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In the District Court of Utah

Third Judicial District Salt Lake County

Court Address 450 South State Street, Salt Lake City, Utah 84114

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| America West Bank Members, L.C., a Utah limited liability company; and John Does 1-100;<br><br>Plaintiff<br><br>v.<br><br>The State of Utah acting through the Utah Department of Financial Institutions; G. Edward Leary, an individual; and John Does 1-20;<br><br>Defendants | **Amended Complaint**<br><br>**(Jury Demanded)**<br><br>Case Number 150908476<br><br>Judge Su Chon |

Plaintiff alleges:

JURISDICTION, VENUE, AND PARTIES

1. Plaintiff America West Bank Members, L.C. ("AWBM") is a Utah limited liability company with its principal place of business in Davis County, Utah.

2. John Does 1-100 are persons or entities as yet unidentified which may have an interest or be required in the future to plead in this action as plaintiffs.

3. The State of Utah acting through the Utah Department of Financial Institutions, G. Edward Leary, and John Does 1-20, all reside or do business in the State of Utah.

4. The events complained of took place primarily in Davis County and Salt Lake County, State of Utah.

5. Jurisdiction and venue are proper in this court pursuant to Utah Code Sections 63G-7-501 and -502.

6. Plaintiff previously filed an action against Defendants in the Third Judicial District, case number 110915676.

7. All of Plaintiff's claims were dismissed.

8. Plaintiff appealed the decision.

9. The Supreme Court held, *inter alia*, that while the claims should be dismissed as pled, the dismissal must be without prejudice.

10. On December 3, 2014, the district court in case number 110915676 received the remittitur of the Utah Supreme Court and a copy of the certified opinion of the court.

GENERAL ALLEGATIONS

11. On or around May 1, 2000, America West Bank (the "Bank") was chartered by UDFI.

12. The charter authorized the Bank to conduct business as a Bank in the state of Utah.

13. The authorization to conduct business as a Bank was a completed, consummated right to operate.

14. The charter was not terminable at will.

15. The charter created more than a unilateral expectation of continued benefits, but instead constituted a claim of entitlement to continued benefits as a contract.

16. The Bank was wholly owned by AWBM.

17. The Bank experienced success from an early date and was profitable.

18. The Bank's performance placed it in the top tier among peer banks for most of the years of its operations.

19. The Bank's regulatory reviews were consistently accompanied by comments that the Bank's condition was satisfactory and that management had either implemented or had made significant progress in implementing prior recommendations.

20. As of early 2007, the Bank had CAMELS ratings assigned, with each category at a good rating of 2.[1]

21. The Bank was also poised to fully implement a business model that would have been revolutionary for the banking industry, a member banking concept.

22. In furtherance of this model, the Bank had received approval from the Federal Reserve for implementation of this concept.

23. This idea created an innovative financial institution, combining the best aspects of the banking and credit union models.

24. As described in patent application 60423181, the Bank would have the ability to distribute earnings to member owners, as in a bank, while avoiding the corporate level tax of a Bank. The Bank would also provide member banking benefits similar to those used by credit unions to build member loyalty.

[1] CAMELS is an acronym, representing Capital adequacy, Asset quality, Management practices, Earnings performance, Liquidity position, and Sensitivity to market risk. Each component, and an overall composite score, is assigned a rating of 1 through 5, with 1 having the least regulatory concern and 5 having the greatest concern.

25. 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.

26. This pending stock offering was expected to raise significant additional capital in the short term and lead to the competitive advantage of the Bank over the long-term.

27. In early 2008, however, the FDIC's and UDFI's temperament toward the Bank suddenly changed as what was previously a cooperative and productive regulatory relationship became aggressive and hostile against the Bank.

28. The Bank was surprised by this change in temperament, and was inclined to ask what prompted the change.

29. The response that Mr. Durbano from the Bank received from Pat Pittman of the FDIC, with Tyson Sill from UDFI present, was that "It's political."

