclose material facts to the state court that, if known, would have resulted in disapproval of the seizure. (*Id.*)

After making its jurisdictional determination, the court held that, when the facts were viewed in the light most favorable to the State, Commissioner Leary had a legitimate basis to seek an order for possession of the bank and that AWBM had waived its procedural due process claim by failing to seek an injunction from the state court within 10 days of the taking. (*Id.* at 34.) The court also held that it lacked jurisdiction over AWBM's substantive due process claim to the extent it was based on the state court's decision to not allow the Bank to participate in the May 1, 2009 hearing that preceded the order of possession. (*Id.* at 35.) The court also denied summary judgment on AWBM's Section 1983 claim because it depended on a finding that AWBM's procedural or substantive due process rights had been violated. (*Id.*)

Analysis

In its motion for summary judgment, the State argues (among other things) that AWBM lacks standing[3] to bring

3. While the State couches its argument in terms of standing, the argument does not concern this court's Article III standing and, thus, does not implicate the court's subject matter jurisdiction. Instead, the argument concerns what is sometimes referred to as "prudential standing," which "encompasses various limitations, including the general prohibition on a litigant's raising another person's legal rights." *See Brumfiel v. U.S. Bank*, 618 F. App'x 933, 936 (10th Cir. 2015). Rule 17(a)(1) of the Federal Rules of Civil

the claims asserted in the second amended complaint because each of those claims are derivative of claims that belong to the Bank and that all of AWBM's derivative rights, relating to the Bank's seizure, were transferred to the FDIC pursuant to 12 U.S.C. § 1821(d)(2)(A) upon the FDIC's appointment as the Bank's receiver. (ECF No. 280 at 26-30.)

Section 1821(d)(2)(A), which was amended in relevant part by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), provides that, when the FDIC is appointed as a conservator or receiver of a bank (including a state bank), the FDIC "shall, as conservator or receiver, and by operation of law, succeed to--

> (i) all *rights, titles, powers, and privileges* of the insured depository institution, *and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution*; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(Emphasis added).

Procedure, which required that actions be prosecuted in the name of the real party in interest, "essentially codifies this portion of the prudential standing doctrine." *Id.*

Appendix B

The Tenth Circuit has held that, by passing FIRREA, "Congress has transferred everything it could to the FDIC, and that includes a stockholder's right, power, or privilege to demand corporate action or to sue directors or others when action is not forthcoming." *Barnes v. Harris*, 783 F.3d 1185, 1192 (10th Cir. 2015) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)).

In *Barnes v. Harris*, the Tenth Circuit addressed application of Section 1821(d)(2)(A) under factual circumstances analogous to those presented in this case. *Barnes* concerned the failure of Barnes Banking Company, a Utah bank that was seized and put into FDIC receivership in 2010. The suit, which was initially filed in state court, was a derivative action brought by shareholders against Barnes Bancorporation, the holding company of Barnes Banking Company, as a nominal defendant and against the holding company's officers and directors for breach of fiduciary duty. *Id.* at 1188. The complaint stated that the officers and directors were being sued in their capacity as officers and directors of the holding company, but the factual allegations centered on their mismanagement of the bank. *Id.*

The FDIC moved to intervene in the state action, arguing that "it possessed the exclusive statutory authority under FIRREA to assert the derivative claims at issue." *Id.* at 1189. After being allowed to intervene, the FDIC removed the action to federal court. *Id.* Once in federal court, the FDIC sought and obtained dismissal of the plaintiffs' complaint in full. *Id.*

Appendix B

On appeal, the Tenth Circuit held that the claims asserted by the plaintiffs belonged to the FDIC under FIRREA. It reasoned that "[i]f the Holding Company's claims are based on harm derivative of injuries to the Bank, then they qualify as claims of a shareholder 'with respect to the [bank] and the assets of the [bank]' and belong to the FDIC" under Section 1821(d)(2)(A)(i). *Id.* at 1193.

The court then looked to Utah law to determine whether the claims asserted were derivative claims. Interpreting Utah law, the court concluded that "Utah courts look to the nature of the injury in determining whether a claim is derivative or direct." *Id.* "[I]n a direct action, the plaintiff can prevail without showing an injury to the corporation—the shareholder need show only an injury to him-or herself that is distinct from that suffered by the corporation." *Id.* (quoting *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1280 (Utah 1998)) (alteration in *Barnes*). But if the "plaintiffs were injured because the company was injured, the claim is derivative." *Id.* (quoting *Dansie v. City of Herriman*, 2006 UT 23, 134 P.3d 1139, 1144 (Utah 2006)) (cleaned up).

Applying Utah law, the court concluded that, with one exception, the plaintiffs did not allege any harm to the holding company that was distinct and separate from the harm to the bank. *Id.* The plaintiffs argued that the holding company's payment of $265,000 in dividends to shareholders caused a harm that was unique to the holding company because it left the holding company

"unable to serve as a source of financial strength for the Bank." *Id.* at 1194. The court, however, held that any harm from the dividend payment was derivative, because the dividend only caused harm because of the bank's failure, and not any independent harm to the holding company. *Id.* Thus, the court held that because the plaintiff's sought "redress for injuries that first befell the Bank, and reached the Holding Company only derivatively as a result of its ownership interest in the Bank," the claims were "decidedly derivative in nature." *Id.*

While *Barnes* makes clear that a stockholder's claims that are derivative of claims belonging to a bank in FDIC receivership are assumed by the FDIC under FIRREA, it does not address the question of whether other claims, that are not classically considered to be derivative, may also fall within the scope of FIRREA's succession clause.[4] On that point, the Court finds the First Circuit's decision in *Zucker v. Rodriguez*, 919 F.3d 649 (1st Cir. 2019), to be instructive.

In *Zucker*, the First Circuit rejected the plaintiff's argument that Section 1821(d)(2)(A)'s succession language applied only "to claims that shareholders may assert

4. In *Barnes*, the Tenth Circuit did hold that one of the plaintiffs' claims was not barred by FIRREA. 783 F.3d at 1196-97. That claim concerned use of funds that the FDIC asserted no claim to and "which were apparently Holding Company property rather than bank assets." *Id.* at 1196. Notably, the Tenth Circuit did not clarify in *Barnes* whether that claim was exempted from FIRREA's succession clause based solely on the fact that it was a direct claim or because it was otherwise outside the scope of Section 1821(d)(2)(A). *Id.*

derivatively under state law on behalf of the institution in receivership," concluding that there was "no support in the text of § 1821(d)(2)(A) for such a judicial gloss." 919 F.3d at 656. Instead, the court held that the plain language of the statute should be applied, in a step-by-step process, to determine whether the claim at issue falls within the scope of FIRREA's succession clause, without regard to whether it is a derivative or direct claim.

The first step in the analysis described in *Zucker* is to determine whether the claim asserts a "right of a stockholder" of the bank. *Id.* The claim at issue in *Zucker* asserted a breach of duties owed to the bank's holding company by the holding company's officers and directors. The court held that although the claims were directed at the officers and directors of the holding company, "the suit depend[ed] entirely on the Holding Company's position as a Bank stockholder, as it seeks to recover for lost interest in the Bank." *Id.* Therefore, the court concluded that the rights being asserted were the rights of the holding company as a stockholder of the bank. Accordingly, they met the first element of Section 1821(d)(2)(A)'s requirements.

In the second step, the court considered whether the rights being asserted were "with respect to the institution and the assets of the institution." The court held that they were, because "the claims depend on the Holding Company's proving that malfeasance by its directors depressed the Bank's assets." *Id.* at 656-57. Accordingly, the plaintiff's claim also met the second element of Section 1821(d)(2)(A) and was, therefore, assumed by the FDIC,

despite the plaintiff's contention that the claim was direct rather than derivative. *Id.*

The court finds the reasoning of the First Circuit in *Zucker* with respect to the scope of FIRREA's succession clause persuasive. There is nothing in the plain language of Section 1821(d)(2)(A) that limits the scope of the statute's succession language to derivative claims exclusively. Accordingly, the court will apply the two-step analysis set forth in *Zucker* to determine whether AWBM's claims were assumed by the FDIC pursuant to FIRREA's succession clause.

Before doing so, however, the court must against determine which of AWBM's it has jurisdiction to decide. As explained above, the court has already held that the *Rooker-Feldman* doctrine bars the court from hearing AWBM's claims to the extent they relate to actions taken by the state court in the state court's possession proceedings. (*See* Mem. Dec. Denying Mot. for P. Summ. J., ECF No. 64.) Thus, the court has no jurisdiction to hear AWBM's claims to the extent they are based on the state court's decision not to allow the Bank or AWBM to participate in the May 1, 2009 hearing that preceded the order of possession.[5]

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5. At oral argument on the State's motion, AWBM raised a new argument that appeared nowhere in their briefing in response to the State's motion for summary judgment and was not pleaded anywhere in AWBM's second amended complaint—that AWBM was deprived of a post-seizure hearing, and therefore had its due process rights violated, as a result of UDFI appointing the FDIC immediately after taking possession of the Bank. According to this new argument, by

Appendix B

As set forth in the court's prior *Rooker-Feldman* analysis, the only claim that it has jurisdiction to hear is the claim that AWBM's rights were violated as a result of Commissioner Leary's purported failure to disclose material information to the state court judge that would have prevented entry of the order of possession. (*Id.* at 24.) In other words, the court has jurisdiction to consider AWBM's claim to the extent it is based on allegations that the order of possession was obtained through fraud. (*Id.*)

Having narrowed the claims, as required by the *Rooker-Feldman* doctrine, it is evident that AWBM's claims fall within the scope of FIRREA's succession clause and thus were assumed by the FDIC upon its appointment as receiver of the Bank.

First, it is clear that the claims assert rights that belong to AWBM by virtue of its status as a stockholder of the Bank. To succeed on its claims, AWBM would have to prove that Defendants withheld material information from the state court regarding the Bank, such as the

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appointing the FDIC as receiver immediately after the state court issued its order of possession, the State stripped the state court of jurisdiction and precluded AWBM from asserting a timely objection to the seizure within the 10-day period allowed by Utah Code § 7-2-3. The court is skeptical of AWBM's argument, which does not appear to be supported by any legal authority. Moreover, the court is also likely barred by the *Rooker-Feldman* doctrine from considering the new claim, as the state court authorized appointment of a receiver and was aware of the FDIC's involvement in the case. (*See* Order of Possession at 4, ECF No. 280-40.) Nevertheless, the court will not address the merits of AWBM's new argument where it was never properly pleaded or briefed in response to the State's motion.

amount of capital needed by the Bank to stay solvent, the alleged change in accounting methodology by UDFI, and the Bank's objection to that change. To the extent AWBM has any rights with respect to the information that was presented to the state court during the possession hearing, they only exist because AWBM is a stockholder of the Bank. Therefore, AWBM's claim are claims asserting rights of a stockholder of the Bank, meeting the first element of Section 1821(d)(2)(A)'s requirement.

Second, it is also evident that the rights asserted by AWBM are rights "with respect to the" Bank. AWBM claims that its due process rights were violated, and that its property rights were unlawfully taken without just compensation, when the Bank was unlawfully seized after Defendants purportedly obtained an unlawful order of possession from the state court by fraud. Thus, to sustain its claims, Defendants' must prove that the seizure, an injury to the Bank, was unlawful. And without showing an injury to the Bank resulting from the purportedly unlawful seizure, AWBM has no claim.

Moreover, the complaint makes clear that AWBM is seeking recovery of the assets of the Bank. As a remedy, the complaint seeks "an order requiring UDFI to issue a corrected press release with terms approved by the court; an order requiring UDFI to reissue the Bank's charter and provide the bank with the minimum capital required for operation; and an order requiring UDFI to correct its files and records consistent with the findings of the court." (2d Am. Compl. at ¶ 183, ECF No. 33.) And in its taking claims, AWBM alleges it was deprived of

"the profitable use and enjoyment of its rights under the charter and the valuable and marketable assets (including notes, trust deeds, accounts, investments, going concern, and good will) which AWBM had acquired and developed in operation of the Bank" (*Id.* at ¶ 234.) Each of these are assets of the Bank, not AWBM. Thus, it is clear that AWBM's claims assert rights "with respect to . . . the assets" of the Bank as well, meeting Section 1821(d)(2)(A)'s second element.

Because AWBM's claims, as narrowed by the *Rooker-Feldman* doctrine, assert rights of a stockholder of the Bank with respect to the Bank and its assets, they fall squarely within the scope of FIRREA's succession clause and were assumed by the FDIC upon its appointment as the Bank's receiver. Therefore, AWBM cannot pursue those claims, on its own behalf, in this action.

AWBM argues that, despite the plain language of Section 1821(d)(2)(A) and the precedent cited above, its claims are distinguishable from those that courts have found to have been assumed by the FDIC because they are against third parties rather than insiders of AWBM or the Bank. But there is nothing in the language of Section 1821(d)(2)(A) that distinguishes between third party claims and claims against insiders. Nor has AWBM cited any legal authority indicating that such a distinction makes a difference. To the contrary, other federal courts have applied FIRREA's succession clause to third party claims. *See, e.g., Zucker*, 919 F.3d at 656 (shareholder's claims to bank's insurance proceeds transferred to FDIC under 12 U.S.C. § 1821(d)(2)(A)(i)); *Am. Nat'l Ins. Co. v.*

JPMorgan Chase & Co., 893 F. Supp. 2d 218, 218 (D.D.C. Sept. 28, 2012) (claims of shareholder's of Washington Mutual against JPMorgan Chase for tortious interference transferred to FDIC under FIRREA's succession clause); *Lubin v. Cincinnati Ins. Co.*, Case No. 1:09-CV-1156-RWS, 2009 U.S. Dist. LEXIS 112019, 2009 WL 4641765 (N.D. Ga. Nov. 30, 2009) (FDIC succeeded to derivative claims against bank's insurer brought by bankruptcy trustee of bank's holding company). Thus, AWBM's claims are not exempt from the requirements of Section 1821(d)(2)(A) merely because they are asserted against third parties rather than company insiders.

AWBM also argues that it should be allowed to proceed because making demand on the FDIC to bring the claims asserted in this action would be futile. AWBM's argument misconstrues the import of FIRREA's succession clause. Nothing in Section 1821(d)(2)(A) grants AWBM the right to proceed derivatively in this action on behalf of the FDIC. Nor has AWBM cited any authority suggesting that it has such a right to do so. Section 1821(d)(2)(A) transfers, at a minimum, AWBM's right to bring derivative claims on behalf of *the Bank* to the FDIC. It does not create a new right to proceed derivatively on behalf of *the FDIC* once those rights have been transferred.[6]

Because AWBM's claims fit squarely within the scope of FIRREA's succession clause, they were assumed by

6. Even if AWBM did have a right to proceed derivatively on behalf of the FDIC, its second amended complaint does not purport to be bringing claims derivatively and does not comply with the requirements of Rule 23.1 of the Federal Rules of Civil Procedure.

the FDIC upon its appointment as receiver of the Bank. AWBM is, thus, not the proper party to assert them in this action and the State is entitled to summary judgment.

Conclusion

For the reasons stated herein, the State's motion for summary judgment is GRANTED. AWBM's claims are dismissed with prejudice and all other pending motions are denied as moot.

SO ORDERED this 21st day of June, 2023.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED JUNE 22, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Case Number: 2:16-CV-326-CW-DAO

AMERICA WEST BANK MEMBERS,

Plaintiff,

v.

THE STATE OF UTAH, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED

that Defendant's motion for summary judgment is **GRANTED** and that the action is **DISMISSED WITH PREJUDICE**.