30. When asked why they took unreasonable positions not previously taken in evaluating the Bank, these two indicated that it was "political," that their "hands were tied," or with a statement of apology "there is nothing I can do."

31. Brent Savage, a former FDIC examiner with access to sources within the FDIC, told Mr. Durbano that the FDIC had directed that the Bank be taken down because the FDIC changed its mind about the innovative member banking concept and decided it must kill the Bank in order to put an end to the new concept.

32. After the change in temperament, the Bank made repeated efforts to portray the true status of the Bank's position.

33. On April 11, 2008, the Bank participated in a meeting at UDFI offices to discuss and defend the position of the Bank. Present were representatives of the Bank and Nathan Heizer and Tom Bay of UDFI.

34. The Bank showed UDFI how it was well positioned because of various factors, including willingness of owners to contribute additional capital, a very engaged board, the Bank's profitability, and willingness to respond to recommendations from regulators.

35. The regulators verbally assured the Bank that they were partners of, not enemies to, the Bank.

36. The Bank had also consistently been noted in peer reports as outstanding among its peer group in its ability to collect on troubled loans or assets, establishing the benchmark and standard among its peers, and compared very favorably in various categories to other institutions in peer reports issued by Bank Measure.

37. And although the performance of the Bank had actually improved from 2007 to 2008 (for example, the Material Loss Review conducted by the Office of Inspector General noted a strengthened capital position from 2007 to 2008), on June 3, 2008 when the Bank received the report of examination from the January 2008 review the CAMELS ratings assigned to the Bank were very low (444333 with a composite of 4).

38. The changes in ratings came about because the UDFI and FDIC in a joint examination process sent a new group of regulators, led by Pat Pittman.

39. Accordingly, the FDIC visitation reports in 2008 and through 2009 show a markedly different tone and approach than those from earlier years.

40. One of the changes in approach was to value the Bank and its assets from a liquidation perspective rather than as an "ongoing concern."

41. Management that was previously considered good was now characterized as critically lacking.

42. The regulators achieved the poor ratings by changing the standard accounting procedures in evaluating the Bank and its capital, assets, and liquidity.

43. Assets that were previously evaluated based on historical trends and appropriate market exposure times were now valued on the assumption of immediate liquidation and the accompanying mark downs.

44. The Bank argued with the regulators about these characterizations, and objected to their validity, but the regulators were unyielding in adhering to their plan to use such methodology.

45. The call report (periodic filing required of banks) which followed after these examinations was signed by the Bank under protest because the report was not accurate.

46. Based on the statements from Pat Pittman and combined with the insight received from the former FDIC examiner, it appears that these measures were taken with the specific objective of manufacturing a supposedly data-driven excuse to justify a decision that had already been made to shut down the Bank.

47. Upon information and belief, any bank in Utah could have been demonized by the regulators if such a methodology were applied in the same manner to their portfolios.

48. The Bank was treated differently than other banks and not upon any reasonable basis for distinction.

49. Instead, on information and belief, the differing treatment was done to further the intent of killing the Bank to prevent its new banking model from seeing the light of day.

50. Had the regulators evaluated the Bank under appropriate standards and practices as had been done during the prior years of the Bank's examinations, the reports of 2008 and 2009 would have been markedly different.

51. The proper reports would have provided no justification for taking any action against the Bank, let alone the drastic action of seizure of all assets.

52. An additional criticism levied against the Bank by the regulators was the Bank's high level of brokered deposits, but this factor actually increased the stability of the Bank because holders of brokered deposits are restricted in their ability to withdraw the deposits and are insured.

53. As the risk of a run on deposits is actually inversely proportional to a bank's concentration of brokered deposits, this factor actually made the Bank more stable than others in its peer group.

54. After receiving the negative examination report, the Bank continued its efforts to show the true state of the Bank's condition.

55. On June 5, 2008, immediately after receiving the written report of examination from the January 2008 examination, Mr. Durbano had conversations regarding the Bank's status with regulators Sean Berrett and Tom Bay of UDFI and Tim Lacke of the FDIC.