June 21, 2023
Date

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Judge

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, FILED APRIL 2, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:16-cv-326

AMERICA WEST BANK MEMBERS,

Plaintiff,

v.

THE STATE OF UTAH, ACTING THROUGH THE UTAH DEPARTMENT OF FINANCIAL INSTITUTIONS, AND G. EDWARD LEARY, AN INDIVIDUAL,

Defendants.

Filed April 2, 2020

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge Clark Waddoups

Appendix D

INTRODUCTION

Before the court is Plaintiff's Motion for Partial Summary Judgment, (ECF No. 45). As explained below, the court DENIES the Motion.

BANK REGULATION BACKGROUND

The Utah Department of Financial Institutions (the Utah Department) is a "self-supported agency of state government." It is responsible for chartering, regulating, and examining state-chartered financial institutions. It currently regulates 21 banks, 30 credit unions, 15 industrial banks, and two trust companies. The Department's Commissioner is G. Edward Leary (Commissioner Leary).

The Federal Deposit Insurance Corporation (FDIC) is an agency created by Congress. Its stated mission is to "maintain stability and public confidence in the nation's financial system by," among other things "examining and supervising financial institutions for safety and soundness and consumer protection."

According to Commissioner Leary, both the Utah Department and the FDIC "regularly conduct examinations of banks to determine their safety and soundness." (Leary Decl. ¶ 3, ECF No. 50-6 at 3.) "The results of those examinations are summarized in Reports of Examination." (Leary Decl. ¶ 3, ECF No. 50-6 at 3.) The Reports of Examination contain a "Risk Management Composite" Rating. (*See* ECF No. 50-1 at 4; 50-2 at 4.)

These ratings range from 1 to 5, with 1 having the least regulatory concern and 5 having the greatest concern. For example, the "rating definition" for a rating of "1" provides, in part, that "[f]inancial institutions in this group are sound in every respect. . . ."[1] In contrast, the "rating definition" for a rating of "5" provides, in part, that "[f]inancial institutions in this group exhibit extremely unsafe and unsound practices or conditions; exhibit a critically deficient performance; often contain inadequate risk management practices relative to the institution's size, complexity, and risk profile; and are of the greatest supervisory concern."[2]

UNDISPUTED FACTS

"On or around May 1, 2000, America West Bank, (the Bank) was chartered by" the Utah Department. (*See* ECF No. 45 at 6; ECF No. 49 at 11 n. 2.) The Bank was authorized to operate in Utah. (*See* ECF No. 45 at 6; ECF No. 49 at 11 n. 2.) In 2005 and 2007 the Bank received Risk Management Composite ratings of "2." (ECF No. 50-1 at 4.)

In 2007 the Utah Department and the FDIC "conducted an examination of America West Bank," and the results were "summarized in [a] January 22, 2008" Report of Examination. (Leary Decl. ¶ 3, ECF No. 50-6 at 3.) The Report included a summary, which provided:

1. https://www.fdic.gov/regulations/examinations/ratings/#4

2. *Id.*

Appendix D

> The overall condition of America West Bank . . . has deteriorated significantly since the last examination and is now deficient. Adversely classified assets have increased dramatically as a result of excessive concentrations in commercial real estate and a downturn in the local real estate market. Additionally, management has continued to lend and grow the portfolio despite obvious signs of adverse conditions in the real estate business cycle. The Allowance for Loans and Lease Losses is inadequate and not reflective of a significant level or trend in nonperforming loans and weakened real estate conditions. The level of capital is deficient given the weakening asset quality and the hazard related to extreme concentrations in real estate. Liquidity, sensitivity and earnings will be adversely impacted if the deteriorating trends in asset quality continue. The Board and Management's performance is deficient and lack of experience at key leadership positions puts into question their capability to adequately adjust their operation to a changed economic environment.

(ECF No. 50-1 at 4.) The January 22, 2008, Report of Examination assigned America West Bank a Risk Management Composite rating of "4." (ECF No. 50-1 at 4.) The FDIC's rating definition for this rating provides:

> Financial institutions in this group generally exhibit unsafe and unsound practices or

> conditions. There are serious financial or managerial deficiencies that result in unsatisfactory performance. The problems range from severe to critically deficient. The weaknesses and problems are not being satisfactorily addressed or resolved by the board of directors and management. Financial institutions in this group generally are not capable of withstanding business fluctuations. There may be significant noncompliance with laws and regulations. Risk management practices are generally unacceptable relative to the institution's size, complexity, and risk profile. Close supervisory attention is required, which means, in most cases, formal enforcement action is necessary to address the problems. Institutions in this group pose a risk to the deposit insurance fund. Failure is a distinct possibility if the problems and weaknesses are not satisfactorily addressed and resolved.[3]

On May 16, 2008, Commissioner Leary and George Doerr, the Deputy Regional Director for the San Francisco Region of the FDIC, sent a letter to American West Bank's Board of Directors with the January 22, 2008 Report of Examination attached. (Leary Decl. ¶ 3, ECF No. 50-6 at 3; ECF No. 50-13.) The letter provided, in part, that America West Bank had "been formally designated a 'problem' institution and, as such, may be subjected to closer regulatory supervision." (ECF No. 50-13 at 3.)

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3. https://www.fdic.gov/regulations/examinations/ratings/#4

Appendix D

"On or about September 3, 2008, the Bank stipulated and agreed to the issuance of a Cease and Desist order with the FDIC." (Leary Decl. ¶ 7, ECF No. 50-6 at 4.) The stipulation provided that America West Bank "consents and agrees to the issuance of an ORDER TO CEASE AND DESIST . . . by the FDIC." (ECF No. 50-14 at 2.) The Order to Cease and Desist provided, in part: "IT IS HEREBY ORDERED, that the Bank . . . cease and desist from" certain "unsafe and unsound practices." (ECF No. 50-16 at 2-3.)

"On September 25, 2008, the Bank stipulated to a . . . cease and desist order with" the Utah Department. (Leary Decl. ¶ 8, ECF No. 50-6 at 4.) The stipulation provided that America West Bank "consents and agrees to the issuance of an Order to Cease and Desist by the Utah Department of Financial Institutions. . . ." (ECF No. 50-15 at 2.).) The Order to Cease and Desist provided, in part: "IT IS HEREBY ORDERED, that the Bank . . . cease and desist from" certain "unsafe and unsound banking practices." (ECF No. 50-17 at 2-3.)

On November 3, 2008, Commissioner Leary and an individual with the FDIC sent a letter to "America West Bank Members, LC's" "Board of Directors." (ECF No. 50-18.) Attached to the letter was "a copy of the July 14, 2008 Bank Holding Company Inspection Report . . . prepared by the Utah Department of Financial Institutions . . . and the Federal Reserve Bank of San Francisco. . . ." (ECF No. 50-18 at 2.) The letter provided that "[e]xaminers conducted an on-site inspection of America West Bank Members LC. . . ." (ECF No. 50-18 at 2.) The letter further provided

that "[t]he report show[ed] the overall condition of America West Bank Members, LC has declined significantly and is now marginal." (ECF No. 50-18 at 2.)

"On January 22, 2009, Plaintiff" and the Utah Department "entered into a written agreement." (Leary Decl. ¶ 11, ECF No. 50-6 at 5; ECF No. 50-19.) The agreement provided, in part, that "America West shall immediately take steps to correct all violations of laws set forth in the Bank Holding Company Inspection Report dated July 14, 2008." (ECF No. 50-19 at 5.)

"The last" Report of Examination for America West Bank "was on February 9, 2009." (Leary Decl. ¶ 10, ECF No. 50-6 at 5; ECF No. 50-19.) That Report provided that "America West Bank . . . is insolvent." (ECF No 50-2 at 5.) This Report assigned the Bank a Risk Management Composite rating of "5," the lowest possible rating. (ECF No. 50-2 at 4.) The FDIC's rating definition for this rating provides:

> Financial institutions in this group exhibit extremely unsafe and unsound practices or conditions; exhibit a critically deficient performance; often contain inadequate risk management practices relative to the institution's size, complexity, and risk profile; and are of the greatest supervisory concern. The volume and severity of problems are beyond management's ability or willingness to control or correct. Immediate outside financial or other assistance is needed in order for the financial

> institution to be viable. Ongoing supervisory attention is necessary. Institutions in this group pose a significant risk to the deposit insurance fund and failure is highly probable.[4]

The Report also noted that "America West Bank" was "subject to [the] two similar Cease and Desist Orders" discussed above. (ECF No. 50-2 at 5.) The Report concluded that the Bank's "Management is considered critically deficient as a result of noncompliance with requirements in [those] Orders, the poor overall financial condition of the bank, an inadequately funded [Allowance for Loan and Lease Losses] account, and continued apparent violations of laws and regulations." (ECF No. 50-2 at 5.)

The Report included a section titled "Compliance with Enforcement Actions" relating to the Utah Department's Cease and Desist Order. (*See* ECF No. 50-2 at 14.) The Utah Department's examiner found that the Bank was not in compliance with six provisions of the Cease and Desist Order.

First, the Cease and Desist Order provided that "[t]he bank shall have and retain qualified management. Each member of management shall have qualifications and experience commensurate with his or her duties and responsibilities at the bank." (ECF No. 50-2 at 14; ECF No. 50-17 at 4.) The Utah Department's Examiner found that the Bank was not in compliance with this provision

4. https://www.fdic.gov/regulations/examinations/ratings/#4

because it had "retained all management since the institution of the ORDER, implying its confidence in the qualifications and experience of each to be commensurate with his or her duties and responsibilities." (ECF No. 50-2 at 14.)

Second, the Cease and Desist Order provided that "[w]ithin 90 days from August 31, 2008, the bank shall increase its Tier 1 capital in such an amount as to equal or exceed 10 percent of the bank's total assets, and shall thereafter maintain Tier 1 capital in such an amount as to **equal or exceed 10 percent** of the bank's total assets." (ECF No. 50-2 at 15; ECF No. 50-17 at 5 (bold added).) The Utah Department's Examiner found that the Bank was not in compliance with this provision because as of November 30, 2008, the Bank's "Tier 1 Capital ratio was 6.33 percent." (ECF No. 50-2 at 16.) As of December 31, 2008, "that ratio was 4.2 percent," and as of January 30, 2009, "that ratio was 4.02 percent." (ECF No. 50-2 at 16.)

Third, the Cease and Desist Order provided that "[w]ithin 90 days of August 31, 2008, the bank shall develop and submit to the Regional Director and the Commissioner a written three-year strategic plan. Such plan shall include specific goals for the dollar volume of total loans, total investment securities, and total deposits as of December 31, 2009, December 31, 2010, and December 31, 2011." (ECF No. 50-2 at 22; ECF No. 50-17 at 13.) The Utah Department's Examiner found that the Bank was not in compliance with this provision because the Bank's Management "provided to the FDIC and the [Utah Department] a Budget Plan, with assumptions, that

projected out to December 2011," but the "plan that was submitted did not address all the requirements of this provision and is considered unacceptable given it includes many unrealistic assumptions." (ECF No. 50-2 at 22.)

Fourth, the Cease and Desist Order provided that "[w]ithin 90 days from August 31, 2008, the bank shall eliminate and/or correct all violations of law, as more fully set forth in the ROE as of January 22, 2008." (ECF No. 50-2 at 22; 50-17 at 13.) The Utah Department's Examiner found that the Bank was not in compliance with this provision:

> [t]he internal audit staff conducted a review, and presented recommendations to the Board for corrections. The review was comprehensive, addressing both the individual violations, and the particulars of each. As of the date of the report to the Board, there were still 5 issues related to the violations which had not been resolved. Four of the five fall under the 'Apparent Contravention to Appendix A of Part 365 of the FDIC Rules and Regulations'; two of these require loan-to-value adjustments to two individual loans, a third requires the addition of a regulatory loan-to-value limit column to a Board report, and the fourth requires the addition of 4 loans identified to have excess loan-to-values to be added to a Board report. The fifth, under the 'Apparent Violation of the Federal Reserve Act 23B', involving the Durbano law firm, is being finalized. The

> current examination also identified 3 new apparent violations of laws and regulations. . . .

(ECF No. 50-2 at 22.)

Fifth, the Cease and Desist Order provided that "[w]ithin 90 days from August 31, 2008, the bank shall develop, adopt, and implement a written policy satisfactory to the Regional Director and the Commissioner" that "shall govern the relationship between the bank and its holding company. . . ." (ECF No. 50-2 at 23; 50-17 at 13.) The Utah Department's Examiner found that the Bank was not in compliance with this provision. (ECF No. 50-2 at 23.) The Utah Department's Examiner found that "CFO Brent Wilde indicate[d] that a policy governing the relationship between the bank and its holding company ha[d] not been developed." (ECF No. 50-2 at 23.)

Sixth, the Cease and Desist Order provided that "[t]he bank shall not pay cash dividends without the prior written consent of the Regional Director and the Commissioner." (ECF No. 50-2 at 23; ECF No. 50-17 at 14.) The Utah Department's Examiner found that the Bank was not in compliance with this provision:

> The Board determined at its November 2008 meeting that dividends to the holding company would be suspended, along with deferral of interest payments by the holding company to the security holders of its Trust Preferred Securities. However, prior to that decision, yet subsequent to the institution of this ORDER,

> the Board approved, and the bank paid, dividends:
>
> - $82, 078.00 for September 2008, paid 10/17/2008
> - $82, 078.00 for October 2008, paid 10/17/2008
>
> CFO Brent Wilde indicates that management was of the opinion, when those dividends were paid, that this Order allowed dividend payments to the holding company for the payment of holding company obligations, without prior written consent.

(ECF No. 50-2 at 23.)

The Utah Department's Examiner also found that the Bank was only partially in compliance with at least four other provisions of the Cease and Desist Order.

On April 22, 2009, Douglas Durbano sent a letter to Perri Babalis of the Utah Attorney General's Office and to members of the Utah Department. (*See* ECF No. 45 at 74.) That letter provided, in relevant part:

> Last Friday, April 17, when we met together in our Board meeting, we discussed the future possibility of a court proceeding or hearing relative to bank receivership. Recognizing that such proceedings can be ex-parte, we requested that we be informed in advance of any such proceeding and given the opportunity to attend

> and present evidence. We wanted to write and confirm our request

(ECF No. 45 at 74.) Mr. Durbano signed the letter as "Chairman of the Board." (ECF No. 45 at 74.)

On April 27, 2009, Assistant Attorney General Babalis responded to Mr. Durbano's letter. That letter provided, in relevant part:

> At no time has the Department made a commitment to this, or any other bank, to provide notice in advance of it taking supervisory action, as provided in [Utah Code Ann.] Title 7, Chapter 2. There are many policy concerns with providing notice to a financial institution of such impending action.

(ECF No. 50-4 at 2.)

"On May 1, 2009, at Commissioner Leary's direction," Assistant Attorney General Babalis" (ECF No. 49 at 24) "filed an ex parte verified petition . . . for an order granting possession of the Bank." (2nd Am. Compl. ¶ 67, ECF No. 33 at 9; ECF No. 36 at 11; *see also* ECF No. 45 at 88.[5]) Commissioner Leary "filed [the] action pursuant

5. The "Verified Petition for Order Approving Possession provides, in part: "G. Edward Leary, Commissioner of Financial Institutions of the State of Utah . . . hereby petitions the Court for an order approving the taking by him of America West Bank[.]" (ECF No. 45 at 88.)

to Utah Code Ann. § 7-2-2 (West 2004)[6]" "for an Order" from a state court "approving the taking of possession of" America West Bank "by the Commissioner." (ECF No. 45 at 88.) "As grounds for the Order for which" the petition had been filed, "the Commissioner "represent[ed] to the Court that he ha[d] found," among other things that "[t]he Bank has failed to maintain a minimum amount of capital," that the Bank was or was "about to become insolvent," and that the Bank "or its officers or directors have failed or refused to comply with the terms of a legally authorized order of the Commissioner. . . ." (ECF No. 45 at 90.)