56. These regulators asked Mr. Durbano how the Bank had recently raised 3.7 million dollars, pleased with the infusion of capital.

57. Mr. Durbano indicated that the capital came from Bank founders and that the Bank could continue to raise capital.

58. But Mr. Durbano also explained the problems caused by the recent negative examination report, and in particular, that certain members of the board had resigned or would soon resign as a result of the examination report.

59. The regulators urged that the board members not resign, but should stick with it and work through it.

60. Tim Lacke repeatedly assured Mr. Durbano to "just trust us," and that "you have to trust me," and that "In the end you will come out and make a lot of money," expressing confidence that the Bank would make it through the economic downturn.

61. On this and at other occasions during 2008, the regulators encouraged the Bank to continue to raise capital and it would be fine.

62. Accordingly, the Bank continued to raise capital, bringing in significant additional capital infusions in the millions during 2008.

63. As relayed by Brent Savage to Mr. Durbano, the individual at the FDIC tasked with killing the Bank (Pat Pittman) received a promotion after successfully completing the job.

64. The Bank applied for TARP funds and was persistent in following up on the application, but a direct result of the manipulated CAMELS ratings was that the Bank would not qualify for TARP.

65. Tim Lacke at one time indicated by email that there was "no hope" for the Bank's application and later by email indicated that the low CAMELS rating of 4 would prevent the Bank from receiving any funds.

66. Indeed, the Bank's application was ultimately denied.

67. On May 1, 2009, Commissioner Leary, acting on behalf of the State of Utah and specifically UDFI, filed an ex parte verified petition (the "Petition") for an order granting possession of the Bank.

68. Commissioner Leary, however, could not have actually and properly determined prior to filing the Petition that immediate seizure was necessary and justified in the particular instance, as UDFI knew that its reports relied on a new and a faulty methodology which the Bank had vigorously opposed as being factually and legally incorrect.

69. Under Utah Code Section 7-2-1, the Commissioner only has the authority to take possession of a bank if he finds that alternative action is "ineffective or impracticable" and at least one of the following conditions exist:

(a) the institution is not in a safe and sound condition to transact its business;

(b) an officer of the institution or other person has refused to be examined or has made false statements under oath regarding its affairs;

(c) the institution or other person has violated its articles of incorporation or any law, rule, or regulation governing the institution or other person;

(d) the institution or other person is conducting its business in an unauthorized or unsafe manner, or is practicing deception upon its depositors, members, or the public, or is engaging in conduct injurious to its depositors, members, or the public;

(e) the institution or other person has been notified by its primary account insurer of the insurer's intention to initiate proceedings to terminate insurance;

(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 or other person is a depository institution that has failed or refused to pay its depositors in accordance with the terms under which the deposits were received, or has or is about to become insolvent;

(h) the institution or other person 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;

(i) the institution or other person or its officers or directors have failed or refused, upon proper demand, to submit its records, books, papers, and affairs for inspection to the commissioner or to a supervisor or an examiner of the department;

(j) the institution or other person or its officers or directors, after 30 days written notice, have failed to comply with or have continued to violate this title or any rule or regulation of the department issued under it;

(k) any person who controls the institution or other person subject to the jurisdiction of the department has used the control to cause the institution or other person to be or about to be in an unsafe or unsound condition, to conduct its business in an unauthorized or unsafe manner, or to violate this title or any rule or regulation of the department issued under it; or

(l) the remedies provided in Section 7-1-307, 7-1-308, or 7-1-313 are ineffective or impracticable to protect the interest of depositors, creditors, or members of the institution or other person, or to protect the interests of the public.

70. Commissioner Leary could not have actually and properly determined that the Bank was not in a safe and sound condition to transact its business because the Bank had sufficient capital to operate and was in a stable and profitable condition.