On May 1, 2009, "Ms. Babalis also filed" a "Notice of Need to Seek Judicial Relief within Ten Days," a Motion to Seal Record, and a proposed order granting the Motion to Seal Record. (*See* ECF No. 49 at 24.) The Notice provided:

> G. Edward Leary, Commissioner of Financial Institutions of the State of Utah . . . hereby gives notice that on the 1st day of May, 2009, he took possession of America West Bank pursuant to Utah Code Ann. § 7-2-3(1)(a) (West 2004), if any institution or other person of which the Commissioner has taken possession considers itself aggrieved by the taking, it may within ten

6. In 2009, the relevant Utah statute provided: "[b]efore taking possession of an institution . . . or within a reasonable time after taking possession of an institution or other person without court order, as provided in this chapter, the commissioner shall cause to be commenced in the appropriate district court, an action to provide the court supervisory jurisdiction to review the actions of the commissioner." Utah Code Ann. § 7-2-2 (West 2009).

> (10) days after the taking apply to the Court to enjoin further proceedings, as set forth in that section of the Utah Code.

On that same day, "an ex parte hearing was held . . . regarding the Petition." (ECF No. 45 at 7; ECF No. 49 at 12.) The hearing was held in a state court in Farmington, Utah. (*See* ECF 45 at 76.) Judge John R. Morris was the "assigned judge." (*See* ECF No. 45 at 76.) "In attendance at the Hearing of the Petition on May 1, 2009 were Perri A. Bablis and Bryce Pettey representing the State of Utah; Commissioner Leary, Tyson Sill, and Paul Allred from [the Utah Department of Financial Institutions]; and Scott Fleming with the FDIC." (ECF No. 45 at 7; ECF No. 49 at 12.)

"At the hearing, Ms. Babalis informed Judge Morris that Doug Durbano had asked to attend the Hearing." (ECF No. 45 at 8; *see also* ECF No. 49 at 13 ("Assistant Attorney General Perri Ann Babalis, who represents [the Utah Department] and Commissioner Leary, presented Judge Morris with Doug Durbano's April 22, 2009 letter and her April 27, 2009 letter to Mr. Durbano denying the request.").) "Judge Morris acknowledged [Mr.] Durbano's request and proceeded with the Hearing, stating that [Mr.] Durbano was not entitled to notice of or presence at the Hearing." (ECF No. 49 at 13; ECF No. 51 at 9-10.)

"Commissioner Leary was the only witness at the Hearing." (ECF No. 45 at 8; ECF No. 49 at 14.) "Ms. Babalis conducted the examination of Commissioner Leary." (ECF No. 45 at 8; ECF No. 49 at 14.) Commissioner

Leary relied on information in the February 2009 Report of Examination when he testified, which had been summarized for him in a memorandum prepared by Thomas Bay, the Utah Department Supervisor of Banks. (Leary Decl. ¶ 15, ECF No. 50-6 at 5; ECF No. 51 at 12.[7]) The audio-video recording of the hearing before Judge Morris has been destroyed. (ECF No. 49 at 19.) But the minute entry for that proceeding indicates that the hearing lasted approximately sixty-eight minutes. (*See* ECF No. 45 at 77 (providing: "Tape Count: 1107-1215.").) The minute entry further provides:

> This is the time set for petition for order approving possession. Parties are introduced. Ms. Babalis motions for the file to be sealed. The Court signs the order. The verified petition is presented. Counsel states that a cease and desist order has already been issued. Commissioner Leary is sworn and is examined regarding each action in the petition by Ms. Babalis. The conclusion of the examination of the bank determined that the bank is

7. Plaintiff does not dispute that Commissioner Leary had a copy of the 2009 Report of Examination and a copy of Thomas Bay's memorandum when Commissioner Leary testified. (*See* ECF No. 51 at 12 ("Although Defendants' attempt to assert that Defendant Leary testified that the amount of capital needed for the Bank to become solvent was $40 million dollars, such figure does not appear in any of the documents **that Defendant Leary had with him at the ex parte hearing**, including the February 2009 Report of Examination, the Memo from Thomas Bay summarizing the 2009 Report of Examination and is obviously not found in the Petition and final Order.") (emphases added).)

> insolvent, there is negative capital. The assets are delinquent and not accruing interest. The loss is estimated in excess of 8 million dollars. Mr. Fleming states the FDIC will accept the appointment as receiver of the institution. The Court states the findings on the record and grants the order for possession.

(ECF No. 45 at 77.)

Judge Morris had the authority to deny the petition if Commissioner Leary's actions were arbitrary, capricious, fraudulent, or contrary to law.[8] Instead, on May 1, 2009, the same day the petition was filed, Judge Morris entered an Order Approving Possession. (ECF No. 45 at 102.) Judge Morris ordered "that . . . [t]he taking of possession of America West Bank by G. Edward Leary . . . is approved, and the Commissioner is vested . . . with title to, and the right to possession of, the business, property, and all assets of the Bank." (ECF No. 45 at 104.)

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8. *See* Utah Code Ann. 7-2-2(2) (2009) ("Before taking possession of an institution or other person under his jurisdiction, or within a reasonable time after taking possession of an institution or other person without court order, as provided in this chapter, the commissioner shall cause to be commenced in the appropriate district court, an action to *provide the court supervisory jurisdiction to review the actions of the commissioner.*") (emphasis added)); *see also* Utah Code Ann. 7-2-2(4) ("The court may not overrule a determination or decision of the commissioner if it is not arbitrary, capricious, fraudulent, or contrary to law. If the court overrules an action of the commissioner, the matter shall be remanded to the commissioner for a new determination by him, and the new determination shall be subject to court review.")).

Judge Morris also entered an Order to Seal Record. (ECF No. 50-10.) Judge Morris ordered:

> that the file in this matter shall be sealed until Monday, May 4, 2009 at 9:00 a.m., to all persons except the Commissioner of Financial Institutions of the State of Utah, the Department of Financial Institutions of the State of Utah, and the Federal Deposit Insurance Corporation. Others shall be granted access only on a showing that the petitioner is a person aggrieved by the taking of possession of the Bank, that the person has need for access to its files, and that the person can and will maintain the confidentiality otherwise required by this Court's Order.

(ECF No. 50-10 at 2-3.) The Notice of Need to Seek Judicial Relief Within Ten Days of the Possession of the Bank was among the documents sealed. (*See* ECF No. 45 at 76.[9]) There is no evidence that the file was unsealed on May 4, 2009, as Judge Morris ordered. (*See* ECF No. 45 at 76 (Indicating that on December 8, 2015, the "Case Classification [was] changed from SEALED to PUBLIC.").)

"At approximately 5:00 p.m. on May 1, 2009, Commissioner Leary met with Durbano and handed

9. It appears that Plaintiff's counsel accessed the state court docket on October 3, 2018. (*See* ECF No. 45 at 76.) The docket from that day provides that the "Notice of need to seek judicial r[]" is "SEALED." (ECF No. 45 at 76.)

him copies of the Petition and Order." (ECF No. 49 at 25; ECF No. 51 at 15-16.) "Commissioner Leary told Durbano that he had obtained an order from the Second District Court of Utah approving possession of the Bank." (ECF No. 49 at 25; ECF No. 51 at 15-16.) "That same day, Commissioner Leary appointed the FDIC as receiver for the Bank." (ECF No. 49 at 25; ECF No. 51 at 15-16.) The Utah Department "had no further involvement in the disposition of the Bank or its assets." (ECF No. 49 at 25; ECF No. 51 at 15-16.)

Under the relevant 2009 Utah statute, America West Bank had ten days to apply to the state court to challenge the Department's taking of the Bank. *See* Utah Code. Ann. § 7-2-3(1)(a) (2009) ("Whenever any institution or other person of which the commissioner has taken possession considers itself aggrieved by the taking, it may within ten days after the taking apply to the court to enjoin further proceedings."). Under that statute, the state court would have had the authority to enjoin the commissioner from further proceedings and to order the commissioner to surrender the bank. *See* Utah Code. Ann. § 7-2-3(1)(c) (2009) ("If the court enjoins further proceedings, it shall order the commissioner to surrender possession of the institution in a manner and on terms designated by the court in the public interest."). If America West Bank had applied to the state court within ten days, the state court would have entered a judgment—either in favor of the commissioner or in favor of the Bank—and either side would have had the ability to appeal that judgment. *See* Utah Code. Ann. § 7-2-3(2) ("An **appeal** may be taken by the commissioner, a receiver, or liquidator appointed

by the commissioner . . . or by the institution from the **judgment** of the court as provided by law.") (bold added)).

In Utah, "[a]n appeal may be taken from a district . . . court to the appellate court with jurisdiction over the appeal from all final orders and judgments . . . by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4" of the Utah Rules of Appellate procedure. Utah R. App. P. 3. The Utah rule requires the notice of appeal to be filed within "30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4.

Despite having the ability to challenge the Department's taking under Utah Code Ann. § 7-2-3, America West Bank did not. (*See* ECF No. 49 at 25 ("Plaintiff did not take any legal action to challenge possession of the Bank until filing an action in the Third District Court of Utah on June 28, 2011."); *see also* ECF No. 51 at 15-16.)).[10] Because the Bank

10. At oral argument, Plaintiff's counsel confirmed that the Bank did not challenge the possession within ten days. (*See* ECF No. 62 at 30 ("the plaintiff did attempt that remedy, hired counsel, sought out the best legal minds, actually found a former commissioner to implement this process. Went to great legal efforts and I recall and a lot of pain because all of the cash that the bank had to spend had to be seized and taken, and yet the bank was required to defend itself and go in for a hearing at significant cost. Documents were prepared, I'll represent to the court at least, documents were prepared, ready for filing, and the attorneys who were representing us, Snow Christensen and Martineau, reputable fellows . . . said guys, we're wasting your money. What good are you going to do? You can't undo a done thing. Excuse my language. Stop. Give it up. You can't come up with a retainer even.").)

did not challenge the Department's taking, the state court did not issue a judgment, and no appeal was taken.

PROCEDURAL BACKGROUND

On June 28, 2011, America West Bank filed a Complaint in state court against the Department, and others, alleging violations of procedural and substantive due process—among other things.[11] On November 8, 2011, the Defendants filed a Motion to Dismiss the state complaint. On March 20, 2012, the state district court entered a minute entry granting the Motion to Dismiss "in full." The decision dismissed the Banks's procedural due process claims with prejudice. On October 24, 2014, the Utah Supreme Court issued an opinion "affirm[ing] the district court's dismissal of plaintiff's procedural due process claim, but [found] error in the dismissal of the claim with prejudice." *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 37, 342 P.3d 224, 237.

On March 23, 2016, the Bank filed an Amended Complaint in state court against the Department, among others. (*See* ECF No. 2-1 at 34.) In this Amended Complaint, the Bank alleged a due process violation and alleged that "[t]he petition [to Judge Morris] was granted on the day of filing, without notice or opportunity for hearing being given to AWMB or the Bank." (ECF No. 2-1 at 16.) On April 21, 2016, the Defendants filed a Notice of Removal, removing the Bank's action to this court. On

11. The Complaint is available on Utah's Xchange website. The state case number is 110915676.

February 6, 2018, the court entered an order dismissing the Bank's contract claims, but allowing the Bank to proceed with their due process claims. (*See* ECF No. 29 at 35.) On April 6, 2018, the Bank filed its currently operative Second Amended Complaint. (ECF No. 33.)

On February 4, 2019, Plaintiff filed a motion seeking "partial summary judgment of its First, Second, and Third Claims for Relief. . . ." (ECF No. 45 at 2.) "Those claims allege (1) violation of Plaintiff's procedural due process rights . . . (2) violation of Plaintiff's substantive due process rights . . . and (3) violation of Plaintiff's civil rights pursuant to U.S.C. §§ 1983 and 1988. . . ." (ECF No. 45 at 2.) Alternatively, Plaintiff also sought a "declaratory judgment . . . that declares [that] the Verified Petition filed with the Second District Court for Davis County, State of Utah . . . on May 1, 2009, and the ex parte hearing also conducted on May 1, 2009, before Judge Morris . . . resulting in the seizure of the Bank, violated either or both the Plaintiff's procedural and/or substantive due process." (ECF No. 45 at 2.)

In its Motion for Summary Judgment, the Bank alleged that the state proceeding before Judge Morris caused it injury. For example, the Bank alleged:

> Judge Morris . . . held an ex-parte, star chamber hearing and specifically refused to allow Mr. Durbano (the acting CEO and an attorney) to attend despite the fact that he specifically requested to do so in writing. Judge Morris granted the Petition without any

> opposition or any factual basis on which to do so. Judge Morris[,] then reciting the conclusory statements in the Petition issued an Order Approving Possession . . . to seize the Bank and all of its assets.

(ECF No. 45 at 4; *see also* ECF No. 45 at 9 ("On nothing more than the conclusory statements of Commmissioner Leary . . . the Petition was granted by Judge Morris during the Hearing.") The Bank characterized Judge Morris' decision to grant the May 1, 2009 verified petition as a "rubber stamp." (ECF No. 45 at 15 ("Accordingly, Judge Morris' approval cannot be considered anything more than the type of *rubber stamp* approval that was disapproved of in *State Bank*.") (emphases in original); *see also* ECF No. 45 at 16 ("In combination with an ex parte hearing in which the Commissioner simply regurgitated the same conclusory statements, resulting in Judge Morris rubber stamping the conclusions of the Commissioner, there can be no question that the Bank's seizure was arbitrary, capricious, fraudulent, or contrary to law.")).

On March 20, 2019, Defendants filed their Opposition to the Motion for Summary Judgment, arguing, among other things, that the Bank's "Motion for Declaratory Judgment should be denied." (ECF No. 49 at 43.)

On April 17, 2019, the Bank filed its Reply, wherein it withdrew its Motion for Declaratory Judgment "but urge[d] the Court to grant the relief sought" in its Motion for Summary Judgment. (ECF No. 51 at 2.)

Appendix D

On July 18, 2019, the court heard oral argument on the Bank's Motion. The Bank's counsel again characterized Judge Morris' approval of the verified petition as a "rubber stamp." (*See* ECF No. 62 at 15, 21, 34, 40, 42.) And the Bank's counsel argued that the Judge Morris himself violated its due process rights. (ECF No. 62 at 13 ("Because if Judge Morris and the government had provided meaningful notice, meaningful hearing, procedural due process would have been complied with.").)

Plaintiffs' counsel also argued that any post-deprivation hearing would have been "too late" for the bank because it had suffered irreparable damage upon the Utah Department's taking possession of the Bank. (*See* ECF No. 62 at 29 ("It's like suggesting that the prisoner subject to an execution or a hanging, if he doesn't like the hanging, has 10 days to object. It's too late. That would be substantively unconstitutional.").)

Defendants' counsel argued that it would be improper for this court to review Judge Morris' decision to grant the verified petition. (*See* ECF No. 62 at 58 ("Did Judge Morris make a mistake signing the order? That's really not a proper question before us today, that should have been—that is a totally different process. It's inappropriate for us to in federal court second guess the state court's ruling;") *see also* ECF No. 62 at 45 ("I find the characterization of Judge Morris's actions as a mere rubber stamp to be unwarranted and suggest that what they're asking this court to do is to have this federal court review an order of the state court not actually reviewing the actions of the defendant here who is Commissioner Leary.").))

Appendix D

STANDARD

Summary judgment is proper when the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that may affect the outcome of the litigation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Id.* The nonmoving party may not rest solely on allegations on the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The court must "view the evidence and draw reasonable inferences therefrom in a light most favorable to the nonmoving party." *Commercial Union Ins. Co. v. Sea Harvest Seafood Co.*, 251 F.3d 1294, 1298 (10th Cir. 2001).

ANALYSIS

The arguments that Defendants' counsel raised at oral argument relate to this court's authority to hear the claims presented in the Bank's Motion for Summary Judgment. The court proceeds in two steps. First, it determines which of the Bank's claims it has the authority to consider. Second, it addresses the merits of those claims over which it has jurisdiction.

Appendix D

I. *Rooker-Feldman*

"Any federal court must, sua sponte, satisfy itself of its power to adjudicate in every case and at every stage of the proceeding, and the court is not bound by the acts or pleadings of the parties." *Harris v. Illinois-California Exp., Inc.*, 687 F.2d 1361, 1366 (10th Cir. 1982).

"The *Rooker-Feldman* doctrine establishes, as a matter of subject-matter jurisdiction, that only the United States Supreme Court has appellate authority to review a state-court decision." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074-75 (10th Cir. 2004); *see also Campbell v. City of Spencer*, 682 F.3d 1278, 1281 (10th Cir. 2012) ("*Rooker-Feldman* is a jurisdictional prohibition on lower federal courts exercising appellate jurisdiction over state-court judgments."). "The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

The Tenth Circuit has cited with approval *Hoblock*, a Second Circuit decision, stating the requirements to find *Rooker-Feldman* applies. *See Guttman v. Khalsa*, 446 F.3d 1027, 1032 (10th Cir. 2006) (citing *Hoblock v. Albany County Board of Elections*, 422 F.3d 77, 89 (2d Cir.2005)). After examining the Supreme Court's holding in *Exxon Mobil*, the Second Circuit concluded that "there are four requirements for the application of *Rooker-Feldman*." *Hoblock*, 422 F.3d at 85.

"First, the federal-court plaintiff must have lost in state court." *Id.* "Second, the plaintiff must 'complain of injuries caused by a state-court judgment.'" *Id.* (quoting *Exxon Mobil*, 544 U.S. at 284). "Third, the plaintiff must 'invite district court review and rejection of that judgment.'" *Id.* (quoting *Exxon Mobil*, 544 U.S. at 284). "Fourth, the state-court judgment must have been 'rendered before the district court proceedings commenced'—i.e., *Rooker-Feldman* has no application to federal-court suits proceeding in parallel with ongoing state-court litigation." *Id.* (quoting *Exxon Mobil*, 544 U.S. at 284). "The first and fourth of these requirements may be loosely termed procedural; the second and third may be termed substantive." *Id.*

A. Substantive *Rooker-Feldman* Requirements

The second requirement, that the plaintiff must be complaining of injuries caused by a state court judgment, "may also be thought of as an inquiry into the source of the plaintiff's injury." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010). "The critical task is thus to identify those federal suits that profess to complain of injury by a third party, but actually complain of injury 'produced by a state-court judgment and not simply ratified, acquiesced in, or left unpunished by it.'" *Id.* at 167 (citation omitted). "A useful guidepost" for making this determination "is the timing of the injury, that is, whether the injury complained of in federal court existed prior to the state-court proceedings and thus could not have been 'caused by' those proceedings." *Id.* "Although this test is seemingly straightforward,

application becomes more complicated when a federal plaintiff complains of an injury that is in some fashion related to a state-court proceeding." *Id.*

"For example, in *McCormick v. Braverman*, 451 F.3d 382, 384 (6th Cir.2006), the plaintiff filed suit in federal court contending that she was the owner of certain real property and that the defendants illegally interfered with her ownership." *Great W. Mining*, 615 F.3d at 167. "More specifically, the plaintiff alleged that the defendants engaged in fraud and misrepresentation in state-court divorce proceedings involving the real property at issue." *Id.* (citing *McCormick*, 451 F.3d at 388). "Assessing the plaintiff's allegations, the court held that while some were barred by the *Rooker-Feldman* doctrine, the remainder were 'independent' claims over which the federal courts had jurisdiction." *Id.* "The non-barred claims were as follows: (1) the defendants committed fraud and misrepresentation in the divorce proceedings; (2) the defendants intentionally did not make the plaintiff a party to the litigation concerning the order of receivership over the real property; and (3) the defendants committed an abuse of process in the divorce proceedings." *Id.* at 167-68.

"Focusing on the source of the alleged injuries, the court held that 'none of these claims assert an injury caused by the state court judgments. . . . Instead, Plaintiff asserts *independent claims* that those state court judgments were procured by certain Defendants through fraud, misrepresentation, or other improper means. . . .'" *Great W. Mining*, 615 F.3d at 168 (emphasis in original) (quoting *McCormick*, 451 F.3d at 392). "Even though the injuries of

which the plaintiff complained helped to cause the adverse state judgments, these claims were 'independent' because they stemmed from 'some other source of injury, such as a third party's actions.'" *Id.* (quoting *McCormick*, 451 F.3d at 393). "On the other hand, the court explained that the plaintiff's claim that the state court's 'order of receivership in and of itself is illegal and causes Plaintiff harm' sought review of that order and thus was not independent and was barred by *Rooker-Feldman*." *Id.* (quoting *McCormick*, 451 F.3d at 395).

With these principles in mind, the court turns to the facts of this case to determine if the Bank complains of injuries caused by the state proceedings granting the May 1, 2009, verified petition. The record presently before the court demonstrates that the Bank is alleging that those proceedings injured the Bank in at least two distinct ways.

First, the Bank argues that it was entitled to be present at the ex-parte hearing on the verified petition, and argues that it was injured by Judge Morris' decision to not allow the Bank to be heard. (*See* ECF No. 45 at 4 ("Judge Morris then held an ex-parte, star chamber hearing and specifically refused to allow Mr. Durbano . . . to attend despite the fact that he specifically requested to do so in writing."); *see also* ECF No. 62 at 13 ("Because if Judge Morris and the government had provided meaningful notice, meaningful hearing, procedural due process would have been complied with.").) This injury did not exist prior to the state-court proceeding, and is unrelated to any (alleged) misdeed of the Defendants. The injury alleged therefore stems from the state court

proceeding itself. To the extent the Bank seeks this court to review and reject Judge Morris' decision not to allow it to participate at the hearing on the verified petition, this court is substantively barred under *Rooker-Feldman* from doing so.

Second, the Bank is, in essence, arguing that the Order granting the May 1, 2009, verified petition was arbitrary and capricious, fraudulent, or contrary to law. The Bank argues that Commissioner Leary's "petition to the state court containing nothing more than conclusory statements, and devoid of factual support, in combination with the ex parte, star chamber hearing, amounted to a seizure of assets that was arbitrary, capricious, fraudulent, or contrary to law. . . ." (ECF No. 45 at 11.) But at the time Judge Morris granted the verified petition, he had "supervisory jurisdiction to review" Commissioner Leary's actions, and could have denied the verified petition if it was arbitrary, fraudulent, or contrary to law. *See* Utah Code Ann. 7-2-2(2) & (4) (2009). This court can reasonably assume that Judge Morris would not have granted the verified petition if he believed it was contrary to law. Thus, the Bank is effectively arguing that Judge Morris' Order granting the petition was contrary to law. At first blush, it appears that this court is barred under *Rooker-Feldman* from considering any injury related to Judge Morris' Order granting the May 1, 2009 petition.

But the Bank has also alleged that "Commissioner Leary . . . omitted material facts from [the Department's] presentation to [Judge Morris] which would have caused [Judge Morris] to deny the Petition. . . ." (Am. Compl. ¶ 136,

ECF No. 33 at 20; *see also* Am. Compl. ¶ 134, ECF No. 33 at 19 ("the false statements and material omissions made by Commissioner Leary and UDFI to the court would constitute a violation of procedural due process.").) It is undisputed that the audio recording of the May 1, 2009, hearing has been destroyed. The court therefore cannot confirm that Commissioner Leary did or did not omit material facts from his presentation to Judge Morris.

The Bank alleges that Judge Morris's Order granting the verified petition was "procured by [the] Defendants through fraud, misrepresentation, or other improper means." *Great W. Mining*, 615 F.3d at 168. If the Bank's allegation of false statements and material omissions is true, the injury it complains of undoubtedly helped to cause the adverse Order granting the May 1, 2009 petition. The claims related to this injury are nevertheless independent from the Order itself because they stem from the actions of the Defendants—not Judge Morris' Order. The court is therefore not barred under *Rooker-Feldman* from considering injuries related to the May 1, 2009 Order.

B. Procedural *Rooker-Feldman* Requirements

As discussed above, the court has already held, on a substantive basis, that *Rooker-Feldman* does not bar this court from considering the Bank's injuries related to the Order granting the May 1, 2009 verified petition. Thus, the only remaining *Rooker-Feldman* question is whether the injury related to Judge Morris' decision to not allow the Bank to attend the May 1, 2009 hearing satisfies *Rooker-Feldman*'s procedural requirements.

Appendix D

As discussed above, there are two procedural requirements for the application of *Rooker-Feldman.* First, "the federal-court plaintiff must have lost in state court." *Hoblock*, 422 F.3d at 85. The injury alleged relates to Judge Morris' decision not to allow the Bank to be present at the May 1, 2009 hearing. The Bank lost on this issue.

Second, "'*Rooker-Feldman* applies only to suits filed after state proceedings are final.'" *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1232 (10th Cir. 2013) (citation omitted). The present suit was filed long after the May 1, 2009, state proceeding. The question is whether the state proceeding is "final" for purposes of *Rooker-Feldman.* In answering that question, the court emphasizes that it only examines the relevant alleged injury—Judge Morris' decision not to allow the Bank to attend the May 1, 2009 hearing.

The Tenth Circuit has "cited with approval the First Circuit's formulation of when a state-court judgment becomes final under the *Rooker-Feldman* doctrine, as set forth post-*Exxon Mobil*. . . ." *Osguthorpe*, 705 F.3d at 1232 n. 12. Relevant here, a state court proceeding is final "'if the state action has reached a point where neither party seeks further action. . . .'" *Id.* (quoting *Federación de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 24 (1st Cir. 2005)). "For example, if a lower state court issues a judgment and the losing party allows the time for appeal to expire, then the state proceedings have ended." *Federación de Maestros*, 410 F.3d at 24.

Here, under the relevant Utah statute the Bank had ten days to challenge the Department's taking of the Bank, and would have had the opportunity to make argument to Judge Morris. *See* Utah Code. Ann. § 7-2-3(1)(a) (2009). Had the Bank done so, the state court would have considered Bank's challenge and entered a judgment—that either side could have appealed. *See* Utah Code. Ann. § 7-2-3(2). The Bank would have had thirty days to appeal that judgment. *See* Utah R. App. P. 4. Because the bank did not challenge the taking within ten days, there was no judgment and therefore no possible appeal. The time to appeal Judge Morris' decision not to allow the Bank to attend the May 1, 2009 hearing has long expired. Therefore, the state proceeding has ended for purposes of *Rooker-Feldman* because the state action has reached a point where neither party sought further action—at least as it relates to the relevant injury alleged.

Because all four requirements for the application of the *Rooker-Feldman* doctrine apply to the Bank's injury related to Judge Morris' decision not to allow the Bank to attend the May 1, 2009 hearing, this court is barred from considering that portion of the Bank's claim. But, as discussed above, the court is not barred from considering the Bank's claim of injury related to the Order itself, because the Bank has alleged that it was obtained through fraud.

Having satisfied itself that it has jurisdiction, the court turns to those portions of the Bank's Motion that are not barred by *Rooker-Feldman.*

II. The Bank's Motion for Summary Judgment

In its Motion, Plaintiff "seeks partial summary judgment of its First, Second, and Third Claims for Relief as stated in its Second Amended Complaint." (ECF No. 45 at 2.)

In its Reply, Plaintiff asks this court to strike the Defendant's declarations and exhibits that were "submitted primarily to establish a record of and prove what transpired in the ex parte hearing before Judge Morris that led to the Order of seizure of America West Bank assets." (ECF No. 51 at 2.) The court need not rule on Plaintiff's evidentiary objections because resolution of its Motion for Summary Judgment does not require the court to consider Defendant's evidence regarding "what transpired in the ex parte hearing."—with one exception.

In his declaration, Commissioner Leary provides that he relied on the information in the February 2009 Report of Examination when he testified in front of Judge Morris. (Leary Decl. ¶ 15, ECF No. 50-6 at 5.) In its Reply, Plaintiff does not dispute this, so the court accepts it as true. (*See* ECF No. 51 at 12 ("such figure does not appear in any of the documents that Defendant **Leary had with him** at the ex parte hearing, including the February 2009 Report of Examination, the Memo from Thomas Bay summarizing the 2009 Report of Examination. . . ." (ECF No 51 at 12 (bold added).) Apart from this single piece of evidence, the court does not need to consider any of the other evidence regarding "what transpired" at the hearing, so the court declines to rule on Plaintiff's evidentiary challenge.

Appendix D

A. Procedural Due Process Claim

The first claim for relief in Plaintiff's Second Amended Complaint is for a "Violation of Procedural Due Process." (Am. Compl., ECF No. 33 at 17.) Plaintiff alleges that Commissioner Leary made "false statements and material omissions" "to the court" that "constitute a violation of procedural due process." (Am. Compl. ¶ 134, ECF No. 33 at 19.) Plaintiff further alleges that "[t]he facts actually available to Commissioner Leary" "would not support any of the twelve statutory pre-conditions to seizure." (Am. Compl. ¶ 14, ECF No. 5 at 3.) Plaintiff further alleges that "Commissioner Leary did not strictly comply with the statutory requirements and was instead motivated by factors entirely unrelated to the stability of the Bank." (Am. Compl. ¶ 144, ECF No. 33 at 21.)

In its Motion for Summary Judgment, Plaintiff argues that it suffered a violation of its procedural due process rights because the Commissioner's decision to seize the bank was arbitrary and capricious. (*See* ECF No. 45 at 11.) This is so, Plaintiff argues, because "[i]t is undisputed that the Petition for seizure of the Bank is devoid of any factual evidence upon which Judge Morris could have reasonably based his approval," making Judge Morris' decision nothing more than a "rubber stamp" approval.

The Fourteenth Amendment forbids the State from depriving an individual of life, liberty, or property without due process of law. "A person alleging that he has been deprived of his right to procedural due process must prove two elements: [1] that he possessed a constitutionally

protected liberty or property interest such that the due process protections were applicable, and [2] that he was not afforded an appropriate level of process." *Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741, 751-52 (10th Cir. 2019) (quoting *Zwygart v. Bd. of Cty. Comm'rs*, 483 F.3d 1086, 1093 (10th Cir. 2007)).

"Property interests are not created by the Constitution, but rather by independent sources such as state law." *Copelin-Brown v. New Mexico State Pers. Office*, 399 F.3d 1248, 1254 (10th Cir. 2005). Plaintiff has not identified any Utah law granting them a property interest to which due process protection was applicable. But from the undisputed facts, the court can reasonably infer that the Bank would likely be able to demonstrate a property interest to which due process protection was applicable. The court therefore considers whether Plaintiff was afforded an appropriate level of process.