71. Commissioner Leary could not have actually and properly determined that an officer of the Bank or other person had refused to be examined or had made false statements under oath regarding its affairs, as all officers and persons related to the Bank were truthful and fully cooperative in all interactions with Commissioner Leary.

72. Commissioner Leary could not have actually and properly determined that the Bank had violated its articles of incorporation or any law, rule, or regulation governing the institution because all valid and applicable provisions were complied with.

73. Moreover, the Bank had a positive history of complying with recommendations and requirements from UDFI and FDIC, and at all times indicated that it would comply with applicable requirements.

74. Commissioner Leary could not have actually and properly determined that the Bank was conducting its business in an unauthorized or unsafe manner, or was practicing deception upon its depositors, members, or the public, or was engaging in conduct injurious to its depositors, members, or the public because all relevant conduct of the Bank was proper and fully disclosed.

75. Commissioner Leary could not have actually and properly determined that the Bank had been notified by its primary deposit account insurer (FDIC) of the insurer's intention to initiate proceedings to terminate insurance, as no such notification or intention had ever been expressed.

76. Commissioner Leary could not have actually and properly determined that the Bank had failed to maintain a minimum amount of capital as required by the department, any state, or the relevant federal regulatory agency, as the actual and correct financial position of the Bank was within acceptable capital requirements.

77. Moreover, Commissioner Leary knew or should have known that the Bank met the required minimum amount of capital under the procedures normally applied to the Bank (and other financial institutions).

78. Commissioner Leary was also in possession of a UDFI report which indicated that the Bank did not have the minimum amount of capital required, but Commissioner Leary knew or should have known that the report was based on a drastically different methodology than applied previously and that such methodology had been vigorously protested by the Bank and signed "under protest."

79. Given that the prior examinations were based on such different methodology than was later employed to produce the negative CAMELS rating, and given Commissioner Leary's familiarity with the examination process in general and the examinations of the Bank in particular, AWBM does not believe Commissioner Leary could have been ignorant of the problems with the report.

80. Commissioner Leary knew or should have known that if the methodology employed in this report were applied to other financial institutions, most if not all such institutions would likewise not show the minimum amount of capital required.

81. Commissioner Leary knew or should have known that under the correct methodology, the Bank would have the minimum amount of capital required.

82. Instead, Commissioner Leary facilitated the FDIC's plan to take down the Bank, as UDFI worked with the FDIC to impose the methodologies discussed above in order to create a basis for asserting that the Bank's assets should be seized.

83. Commissioner Leary could not have actually and properly determined that the Bank had failed or refused to pay its depositors in accordance with the terms under which the deposits were

received, or has or is about to become insolvent, as the Bank never failed to pay any depositor and had no indications of insolvency.

84. Moreover, Commissioner Leary knew or should have known that the brokered deposits, of which the Bank had high concentrations, were not subject to normal solvency concerns.

85. Commissioner Leary could not have actually and properly determined that the Bank or its officers or directors had failed or refused to comply with the terms of a legally authorized order issued by Commissioner Leary or by any federal authority or authority of another state having jurisdiction over the Bank, as the Bank had at all times worked with vigilance to comply with legally authorized orders.

86. Commissioner Leary could not have actually and properly determined that the Bank or its officers or directors had failed or refused, upon proper demand, to submit its records, books, papers, and affairs for inspection to Commissioner Leary or to a supervisor or an examiner of UDFI, as the Bank and its officers and directors had at all times voluntarily submitted to inspections requested.

87. Commissioner Leary could not have actually and properly determined that the Bank or its officers or directors, after 30 days written notice, had failed to comply with or have continued to violate applicable code sections or any rule or regulation of the department issued thereunder, as no such notice and subsequent failure to comply had occurred.

88. Commissioner Leary could not have actually and properly determined that a person who controls the Bank had used the control to cause the Bank to be or about to be in an unsafe or unsound condition, to conduct its business in an unauthorized or unsafe manner, or to violate the law, as the officers and directors of the Bank had at all times used reasonable diligence in operating the Bank and complying with applicable requirements.