"The right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 114 S. Ct. 492, 500-01, 126 L. Ed. 2d 490 (1993). "The purpose of this requirement is not only to ensure abstract fair play . . . Its purpose, more particularly, is to protect [the] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). The United States Supreme Court "tolerate[s] some

exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *James Daniel Good Real Prop*, 510 U.S. at 53 (quoting *Fuentes* 407 U.S. 67 at 82).

"Bank failures are emblematic of an instance where government officials may seize property prior to notice or a hearing because of the 'delicate nature of the institution and the impossibility of preserving credit during an investigation.'" *Am. W. Bank Members v. Utah*, No. 2:16-CV-326-CW-EJF, 2018 WL 734401, at *12 (D. Utah Feb. 6, 2018) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 253, 67 S. Ct. 1552, 1556, 91 L. Ed. 2030 (1947)). "Guided by *Fahey*," the Tenth Circuit "held in *Franklin* . . . that the opportunity for a postdeprivation hearing 'precludes any due process violations' when a **conservator** is appointed for a bank that had been seized." *Columbian Fin. Corp. v. Stork*, 811 F.3d 390, 397 (10th Cir. 2016) (bold added) (quoting *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1140 (10th Cir. 1991)).

But the Tenth Circuit "has acknowledged that the consequences of a receivership and conservatorship are different." *Id.* at 398. Generally, "conservators can control bank assets only temporarily while receivers can permanently dispose of the bank's assets." *Columbian Fin. Corp.*, 811 F.3d at 396; *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996) ("The principal difference between a conservator and receiver is that a conservator may operate and dispose of

a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution.").

Here, "Commissioner Leary appointed the FDIC as **receiver** for the Bank." (ECF No. 49 at 25 (bold added).) After its appointment, the "FDIC immediately and publicly announced the failure and seizure of the Bank, and began liquidating assets of the Bank." (2nd Am. Compl. ¶ 109, ECF No. 33 at 16; ECF No. 36 at 18.)

The Tenth Circuit's "precedents have not squarely addressed the need for a predeprivation hearing when a bank's assets are placed in the control of a receiver (rather than a conservator)." *Columbian Fin. Corp*, 811 F.3d at 397. But the Tenth Circuit has noted that "[t]hree other circuits ha[ve] held that a predeprivation hearing [is] unnecessary even when the bank is placed in the hands of a receiver rather than a conservator," so long as the bank is afforded a post-deprivation hearing. *See id.* at 399.[12]

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12. Here, the Tenth Circuit cited the three following cases and provided their holdings in explanatory parentheticals:

> [1] *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1101 (D.C.Cir.1996) (holding that the right to due process did not require a hearing before the government seized banks and allowed the FDIC to liquidate the banks); [2] *First Fed. Sav. Bank & Trust v. Ryan*, 927 F.2d 1345, 1358 (6th Cir.1991) (holding that a postdeprivation hearing satisfies due process because "[i]n the event of wrongful appointment of a receiver, the plaintiff could sue for all damages arising out of the wrongful appointment"); [3] *FDIC v. Am. Bank Trust Shares, Inc.*, 629 F.2d 951, 953-54 (4th Cir.1980) (rejecting a bank's due process claim when the bank

Appendix D

As the court previously provided, "the Supreme Court clearly articulated the test for when government officials may seize property without a prior hearing:"

> 1. The seizure is directly necessary to secure an important governmental or general public interest.
>
> 2. There is a special need for very prompt action.
>
> 3. The government kept strict control over its monopoly on legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Am. W. Bank Members v. Utah, No. 2:16-CV-326-CW-EJF, 2018 WL 734401, at *12 (D. Utah Feb. 6, 2018) (citations omitted) (internal quotation marks omitted).

Viewing the evidence and drawing all reasonable inferences in the light most favorable to Defendants, the court "believe[s] that this situation meets this three-prong test." *First Fed. Sav. Bank & Tr. v. Ryan*, 927 F.2d 1345, 1358 (6th Cir. 1991). "First, the safety of the

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> was not provided notice prior to appointment of the FDIC as a receiver and sale of the bank's assets).

Columbian Fin. Corp., 811 F.3d at 399.

banking system is generally considered to be an important governmental or public interest. In this country, it has long been established that the banking system is subject to government regulation and protection in the interest of economic stability." *First Fed. Sav. Bank*, 927 F.2d at 1358; *see also James Madison Ltd. by Hecht*, 82 F.3d at 1099. ("the Government has a substantial interest in moving quickly to seize insolvent institutions."). Second, an insolvent bank is a "classic . . . situation[] in which prompt action is necessary." *Id.* Further, the Utah Department of Financial Institution's examiner had concluded that America West Bank was not in compliance with at least six provisions of its Cease and Desist Order. Viewing the evidence and drawing all reasonable inferences in the light most favorable to the Defendants, prompt action was necessary to correct the actions of the recalcitrant bank management. Third, the Commissioner "kept strict control over" his use of "legitimate force" because his determination that possession of the bank was necessary was permissible under the governing Utah statutes.

Judge Morris's Order Approving Possession of America West Bank provided that "[i]t appear[ed] to the Court that all conditions required by Utah Code Ann. § 7-2-1(2)(a) (West 2004) ha[d] been met for the Commissioner to take possession of the Bank." (ECF No. 45 at 104.) That statute provides that the commissioner may "take possession of [a financial] institution" "subject to the jurisdiction of the department with or without a court order" if the commissioner finds that "any of the conditions set forth in Subsection (1) exist with respect to an institution" and "an order issued pursuant to Section

7-1-307, 7-1-308, or 7-1-313 would not adequately protect the interests of the institution's depositors, creditors, members, or other interested persons from all dangers presented by the conditions found to exist. . . ." Utah Code Ann. § 7-2-1(2-3.) (West 2004).

Subsection 1 includes twelve conditions that, if found by the commissioner, could subject a financial institution to "supervisory actions." *See* Utah Code Ann. § 7-2-1(1). Most relevant here are four conditions:

> (a) The institution is not in a safe and sound condition to transact business;
>
> (f) the institution or other person has failed to maintain a minimum amount of capital as required by the department, any state, or the relevant federal regulatory agency;
>
> (g) the institution . . . has failed or refused to pay its depositors . . . or has or is about to become insolvent;
>
> (h) the institution . . . or its officers or directors have failed or refused to comply with the terms of a legally authorized order issued by the commissioner or by any federal authority or authority of another state having jurisdiction over the institution or other person.

Utah Code Ann. § 7-2-1(1)(a, f-h) (West) (2004). The February 9, 2009, Report of Examination provided the

Commissioner with ample justification to take possession of America West Bank under any of the four conditions described in subsection one above.

First, the 2009 Report of Examination assigned the Bank a Risk Management Composite rating of "5," the lowest possible rating. (ECF No. 50-2 at 4.) "Financial institutions in this group exhibit extremely unsafe and unsound practices or conditions. . . .[13]" For all the reasons stated in the 81 page Report, the Commissioner had reason to believe that America West Bank was not, "in a safe and sound condition to transact business." Utah Code Ann. § 7-2-1(1)(a) (2004). This provided the Commissioner with a legitimate basis to take possession of the Bank under Utah Code Ann. § 7-2-1(3)(b) (2004).

Second, the 2009 Report of Examination found that America West Bank was "critically undercapitalized and [was] insolvent." (ECF No. 50-2 at 7.) In a prior Cease and Desist Order, the Utah Department had ordered the Bank to increase its Tier 1 capital "in such an amount as to equal or exceed 10 percent of the bank's total assets" within 90 days from August 31, 2008. (ECF No. 50-2 at 15; ECF No. 50-17 at 5.) As of January 30, 2009, the Bank's Tier 1 Capital Ratio was 4.02 percent. (*See* ECF No. 50-2 at 16.) Based on the 2009 Report of Examination, the Commissioner had reason to believe America West Bank had "failed to maintain a minimum amount of capital as required by the department. . . ." Utah Code Ann. § 7-2-1(1)(f) (West) (2004).

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13. https://www.fdic.gov/regulations/examinations/ratings/#4

This provided the Commissioner with a legitimate basis to take possession of the Bank under Utah Code Ann. § 7-2-1(3)(b) (2004).

Third, the 2009 Report of Examination found that America West Bank was insolvent, meeting condition "g" of subsection 1 of the statute. This provided the Commissioner with a legitimate basis to take possession of the Bank under Utah Code Ann. § 7-2-1(3)(b) (2004).

Fourth, as described in detail above, the 2009 Report of Examination found that America West Bank was not in compliance with at least six provisions of its Cease and Desist Order. Based on the 2009 Report of Examination, the Commissioner had reason to believe America West Bank "or its officers or directors ha[d] failed or refused to comply with the terms of a legally authorized order issued by the commissioner. . . ." Utah Code Ann. § 7-2-1(1)(h) (West) (2004). This provided the Commissioner with a legitimate basis to take possession of the Bank under Utah Code Ann. § 7-2-1(3)(b) (2004).

Based on the 2009 Report of Examination, the Commissioner had at least four legitimate justifications to take possession of the Bank under the statute. Plaintiff does not dispute that Commissioner Leary relied on the information contained in the 2009 Report of Examination with him when he testified in front of Judge Morris. (*See* ECF No. 51 at 12 ("such figure does not appear in any of the documents that Defendant Leary had with him at the ex parte hearing, including the February 2009 Report of Examination, the Memo from Thomas Bay summarizing

the 2009 Report of Examination. . . .").) Viewing the evidence in Defendants' favor, Judge Morris granted the verified petition based on the information contained in the 2009 Report of Examination—and not on the Defendants' false statements or material omissions.[14] The information contained in the 2009 Report of Examination satisfies the *Fuentes* three-prong test.

Because the *Fuentes* three prong test is satisfied, due process did not require a predeprivation hearing so long as the Bank was afforded an opportunity for a post-deprivation hearing. Defendants—relying on *Brown v. Weis*, 871 P.2d 552 (Utah Ct. App. 1994)—argue that Plaintiff was afforded an opportunity for a post-deprivation hearing but forwent that opportunity.

In *Brown*, the Utah Department of Financial Institutions took possession of a thrift and loan company under Utah Code Ann. § 7-2-1 after the Commissioner filed a petition with a state district court and after the court granted the petition. *See Brown*, 871 P.3d at 567. The day after the court granted the petition, the president of the thrift and loan company "was served with notice

14. As discussed above, the minute entry from the May 1, 2009, proceeding indicates that the hearing lasted approximately sixty-eight minutes. (*See* ECF No. 45 at 77.) Further, the minute entry provides that Commissioner Leary was placed under oath. (*See* ECF No. 45 at 77 (Commissioner Leary is sworn and examined regarding each action in the petition by Ms. Babalis.").) Viewing the evidence in the light most favorable to the Defendants, it is reasonable to infer from the minute entry that Judge Morris did not grant the verified petition based solely on information contained within the petition.

that the petition for possession had been filed and that any objection should be lodged within ten days," as required by statute.[15] *Id.* "However, plaintiffs did not file an objection within ten days." *Id.* at 568. The court in *Brown* held that the plaintiffs forwent "their opportunity" to challenge the Commissioner's actions as "contrary to law" by failing to object within ten days. *See id.*

Defendant argues that "this case falls squarely within the holding of *Brown*. . . ." (ECF No. 49 at 36.) But unlike in *Brown*, it is unclear whether America West Bank received written notice that any objection to the Commissioner's decision had to be filed within ten days. Defendant only alleges that "Commissioner Leary met with Durbano and handed him copies of the Petition and Order," but does not mention the Notice. (ECF No. 49 at 25.) The Notice was filed with the court under seal. Based on the record

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15. Utah Code Ann. § 7-2-3 (Supp.1986) (bold added) stated, in part:

> (1) Whenever any institution or other person considers itself aggrieved by the taking under Subsection 7-2-1(2)(b), it **may within 10 days** after the taking apply to the court to enjoin further proceedings, and the court, after citing the commissioner to show cause why further proceedings should not be enjoined and after hearing the allegations and proofs of the parties and determining the facts, may dismiss the application or, if the court finds the taking to be arbitrary, capricious, an abuse of discretion or otherwise contrary to law, enjoin the commissioner from further proceedings and direct [her] to surrender possession in such manner and upon such terms as the court may designate in the public interest.

available to the court, it is unclear whether America West Bank had access to the Notice that was filed under seal. Regardless, the Bank is charged with notice of the statute.

"To be constitutionally adequate, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Reams v. Irvin*, 561 F.3d 1258, 1265 (11th Cir. 2009) (citations omitted) (internal quotation marks omitted). "For one hundred years, the Supreme Court has declared that a publicly available statute may be sufficient to provide constitutionally adequate notice because individuals are presumptively charged with knowledge of such a statute." *Id.* (citations omitted) (internal quotation marks omitted). "Thus, where remedial procedures are established by published, generally available state statutes and case law . . . officials need not take additional steps to inform a property owner of her remedies." *Id.* (citations omitted) (internal quotation marks omitted).

The statute here provided: "Whenever any institution or other person of which the commissioner has taken possession considers itself aggrieved by the taking, it may within ten days after the taking apply to the court to enjoin further proceedings." Utah Code Ann. § 7-2-3(1)(a) (2004). America West Bank is charged with knowledge of the contents of this statute. It did not seek a post-deprivation hearing.

Viewing the evidence in the light most favorable to the Defendants, the Commissioner had a legitimate basis to

seek a petition for possession of the Bank. The state court granted the petition. The Bank did not file any objection within ten days. Viewing the evidence in Defendants' favor, the Bank waived any procedural due process violation claim.[16] *See Domka v. Portage Cty., Wis.*, 523 F.3d 776, 781 (7th Cir. 2008) ("It is without question that an individual may waive his or her procedural due process rights."). Plaintiff's Motion for Summary Judgment on this claim is DENIED.

B. Substantive Due Process Claim

The second claim for relief in Plaintiff's Second Amended Complaint is for a "Violation of Substantive Due Process." (Am. Compl., ECF No. 33 at 25.) Plaintiff alleges that "[i]f the authorizing statute is applied here to authorize Defendants to seize the Bank without a hearing," "the statute as applied authorizes conduct so unreasonable as to constitute a flagrant violation of substantive due process." (Am. Compl. ¶ 178, ECF No. 33 at 25-26.) Plaintiff's substantive due process claim appears to be tied to Judge Morris' decision not to allow the Bank to attend the May 1, 2009 hearing. (*See* ECF No. 62 at 13 ("Again, I have gone back to the statute because if the statute says no rights to a hearing, frankly we would be

16. At oral argument, Plaintiff argued that any post-deprivation hearing would have been "too late" and would not have comported with due process, comparing the Utah Department's taking of the Bank to the execution of a prisoner. (*See* ECF No. 62 at 29.) The court rejects this argument. The Bank could have sought an emergency hearing with the state court and could have prevented the injuries it now complains of.

arguing substantive due process. But no, the Utah statute, I have read it many times now, and I'll represent to the court with some confidence that the Utah statute does not exclude an opposition party from attending a hearing that could lead to the seizure.").) To the extent the Bank's substantive due process claim relates to Judge Morrris' decision not to allow the Bank to attend the May 1, 2009, hearing, this court is barred under *Rooker-Feldman* from considering that claim.

If Plaintiff's substantive due process claim stems from injury unrelated to Judge Morris' decision, Plaintiffs are not entitled to summary judgment on their second claim. As Defendants argue, in its Motion Plaintiff "does not even cite the appropriate standard for reviewing a claim of substantive due process rights violation." (ECF No. 49 at 37.) Plaintiff's Motion for Summary Judgment on its second claim is DENIED.

C. Section 1983 Claim

The Third claim for relief in Plaintiff's Second Amended Complaint is for a violation of 42 U.S.C. Section 1983. (Am. Compl. ¶ 187, ECF No. 33 at 27.) "There can be no 'violation' of § 1983 separate and apart from the underlying constitutional violations." *Brown v. Buhman*, 822 F.3d 1151, 1162 n. 9. (10th Cir. 2016). In the Second Amended Complaint, Plaintiff appears to tie its Section 1983 claim to the alleged violations of procedural and substantive due process. Because the court has held that Plaintiff has not established a violation of its due process rights, and because it does not allege any other

constitutional violations, its Section 1983 claim fails. Its Motion for Summary Judgment on this claim is DENIED.

CONCLUSION

For the reasons stated, Plaintiff's Motion for Partial Summary Judgment, (ECF No. 45) is DENIED.

SO ORDERED this 2nd day of April, 2020.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Judge

APPENDIX E — OPINION OF THE SUPREME COURT OF THE STATE OF UTAH, FILED OCTOBER 24, 2014

IN THE
SUPREME COURT OF THE STATE OF UTAH

No. 20120456

AMERICA WEST BANK MEMBERS, L.C.,

Appellant,

v.

STATE OF UTAH AND ITS AGENTS; UTAH DEPARTMENT OF FINANCIAL INSTITUTIONS; G. EDWARD LEARY,

Appellees.

Filed October 24, 2014

Third District, Salt Lake
The Honorable Tyrone E. Medley
No. 110915676

Associate Chief Justice Nehring authored an opinion of the Court with respect to Parts I, II.A, II.C, and III, in which Chief Justice Durrant, Justice Durham, Justice Lee, and Justice Parrish joined, and a dissenting opinion with respect to Part II.B.

Justice Lee authored an opinion of the Court, in which Chief Justice Durrant, Justice Durham, and Justice Parrish joined.

Appendix E

ASSOCIATE CHIEF JUSTICE NEHRING, opinion of the Court except as to Part II.B:

INTRODUCTION

[¶ 1] America West Bank Members, L.C. (AWBM) challenges the district court's dismissal of its claims against the State of Utah, the Utah Department of Financial Institutions (UDFI), and the director of UDFI, Mr. G. Edward Leary (collectively referred to as the State).[1] AWBM asserts that the district court erred when it dismissed its claims for lack of sufficient factual allegations under rule 12(b)(6) of the Utah Rules of Civil Procedure. AWBM contends it pleaded sufficient factual allegations for breach of contract, breach of the covenant of good faith and fair dealing, violations of procedural and substantive due process under the Utah Constitution, and violation of the Takings Clause of the Utah Constitution. We affirm the decision of the district court dismissing AWBM's claims.

BACKGROUND

[¶ 2] America West Bank (Bank) is wholly owned by its members, AWBM. On May 1, 2009, UDFI filed a petition in district court for an order approving the seizure of the Bank. That same day, the district court granted the petition without the presence or participation of AWBM.

1. AWBM initially included Mr. Tom Bay, the supervisor of banks for UDFI, as a party. However, Mr. Bay was not properly given notice of the claims as required by the Utah Governmental Immunity Act and was dismissed as a party.

UDFI then appointed the Federal Deposit Insurance Corporation (FDIC) as receiver of the Bank. The FDIC announced publicly it had been appointed receiver of the Bank and immediately began winding down the affairs of the Bank and liquidating its assets.

[¶ 3] On June 28, 2011, AWBM filed a complaint in district court against the State of Utah; UDFI; the commissioner of UDFI, Mr. G. Edward Leary; and UDFI's supervisor of banks, Mr. Tom Bay. AWBM also filed a notice of claim against Mr. Leary, as required by the Utah Governmental Immunity Act (Immunity Act).[2] AWBM alleged various claims, including common law tort, breach of contract, breach of the covenant of good faith and fair dealing, constitutional takings, and due process violations. Liquidation of the Bank's assets was ongoing when AWBM filed its complaint. The state filed a motion to dismiss the complaint ACJ NEHRING, opinion of the Court except as to Part II.B based on rules 12(b)(1) and 12(b)(6) of the Utah Rules of Civil Procedure. AWBM opposed the motion to dismiss.

[¶ 4] In its opposition to the State's motion to dismiss, AWBM consented to the dismissal of some of its claims. AWBM acknowledged that it failed to file an appropriate notice of claim against Mr. Bay, as required by the Immunity Act, and as a result, all claims against Mr. Bay were dismissed.[3] Additionally, AWBM conceded

2. *See* UTAH CODE § 63G-7-401 to -904.

3. UDFI moved to dismiss AWBM's claims under both rules 12(b)(1) and 12(b)(6) of the Utah Rules of Civil Procedure. The

to the dismissal with prejudice of its claims of failure to disclose evidence at a hearing, negligent destruction of property, and negligence, based primarily on the existence of immunity enjoyed by the defendants.[4]

[¶ 5] The district court did not hold a hearing on the motion to dismiss, but "reviewed and considered all Memoranda in support, opposition and reply" and granted the State's motion to dismiss "in full as prayed for based upon all of the reasons . . . and legal authorities set forth in [the State's] [m]emoranda in support and reply, including [AWBM's] concessions." Based on the minute entry and the State's motion to dismiss and accompanying memorandum, the district court dismissed AWBM's breach of contract, breach of the covenant of good faith and fair dealing, and unconstitutional taking claims all due to insufficient factual allegations in the complaint. The district court also dismissed AWBM's claims of denial of

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rule 12(b)(1) dismissal for lack of subject matter jurisdiction relates only to AWBM's "fail[ure] to comply with the notice of claim provisions of the Utah Governmental Immunity Act" as it relates to Mr. Bay. *Gurule v. Salt Lake Cnty.*, 2003 UT 25, ¶ 1, 69 P.3d 1287. AWBM conceded that proper notice was not given to Mr. Bay, and Mr. Bay is not a party to this appeal. Therefore, we address the dismissal of the remaining claims through the lens of rule 12(b)(6) of the Utah Rules of Civil Procedure.

4. As is noted by AWBM in its brief, the district court did not specify which claims were dismissed with prejudice and which claims were dismissed without prejudice. The court's minute entry simply stated that UDFI's motion was granted in full. We rely on the designations used in UDFI's motion to determine whether claims were dismissed with or without prejudice.

procedural and substantive due process with prejudice, because it found that the right to a pre-seizure hearing was not clearly established and, therefore, could not form the basis of a due process claim.

[¶ 6] Following the district court's dismissal of AWBM's claims, AWBM filed a timely notice of appeal. AWBM appeals the dismissal of its claims for breach of contract, breach of the covenant of good faith and fair dealing, unconstitutional taking, denial of procedural due process, and denial of substantive due process.

STANDARD OF REVIEW

[¶ 7] AWBM contends the district court erred when it dismissed its causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unconstitutional taking, and violations of procedural and substantive due process under rule 12(b)(6) of the Utah Rules of Civil Procedure. "A district court's grant of a motion to dismiss based upon the allegations in the plaintiff's complaint[] presents a question of law that we review for correctness."[5] When "reviewing a dismissal under Rule 12(b)(6) of the Utah Rules of Civil Procedure, we accept the plaintiff's description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded nor need we accept legal conclusions in

5. *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (alteration in original) (internal quotation marks omitted).

contradiction of the pleaded facts."[6] The district court's ruling "should be affirmed only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim."[7] "Furthermore, it is well established that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even if it differs from that stated by the trial court."[8]

ANALYSIS

[¶ 8] AWBM appeals the district court's dismissal of its claims for breach of contract, breach of the covenant of good faith and fair dealing, unconstitutional taking, and violations of substantive and procedural due process. The district court granted the State's motion to dismiss all of AWBM's claims. The district court dismissed all of AWBM's claims under rule 12(b)(6) of the Utah Rules of Civil Procedure for failure to state a claim upon which relief can be granted." The claims for breach of contract and breach of the covenant of good faith and fair dealing were dismissed without prejudice for failure to plead sufficient facts supporting the claims. The claim of an unconstitutional taking, which AWBM argued as a violation of substantive due process, was also dismissed without prejudice for failure to plead sufficient facts.

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6. *Id.* (internal quotation marks omitted).

7. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

8. *Osguthorpe*, 2010 UT 29, ¶ 10, 232 P.3d 999 (internal quotation marks omitted).

Finally, the claims alleging a violation of substantive and procedural due process were dismissed with prejudice by the district court because it concluded there is no right to a pre-seizure hearing when the state takes a financial institution into receivership.

[¶ 9] As a threshold matter, we must determine if we have jurisdiction to hear this appeal.[9] If we lack jurisdiction, we must dismiss the appeal.[10] Only if we first determine that we have appropriate jurisdiction will we address the merits of a case.

I. THE DISTRICT COURT'S DISMISSAL IS A FINAL, APPEALABLE ORDER

[¶ 10] The State argues that "[t]here may be a question whether the [c]ourt has jurisdiction to hear [AWBM's] claims," and contends that the order below may not be a final order subject to appeal. "[T]he issue of subject matter jurisdiction is a threshold issue, which can be raised at any time and must be addressed before [turning to] the merits of other claims. . . ."[11] We have consistently upheld the "final judgment" rule, which states that "[a]n appeal is improper if it is taken from an

9. *Thomas v. Lewis*, 2001 UT 49, ¶ 13, 26 P.3d 217.

10. *Bradbury v. Valencia*, 2000 UT 50, ¶ 8, 5 P.3d 649.

11. *Houghton v. Dep't of Health*, 2005 UT 63, ¶ 16, 125 P.3d 860 (internal quotation marks omitted); *see also State v. Sun Sur. Ins. Co.*, 2004 UT 74, ¶ 7, 99 P.3d 818 ("Questions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims.").

order or judgment that is not final."[12] A "final judgment for purposes of appeal is one that resolves all claims, counterclaims, cross-claims, and third-party claims before the court and fully and finally resolves the case."[13]

[¶ 11] "Utah has adopted the majority rule that an order of dismissal is a final adjudication, and thereafter, a plaintiff may not file an amended complaint,"[14] even if such a dismissal is without prejudice.[15] This rule is rooted in the United States Supreme Court decision *United States v. Wallace & Tiernan Co.*[16] There, the Court found that dismissal "without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended [the] suit so far as the District

12. *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649. There are exceptions to the "final judgment" rule; however, none of the exceptions are relevant to the present case. Therefore, we focus only on whether this dismissal is final under the final judgment rule.

13. *Merkey v. Solera Networks, Inc.*, 2009 UT App 130U, para. 4 (per curiam); *see also Bradbury*, 2000 UT 50, ¶ 10, 5 P.3d 649 ("To be final, the trial court's order or judgment must dispose of all parties and claims to an action.").

14. *Nichols v. State*, 554 P.2d 231, 232 (Utah 1976).

15. *See Steiner v. State*, 27 Utah 2d 284, 495 P.2d 809, 810–11 (Utah 1972) (holding that a dismissal involving two defendants was a final appealable order despite one defendant being dismissed without prejudice while the other was dismissed with prejudice).

16. 336 U.S. 793, 69 S. Ct. 824, 93 L. Ed. 1042 (1949).

Court was concerned."[17] Our general rule in determining whether an order is final is "whether the *effect* of the ruling is to finally resolve the issues."[18] We do not focus on whether a dismissal was with or without prejudice, because the "test to be applied is a pragmatic test."[19]

[¶ 12] In the present case, there are no counterclaims, cross-claims, or third-party claims. The district court determined it did not have an adequately pleaded complaint before it and dismissed the complaint, thereby ending the suit as far as the district court was concerned.[20] The pragmatic effect of the dismissal was

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17. *Id.* at 794 n.1; *see also Ciralsky v. CIA*, 355 F.3d 661, 666, 359 U.S. App. D.C. 366 (D.C. Cir. 2004) ("Most courts that have considered the question have followed the Supreme Court's lead, holding that the dismissal of an action—whether with or without prejudice—is final and appealable.").

18. *Bowles v. State ex rel. Utah Dep't of Tramp.*, 652 P.2d 1345, 1346 (Utah 1982).

19. *First of Denver Mortg. Investors v. C. N. Zundel & Assocs.*, 600 P.2d 521, 528 (Utah 1979) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)); *see also* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3913 (2d ed. 2013) ("[T]he finality requirement should not be applied as a sterile formality, but instead should be applied pragmatically. . . ."); *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968) ("We do not believe that this distinction should control: dismissals with and without prejudice are equally appealable as final orders.").

20. *See Wallace & Tiernan Co.*, 336 U.S. at 794 n.1; *Moore v. Pomory*, 329 Md. 428, 620 A.2d 323, 325 (Md. 1993) (holding that

to fully terminate the case in the district court. Because we follow the majority rule that an order of dismissal is a final adjudication, and because our test for finality is a pragmatic one, we conclude that we have jurisdiction to hear this appeal.

II. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED AWBM'S CLAIMS

[¶ 13] On appeal, AWBM relies heavily on the principle that, on a motion to dismiss, the court must "accept the plaintiff's description of facts alleged in the complaint to be true."[21] Additionally, rule 8(a) of the Utah Rules of Civil Procedure sets a liberal standard for complaints, requiring only that a complaint "contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief."[22] "A dismissal is a severe measure and should be granted by the trial court only if it is clear that

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a dismissal of a plaintiff's complaint without prejudice "does not mean that the case is still pending in the trial court and that the plaintiff may amend his complaint or file an amended complaint in the same action," but rather "the case is fully terminated in the trial court").

21. *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999 (internal quotation marks omitted).

22. This court has not had occasion to address the heightened plausibility standard for pleadings set forth by the United States Supreme Court in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and we express no opinion here regarding that America West v. State approach.

a party is not entitled to relief under any state of facts which could be proved in support of its claim."[23] Keeping these principles in mind, we address each of AWBM's claims in turn.

A. *The District Court Did not Err When It Dismissed AWBM's Claims for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing*

[¶ 14] The district court dismissed AWBM's claims for breach of contract and breach of the covenant of good faith and fair dealing due to a lack of sufficient factual allegations in the complaint. AWBM argues that its complaint properly stated a claim for breach of contract. Particularly, AWBM claims it has alleged the existence of a contract between the State and AWBM, that the State breached the contract, and that AWBM is entitled to damages as a result. AWBM claims that due to its assertion of a right to damages, it can be implied or inferred that AWBM performed its obligations under the contract. Conversely, the State argues that one cannot prove a breach of contract claim without alleging the actual existence of a contract. We agree with the State.

[¶ 15] Because "[r]ule 12(b)(6) concerns the sufficiency of the pleadings, not the underlying merits of a particular case[,] . . . the issue before the court is whether the petitioner has alleged enough in the complaint to state a cause of action, and this preliminary question is asked

23. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

and answered before the court conducts any hearings on the case."[24] The complaint need only "contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief."[25] In order to properly state a claim for a breach of contract, a party must "allege[] sufficient facts, which we view as true, to satisfy each element."[26] "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages."[27] AWBM contends that it has alleged all of the required elements, either specifically or by implication and inference.[28]

[¶ 16] Beyond stating the elements required to show a prima facie case for breach of contract, we have

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24. *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

25. UTAH R. CIV. P. 8(a).

26. *MBNA Am. Bank v. Goodman*, 2006 UT App 276, ¶ 6, 140 P.3d 589.

27. *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 14, 20 P.3d 388.

28. AWBM's complaint regarding breach of contract states:

> 22. Defendants have breached a contract between the parties.
>
> 23. Plaintiffs have been damaged as a result of Defendants' breach.
>
> 24. Plaintiffs are entitled to recover damages in an amount to be proven at trial, which are currently unknown and ongoing, plus attorneys fees and interest.

not specified what it means to provide a "short and plain statement" of a breach of contract claim "showing that the party is entitled to relief."[29] We, as well as the court of appeals, have hinted at the requirements.[30] We take this opportunity to clarify what is required for a "short and plain" statement for relief for a breach of contract claim under the Utah Rules of Civil Procedure.[31]

[¶ 17] The Utah Rules of Civil Procedure contain an appendix of forms, and we turn to those forms for guidance in outlining the pleading requirement of a "short and plain statement" for breach of contract. Form four, entitled "Complaint-Promissory Note," and form five, entitled "Complaint-Multiple Claims," are particularly helpful. These forms illustrate the standard of pleading in a complaint for a breach of a promissory note, which is

29. *Utah R. Civ.* P. 8(a)(1).

30. *See Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, 314 P.3d 1079. In *Shah*, the court of appeals found that a patient's complaint against her physician and hospital "specifically identified contractual relationships" despite the absence of a written contract. *Id.* ¶ 17. The court of appeals ultimately rejected the plaintiff's claims on other grounds. *Id.* ¶ 18. Additionally, in *Canfield v. Layton City*, we concluded that a "violation of . . . written employment rules" sufficiently "outline[d] a breach of contract claim" and was sufficient to withstand dismissal for failure to state a claim upon which relief can be granted. 2005 UT 60, ¶ 7, 15, 22–23, 122 P.3d 622.

31. *See Peak Alarm Co. v. Salt Lake City Corp.*, 2010 UT 22, ¶ 70 n.13, 243 P.3d 1221 (noting we have not addressed *Twombly*'s heightened plausibility standard for pleadings under the Federal Rules of Civil Procedure).

a contract, and a multi-count complaint that specifically includes a breach of contract. As exemplars, these forms indicate that, at a minimum, a breach of contract claim must include allegations of when the contract was entered into by the parties, the essential terms of the contract at issue, and the nature of the defendant's breach.[32] These essential elements are required to fulfill the requirements of a "short and plain" statement under our pleading standard. These minimal allegations will "give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."[33]

[¶ 18] AWBM has not met this standard. AWBM's complaint implies the existence of a contract and a breach of that contract. However, AWBM made no allegations regarding the date when the contract was entered into, the essential terms of the contract, nor the nature of the defendant's breach. Without the allegations outlined above, there can be no claim for a breach of contract. We therefore affirm the district court's dismissal without prejudice of AWBM's breach of contract claim.

[¶ 19] A claim for breach of the covenant of good faith and fair dealing is a derivative of the breach of contract claim. Because AWBM did not allege the existence of facts required to plead a breach of contract, it has also failed to plead a breach of the covenant of good faith and

32. *See* UTAH R. CIV. P., Forms 4 & 5.

33. *Canfield*, 2005 UT 60, ¶ 14, 122 P.3d 622 (internal quotation marks omitted).

fair dealing. Accordingly, we affirm the district court's dismissal without prejudice of AWBM's claim for breach of the covenant of good faith and fair dealing.

B. *The District Court Did not Err When It Dismissed AWBM's Due Process Claims with Prejudice*

[¶ 20] Today, the court concludes that AWBM's due process claims should be dismissed without prejudice. I disagree, and I would hold that the district court properly dismissed the due process claims with prejudice. As the court notes,[34] the district court dismissed AWBM's claims alleging violations of substantive and procedural due process with prejudice. The district court found that AWBM failed to demonstrate a "clearly established" right to a pre-seizure hearing, which is a requirement to receive damages for a due process violation under the Utah Constitution.[35] AWBM argues the district court erred when it dismissed its procedural and substantive due process claims. AWBM does not clearly state what constituted a violation of its procedural and substantive due process rights; however, on the face of its complaint and on appeal, AWBM argues that errors or inadequacies in the procedure surrounding the seizure of the Bank violated its right to due process.[36] This is clearly a

34. *Infra* ¶ 37.

35. *See Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, ¶ 23, 16 P.3d 533.

36. AWBM argues that UDFI did not show a sufficient emergency or special need for seizure of the Bank, and thus failed to follow the applicable statutes. However, AWBM has not

procedural due process claim.[37] AWBM has not asserted it was deprived of any fundamental right. Therefore, I decline to address AWBM's allegation of substantive due process violations as an independent claim.

[¶ 21] I agree with the court that the *Spackman* test must be satisfied in order for AWBM to be entitled to damages. I also agree with the court that the elements of *Spackman* are not set forth in the complaint and thus, the district court properly dismissed AWBM's due process claim under Utah Rule of Civil Procedure 12(b)(6).[38] However, in my view, AWBM's due process claims were properly dismissed with prejudice.

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challenged the findings of the commissioner, UDFI, or the district court regarding the seizure of the Bank. The record contains no evidence of the commissioner's findings or the seizure proceedings. AWBM has simply alleged that the proceedings violated their "constitutional, common law, and statutory rights." Without more, we must presume the regularity of those proceedings. *State v. Chettero*, 2013 UT 9, ¶ 32, 297 P.3d 582 ("[W]hen crucial matters are not included in the record, the missing portions are presumed to support the action of the trial court." (internal quotation marks omitted)); *State v. Pritchett*, 2003 UT 24, ¶ 13, 69 P.3d 1278 (same). Thus, I decline to address this specific argument.

37. AWBM's complaint alleged violations of substantive due process. However, AWBM's allegations of substantive due process referred to the seizure of the bank without just compensation, a point AWBM concedes on appeal. Because AWBM's substantive due process claims are just another iteration of a takings claim, we examine them under the Takings Clause, *infra*, Part II.C.

38. *Infra* ¶ 40.

[¶ 22] Under the first element of *Spackman*, AWBM must show that it "suffered a flagrant violation of [its] constitutional rights."[39] A right is "not clearly established unless its contours are sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right."[40] This "ensures that a government employee is allowed the ordinary human frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her]self liable for a constitutional violation."[41] We have also recognized that "it will be easier for a plaintiff to demonstrate a flagrant violation where precedent clearly establishes that the defendant's alleged conduct violates a provision of the constitution."[42] Conversely, "in the absence of relevant precedent recognizing the right and prohibiting the alleged conduct, it will be more difficult for a plaintiff to prevail."[43] Additionally, there are circumstances where conduct "will be so egregious and unreasonable that it constitutes a flagrant violation of a constitutional right even in the absence of controlling precedent."[44]

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39. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 58, 250 P.3d 465 (internal quotation marks omitted).

40. *Id.* ¶ 66 (internal quotation marks omitted).

41. *Id.* (alteration in original) (internal quotation marks omitted).

42. *Id.* ¶ 67.

43. *Id.*

44. *Id.*

[¶ 23] We have never addressed the question of whether a pre-seizure hearing is required when a financial institution is seized. However, this question has been squarely addressed by the United States Supreme Court under the Federal Due Process Clause. While procedural due process generally requires notice and a hearing, " [t]here are extraordinary situations that justify postponing notice and opportunity for a hearing."[45] Those situations "must be truly unusual," and a "seizure without opportunity for a prior hearing" is allowed "[o]nly in a few limited situations."[46] The Court has held that the limited situations justifying a seizure without a prior hearing must, at a minimum, meet three requirements:

> First, in each case, the seizure [must be] directly necessary to secure an important governmental or general public interest. Second, there [must be] a special need for very prompt action. Third, the State [must keep] strict control over its monopoly of legitimate force; the person initiating the seizure [must be] a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[47]

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45. *Fuentes v. Shevin*, 407 U.S. 67, 90, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (internal quotation marks omitted).

46. *Id.* at 90–91.

47. *Id.* at 91.

Appendix E

The Court has held that seizure of property *without a prior hearing* is justified "to collect the internal revenue of the United States, to meet the needs of a national war effort, *to protect against the economic disaster of a bank failure*, and to protect the public from misbranded drugs and contaminated food."[48] The court acknowledges that the United States Supreme Court concluded that a seizure without a prior hearing meets this standard.[49]

[¶ 24] In *Fahey v. Mallonee*, the Supreme Court was presented, as we are here, with the issue of whether a "hearing after the conservator takes possession [of a bank] instead of before" was constitutional.[50] The Court acknowledged that dispensing with a pre-seizure hearing when a financial institution is seized is indeed a "drastic procedure," but that "the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner."[51] The Court held that "in the light of the history and customs of banking," the seizure of a financial institution without a prior hearing is not "unconstitutional."[52] Thus, procedural due process does not require a pre-seizure hearing when a state seizes a bank, provided a post-seizure hearing is

48. *Id.* at 91–92 (emphasis added) (footnotes omitted).

49. *Infra* ¶ 42 n.2.

50. 332 U.S. 245, 253, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947).

51. *Id.*

52. *Id.* at 254.

available.[53] The Utah Financial Institutions Act provides a post-seizure hearing, and AWBM had the opportunity for a post-seizure hearing.[54]

[¶ 25] The Utah Court of Appeals has also addressed this issue. In *Brown v. Weis*, the court of appeals addressed an argument similar to the one presented by AWBM.[55] The court of appeals reiterated the three factors set forth in *Fuentes* and noted that "[o]ne of the very situations cited by the *Fuentes* court as ordinarily satisfying the above criteria is the necessity of protecting against the economic disaster of a bank failure."[56] The court of appeals, relying primarily on *Fuentes*, concluded that the summary seizure of a failing financial institution is in the public interest and that due process did not require a pre-seizure hearing.[57]

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53. *Fahey*, 332 U.S. at 253–54.

54. Utah Code § 7-2-3.

55. 871 P.2d 552, 558 (Utah Ct. App. 1994).

56. *Id.* at 566 (citing *Fuentes*, 407 U.S. at 91–92).

57. *Id.* at 566–67; *see also Roslindale Coop. Bank v. Greenwald*, 638 F.2d 258, 260 (1st Cir. 1981) ("The drastic consequences of bank failure or mismanagement and 'the impossibility of preserving credit during an investigation' call for prompt and decisive action and place this proceeding among the 'extraordinary situations' in which notice and hearing may be postponed until after seizure." (quoting *Fahey*, 332 U.S. at 253; *Fuentes*, 407 U.S. at 90–91 & n.23)); *Gregory v. Mitchell*, 459 F. Supp. 1162, 1165–66 (M.D. Ala. 1978) ("Summary seizure of a bank[–]i.e., seizure without a prior hearing[–]has been approved by many courts, including the Supreme Court of the United States, on the ground [that] such action is justified by the

[¶ 26] The court is correct that *Fuentes* outlines a context-dependent and fact-specific test.[58] However, we need not "assess the question based on the facts and circumstances" of every individual case, as the court suggests.[59] The court notes that "*Fuentes* articulates the general standards under which property may be seized *without a hearing*" and *Fahey* concluded that a "seizure *without a hearing* had met that standard."[60] However, the court fails to distinguish between a pre-seizure and post-seizure hearing, opting instead to lump the two together.[61] *Fuentes* does not stand for the proposition that each and every due process challenge is subject to the fact-intensive three-part test announced in the opinion. Rather, the *Fuentes* Court was determining whether prejudgment replevin statutes should be included in the "few limited situations" where "outright seizure [would be allowed] without opportunity for a prior hearing."[62] The United States Supreme Court held that the replevin statutes at issue did require an opportunity to be heard

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potential economic disaster of a bank failure."); *Hoffman v. State*, 834 P.2d 1218, 1219 n.2 (Alaska 1992) ("[T]he federal due process clause does not require a pre-seizure hearing when a state seizes a bank." (citing *Fahey*, 332 U.S. at 253–54)).

58. *Infra* ¶ 42.

59. *Infra* ¶ 42.

60. *Infra* ¶ 42 n.2 (emphases added).

61. Clearly, the lack of an opportunity to be heard, either pre- or post-seizure, would have immense due process implications.

62. *Fuentes*, 407 U.S. at 90–91 (footnote omitted). The court acknowledges this proposition also. *Infra* ¶ 42 n.2.

before property was taken.[63] But what has been made clear by the Court is that "in light of the history and customs of banking" and the need to protect both customers and the public from a bank failure, the seizure of a financial institution without a prior hearing does not violate the Due Process Clause if a post-seizure hearing is available.[64] In the present case, a post-seizure hearing was available, thus there is no violation of due process.

[¶ 27] It is not correct that this holding would create a "per se rule insulating all bank seizures from constitutional challenge under the Due Process Clause."[65] Instead, I simply acknowledge and agree with what the United States Supreme Court has held: in the context of a bank seizure, due process does not require a pre-seizure hearing if a post-seizure hearing is available; a post-seizure hearing is enough.[66] The seizure of a failed

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63. *Fuentes*, 407 U.S. at 96. The Court also noted that its holding was "a narrow one," in that the State retained the power "to seize goods before a final judgment in order to protect the security interests of creditors," provided those creditors "tested their claim to the goods through the process of a fair prior hearing." *Id.*

64. *Id.* at 91; *Fahey*, 332 U.S. at 254–56.

65. *Infra* ¶ 42.

66. *See Fuentes*, 407 U.S. at 90–91; *Fahey*, 332 U.S. at 253–54; *accord First Fed. Savs. Bank & Trust v. Ryan*, 927 F.2d 1345, 1358 (6th Cir. 1991); *Roslindale Coop. Bank*, 638 F.2d at 260; *FDIC v. Am. Bank Trust Shares, Inc.*, 629 F.2d 951, 954–55 (4th Cir. 1980); *Turner v. Officers, Dirs. & Emps. of Mid Valley Bank*, 712 F. Supp. 1489, 1500–02 (E.D. Wash. 1988); *Salinas Valley Cmty.*

bank before a hearing meets the test in *Fuentes*. "The drastic consequences of bank failure or mismanagement and the impossibility of preserving credit during an investigation call for prompt and decisive action and place [a bank seizure] among the extraordinary situations in which notice and hearing may be postponed until after seizure."[67] A post-seizure hearing is available under the Utah Financial Institutions Act and may be initiated within ten days after a bank is seized.[68] Additionally, the commissioner of the UDFI is the only government official capable of initiating a bank seizure.[69] AWBM is not entitled to and has no constitutional right to a pre-seizure hearing.[70] AWBM challenged the bank seizure under the Due Process Clause because the State seized its bank without first providing AWBM with a hearing. Thus, under no circumstance can AWBM prove facts that show that it was entitled to a pre-seizure hearing. Thus, AWBM cannot meet the first element of *Spackman* showing that there was a flagrant violation of its constitutional right, as there is no right to a pre-seizure hearing.[71]

Fed. Credit Union v. Natl Credit Union Admin., 564 F. Supp. 701, 706 (N.D. Cal. 1983); *FDIC v. Bank of San Marino (In re Bank of San Marino)*, 167 Cal. App. 3d 247, 213 Cal. Rptr. 602, 607 (Ct. App. 1985).

67. *Roslindale Coop. Bank*, 638 F.2d at 260 (citation omitted) (internal quotation marks omitted).

68. Utah Code § 7-2-3(1)(a).

69. *Id.* § 7-2-1.

70. *Fahey*, 332 U.S. at 253–54.

71. It should also be said that it is not enough to merely allege a constitutional violation under the first element of *Spackman*. In

[¶ 28] AWBM cannot prove the first element of *Spackman*. There can be no flagrant violation of a non-existent right. Clear precedent from the United State Supreme Court indicates that there is no right to a pre-seizure hearing when a financial institution is seized by the state, and due process is satisfied if a post-seizure hearing is available.[72] Therefore, AWBM has no clearly established right to a pre-seizure hearing. its due process rights are preserved by its opportunity for a post-seizure hearing, at which time AWBM could have brought constitutional

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order to meet the first *Spackman* element, the violation must be "flagrant." 2000 UT 87, ¶ 23, 16 P.3d 533. To establish a "flagrant violation," a defendant must have violated a right whose "contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. (internal quotation marks omitted). First, AWBM had no right to a pre-seizure hearing and thus the State's agents had no understanding that the seizure of the bank violated any right. Second, AWBM has made allegations of a flagrant violation, but it conceded to the dismissal of those claims with prejudice in the district court. The majority concludes otherwise. *Infra* ¶ 41. In its complaint, AWBM alleged that State agents either intentionally or negligently failed to disclose material information in a verified petition to the district court when seeking the bank seizure. On appeal, AWBM argues that this failure to disclose material information was a flagrant violation. But even if this were the case, AWBM has already conceded the dismissal of these allegations with prejudice. AWBM cannot now resurrect a forfeited argument and should not be given an opportunity to relitigate claims it has already conceded. Thus, under the circumstances, AWBM cannot prove any set of facts in support of a "flagrant" violation. This further supports the district court's dismissal of AWBM's due process claim with prejudice.

72. *Fuentes*, 407 U.S. at 91–92; *Fahey*, 332 U.S. at 254–56.

challenges to the seizure of the bank. Thus, I would affirm the district court's dismissal of AWBM's due process claims with prejudice.

C. *The District Court Did not Err When It Dismissed AWBM's Claim for an Unconstitutional Taking Without Prejudice Due to Insufficient Factual Allegations*

[¶ 29] The district court dismissed AWBM's Takings Clause claim for failure to allege sufficient facts to justify the cause of action. AWBM argues that it has pleaded sufficient facts to demonstrate that it had a protectable property interest, and that its property was taken by government action. AWBM argues that, therefore, it is entitled to "just compensation."

[¶ 30] Article I, section 22 of the Utah Constitution reads, "Private property shall not be taken or damaged for public use without just compensation."[73] This section, Utah's Takings Clause, is "distinct from, and provid[es] greater protection than, those constitutional provisions that provide compensation only for the 'taking' of private property."[74] This broad guarantee of just compensation "is triggered when there is any substantial interference

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73. The Takings Clause of the Utah Constitution expressly provides a damage remedy for a violation—"just compensation." Because of this textual constitutional right to damages, we do not address AWBM's takings claim under *Spackman*. 2000 UT 87, ¶ 20, 16 P.3d 533.

74. *Utah Dep't of Tramp. v. Admiral Beverage Corp.*, 2011 UT 62, ¶ 21, 275 P.3d 208.

with private property which destroys or materially lessens its value, or by which the owner's rights to its use and enjoyment is in any substantial degree abridged or destroyed."[75]

[¶ 31] Although the Utah Takings Clause provides greater protection than its federal counterpart, we have adopted the federal distinction between a physical and regulatory taking.[76] This distinction is important, as the two takings have "markedly different analytical formulas."[77] Generally, there are two principal steps in the takings analysis.[78] First, a claimant must demonstrate some protectable interest in property.[79] Second, the claimant must show that the property interest was taken or damaged by government action.[80] The district court dismissed AWBM's takings claim for a failure to allege sufficient facts to support the claim, particularly that AWBM did not demonstrate that the taking was for a

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75. *Id.* ¶ 22 (internal quotation marks omitted).

76. *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 2006 UT 2, ¶ 32, 128 P.3d 1161.

77. *Id.*; *see also id.* ¶¶ 32–33 (noting the difference between a physical and regulatory taking).

78. *Admiral Beverage Corp.*, 2011 UT 62, ¶ 22, 275 P.3d 208.

79. *Id.*; *Harold Selman, Inc. v. Box Elder Cnty.*, 2011 UT 18, ¶ 23, 251 P.3d 804; *Intermountain Sports, Inc. v. Dep't of Transp.*, 2004 UT App 405, ¶ 8, 103 P.3d 716.

80. *See Admiral Beverage Corp.*, 2011 UT 62, ¶ 22, 275 P.3d 208; *Harold Selman, Inc.*, 2011 UT 18, ¶ 23, 251 P.3d 804; *Intermountain Sports, Inc.*, 2004 UT App 405, ¶ 8, 103 P.3d 716.

public use. AWBM argues it has alleged these elements. We disagree and affirm the district court's dismissal without prejudice.

[¶ 32] A compensable taking may occur in either of two ways.[81] A property owner "may suffer a physical invasion or permanent occupation of his or her property," or may be deprived of property when a regulatory scheme "go[es] too far and impinge[s] on private freedom."[82] "Physical takings without just compensation are unconstitutional 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'"[83] Regulatory takings, unlike physical takings, "do not always trigger an obligation to compensate the property owner."[84] When a regulatory scheme does not involve a physical invasion or permanent occupation, "[t]he Supreme Court has assigned no set formula to determine whether a regulatory taking is unconstitutional"; instead, the Court has engaged in an "essentially ad hoc, factual inquir[y]."[85] In conducting this inquiry, the Court looks to several factors, such as the "economic impact of the regulation, its interference

81. *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1071–72 (Fed. Cir. 1994).

82. *Id.* (internal quotation marks omitted).

83. *B.A.M. Dev., L.L.C.*, 2006 UT 2, ¶ 32, 128 P.3d 1161 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

84. *Id.* ¶ 33.

85. *Id.* (internal quotation marks omitted).

with reasonable investment-backed expectations, and the character of the government action."[86]

[¶ 33] According to AWBM's complaint, "it appears that the Plaintiff and its Members have lost all of the ownership, goodwill, equity, capital, and investments that they made in the Bank." This is the extent of AWBM's allegations contained in its complaint, and neither we nor the district court can discern whether this alleged taking constituted a physical or regulatory taking. This distinction has a marked impact on UDFI's response and defense, the district court's analysis, and the outcome. Without more, we cannot agree that AWBM has sufficiently pleaded a taking, and we thus affirm the district court's dismissal of the claim, but do so without prejudice.[87]

III. THE DISTRICT COURT DID NOT HOLD AWBM TO A HEIGHTENED PLEADING STANDARD

[¶ 34] AWBM argues that the district court erred when it dismissed AWBM's causes of action because it applied a higher pleading standard than that dictated by rule 8 of the Utah Rules of Civil Procedure. AWBM argues the district court erred when it relied on the State's motion

86. *Id.* (internal quotation marks omitted).

87. Although we announce today that a claim for a compensable taking under Article I, section 22 of the Utah Constitution must allege the type of taking (physical or regulatory), we express no opinion on the heightened pleading standard required by federal courts under *Twombly*.

to dismiss and accompanying memorandum that cited to *Ellefsen v. Roberts*[88] and *Heathman v. Hatch*.[89] It argues that the district court's reliance on these cases resulted in the application of a heightened pleading standard. We disagree. *Heathman* involved a claim of fraud, which requires heightened pleading under rule 9 of the Utah Rules of Civil Procedure.[90] But the State did not argue that heightened pleading was required here. The State cited *Heathman* for the proposition that the objective of the pleading rules under the Utah Rules of Civil Procedure "is to require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed[.]"[91]

[¶ 35] Similarly, the State cited *Ellefsen* for the proposition that "[t]he sufficiency of plaintiff's pleadings, which are construed together, must be determined by the facts pleaded rather than the conclusions stated."[92] There is no indication on the record, nor can we discern any evidence from the record, that the district court applied a heightened pleading standard.

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88. 526 P.2d 912 (Utah 1974).

89. 13 Utah 2d 266, 372 P.2d 990 (Utah 1962).

90. *Id*. at 991. *Heathman* also addressed claims of negligence. *Id*.

91. *Id*. at 992.

92. *Ellefsen*, 526 P.2d at 915.

Appendix E

CONCLUSION

[¶ 36] We affirm the district court's dismissal of all of AWBM's claims. AWBM's claims for breach of contract and breach of the covenant of good faith and fair dealing are dismissed without prejudice. AWBM's due process claims are dismissed without prejudice. Finally, AWBM has not adequately pleaded its takings claim, and the claim is dismissed without prejudice.

Appendix E

JUSTICE LEE, opinion of the Court:

[¶ 37] We affirm the district court's dismissal of plaintiff's procedural due process claim, but find error in the dismissal of the claim with prejudice. The defect in that claim is a failure to plead the claim at an adequate level of detail. And for that reason the dismissal should have been without prejudice.

[¶ 38] In order to state a claim for monetary damages for an alleged violation of the constitution, a plaintiff must allege three elements: (1) the plaintiff "suffered a flagrant violation of his or her constitutional rights," (2) "existing remedies do not redress [the plaintiff's] injuries," and (3) "equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries." *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, ¶¶ 23–25, 16 P.3d 533 (internal quotation marks omitted).

[¶ 39] The complaint under review falls far short of alleging those elements. It makes the limited allegation that due process required a pre-seizure hearing, by baldly asserting that the applicable legal standard was not met. Thus, according to the complaint, the seizure was not "directly necessary to secure an important governmental or general public interest," there was no "special need for very prompt action," and the responsible governmental official had not concluded that the seizure was, "pursuant to a narrowly-drawn statute, necessary and justified in

this particular instance." *See Fuentes v. Shevin*, 407 U.S. 67, 91, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (articulating the test for determining when a pre-seizure hearing is required under the Due Process Clause).

[¶ 40] This is merely an allegation that a constitutional violation occurred, satisfying only half of the first element of the *Spackman* test. To survive a rule 12(b)(6) motion, the plaintiff also must allege that the violation was "flagrant," that alternative remedies would not redress the plaintiff's damages, and that equitable relief was "wholly inadequate." *Spackman*, 2000 UT 87, ¶¶ 23, 25, 16 P.3d 533. These essential elements are set forth nowhere in the complaint. Thus, this claim was properly dismissed for failure to state a claim.

[¶ 41] The district court granted the defendants' motion to dismiss "in full." And the motion sought dismissal "with prejudice," so the district court's judgment was apparently a dismissal with prejudice. Such a dismissal is a "drastic remedy," *Bonneville Tower Condo. Mgmt. Comm. v. Thompson Michie Assocs.*, 728 P.2d 1017, 1020 (Utah 1986), which is generally appropriate "only if it appears to a certainty that [a] plaintiff cannot state a claim." *Alvarez v. Galetka*, 933 P.2d 987, 991 (Utah 1997) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990)).[1]

1. At some point, the failure to plead a claim at a sufficient level of detail could sustain a dismissal with prejudice, but that remedy is usually reserved for cases where the plaintiff has had

[¶ 42] Justice Nehring contends that a pre-seizure hearing is never required under the Due Process Clause. And he accordingly concludes that plaintiffs are categorically incapable of stating a claim as a matter of law. *See supra* ¶ 26. We see the matter differently. Granted, in *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947), the Supreme Court held that seizure of a financial institution under the Home Owners' Loan Act of 1933 was appropriate. *See id.* at 253–54. But the operative test—subsequently articulated in *Fuentes*[2] "is a fact-intensive one. Thus, although no hearing was required in *Fahey*, there is no per se rule in controlling precedent. The governing test (in *Fuentes*) is more context-dependent and fact-specific. And that test is incompatible with the notion of a per se rule insulating all bank seizures from constitutional challenge under the Due Process Clause. Instead, *Fuentes* calls on courts to assess the question based on the facts and circumstances of an

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multiple opportunities to amend and has continually failed to state a claim. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (holding that leave to amend should generally be freely given, unless the plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed"). That exception has no application here, as this was plaintiff's first attempt to assert this claim.

2. *Fuentes* concerned a prejudgment writ of replevin statute, not a bank seizure. 407 U.S. at 69. But *Fuentes* articulates the general standards under which property may be seized without a hearing. *Id.* at 91. The Court then went on to list several examples where it had concluded that seizure without a hearing had met that standard, including in *Fahey*. *Id.* at 91–92 & nn. 24–28.

individual case, considering whether the specific seizure at issue is *"directly* necessary to secure an important governmental interest"; whether there is a "special need for very prompt action"; and whether the responsible state actor determined "under the standards of a *narrowly drawn statute*, that it was necessary and justified in the *particular* instance." 407 U.S. at 91 (emphasis added). Thus, *Fahey* may be read to deem it unlikely that a pre-seizure hearing is required by due process; but it does not state a per se rule, or necessitate such a result in all cases.

[¶ 43] Under the fact-intensive *Fuentes* analysis, we cannot conclude "to a certainty" that it is impossible for the plaintiff to allege facts sustaining the conclusion that a pre-seizure hearing was required by due process in this case. Here the complaint did little more than allege that a seizure occurred and summarily recite the *Fuentes* test. And in light of the limited factual basis set forth in the complaint, it is impossible to conclude that there are no facts under which the plaintiff could allege a colorable due process claim.

[¶ 44] We affirm the dismissal of the plaintiff's procedural due process claim, but find error in the dismissal of the claim with prejudice and accordingly direct the district court to enter a judgment of dismissal without prejudice.

APPENDIX F — ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, DATED APRIL 25, 2012

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Case No. 110915676

AMERICA WEST BANK MEMBERS, L.C., A UTAH LIMITED LIABILITY COMPANY, *et al.*,

Plaintiffs,

v.

THE STATE OF UTAH, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Judge Tyrone Medley

Defendants moved to dismiss this action. The parties filed supporting and opposing memoranda and the motion was submitted for decision. The Court decided to grant the motion for the reasons in its March 19, 2012 Minute Entry Decision Re: Defendant's Motion to Dismiss.

Appendix F

It is ordered that Defendants' Motion to Dismiss is granted in full as prayed for and that this action is dismissed.

DATED this 25 day of April, 2012.

BY THE COURT

/s/ Tyrone Medley
HONORABLE TYRONE MEDLEY
District Court Judge

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-4091
(D.C. No. 2:16-CV-00326-CW)
(D. Utah)

AMERICA WEST BANK MEMBERS,

Plaintiff-Appellant,

v.

THE STATE OF UTAH, *et al.*,

Defendants-Appellees.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR AMERICA WEST BANK,

Intervenor-Appellee.

Filed December 16, 2024

ORDER

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Appendix G

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

* * *

The relevant provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), § 1821(d)(2)(A), provides:

> (A) Successor to institution
>
> > The [Federal Deposit Insurance] Corporation shall, as conservator or receiver, and by operation of law, succeed to –
> >
> > (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

* * *

The relevant provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), § 1821(d)(13), provides:

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall –

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over –

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

* * *

Appendix H

The relevant portion of Utah Stat. § 1821(d)(2)(A) provides:

> (d) Powers and duties of Corporation as conservator or receiver
>
> (1) Rulemaking authority of Corporation
>
> The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.
>
> (2) General powers
>
> (A) Successor to institution
>
> The Corporation shall, as conservator or receiver, and by operation of law, succeed to –
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

* * *

Appendix H

The relevant portions of Utah Statute § 7-2-3 provides:

(1)(a) Whenever any institution or other person of which the commissioner has taken possession considers itself aggrieved by the taking, it may within 10 days after the taking apply to the court to enjoin further proceedings.

(b) After ordering the commissioner to show cause why further proceedings should not be enjoined and after hearing the allegations and proofs of the parties and determining the facts, the court may:

(i) dismiss the application; or

(ii) enjoin the commissioner from further proceedings if the court finds the taking to be arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

(c) If the court enjoins further proceedings, it shall order the commissioner to surrender possession of the institution in a manner and on terms designated by the court in the public interest.

(d) Notice of any hearings shall be given to persons designated by the court in the manner designated by the court.