89. Commissioner Leary could not have actually and properly determined that the remedies provided in Utah Code Sections 7-1-307, 7-1-308, or 7-1-313 were ineffective or impracticable to protect the interest of depositors, creditors, or members of the Bank, or to protect the interests of the public, as not only was there no cause warranting any action to protect, but the remedies provided in the referenced Sections certainly would have been adequate.

90. Commissioner Leary could not have actually and properly determined that there was no alternative to taking possession of the Bank.

91. Instead, UDFI did the bidding of the FDIC, including imposition of a methodology which UDFI employed for the specific purpose of purporting to have cause to seize the Bank and appoint the FDIC as the receiver.

92. Just days before UDFI took possession, Kevin Garn approached Commissioner Leary to ask why the Bank was being targeted by UDFI in an unreasonable way.

93. Commissioner Leary replied apologetically, stating that he was under pressure from the FDIC and was afraid that the FDIC would follow through on their threat to contact the governor if UDFI did not seize the Bank.

94. But UDFI is not subject to the control of the FDIC and was not required to do the FDIC's bidding.

95. If the FDIC wanted to impose supervisory measures on the Bank it had its own mechanisms to employ.

96. The incorrect methodology was not imposed for the purpose of protecting the public from the possible effects of bank failure, but to manufacture an apparent justification for seizing the Bank.

97. Upon information and belief, when the UFDI's petition to seize the Bank was presented to the District Court *ex parte*, Commissioner Leary represented that the Bank must be seized because it did not meet the minimum capital requirements.

98. The case in which the petition was filed is under seal.

99. As noted above, such representation would have been premised on a methodology employed for the sole purpose of obtaining a result that could purport to justify seizure of the Bank.

100. As relayed by Paul Allred to Mr. Durbano, the Court asked Commissioner Leary how much capital infusion would be required to meet the minimum capital requirements, and Commissioner Leary told the judge that he did not know.

101. Commissioner Leary, however, would or should have known how much capital would be required to meet the minimum requirements because this information must have been in his joint examination report (even as calculated under the faulty methodology).

102. Commissioner Leary also should have known, based on his knowledge of the Bank and its representations to him, that the Bank had the potential to raise significant amounts of capital quickly if allowed to do so and given the tools to do so, as the Bank had previously raised capital and had earlier been encouraged by the regulators to continue to raise more capital and been given assurances that such would result in the ongoing safety and protection of seizure of the Bank.

103. Commissioner Leary also knew that the Bank's innovative member banking concept could generate significant capital infusions.

104. But after the temperament of the regulators changed in late 2007 and early 2008, restrictions were put in place to make it difficult for the Bank to raise capital.

105. And when Mr. Durbano asked Commissioner Leary a few days before the seizure how much capital the Bank needed, Commissioner Leary told Mr. Durbano that he would not let the Bank raise capital anymore.

106. The petition was granted on the day of filing, without notice or opportunity for hearing being given to AWBM or the Bank.

107. The Bank had previously requested in writing that it receive notice of any action taken by UDFI.

108. Also on the same date, as requested by the UDFI, the FDIC was appointed as receiver for the Bank.

109. The FDIC immediately and publicly announced the failure and seizure of the Bank, and began liquidating assets of the Bank.

110. This announcement and ensuing liquidation worked to deprive AWBM of all ownership, goodwill, equity, capital, and investments reflected by ownership of the Bank, as no later pronouncement by a court enjoining the seizure and liquidation could have restored the public's confidence in the Bank.

111. Thereafter, the FDIC, acting in behalf of UDFI as its agent exercised complete control and dominion over all the assets of the Bank.

112. On the day that the FDIC physically took over the Bank, Commissioner Leary and an attorney for the State pulled aside Mr. Durbano and told him not to resist the FDIC actions because "They can make it much worse for you."

113. The FDIC disposed of the assets at the discounts associated with quick liquidation and bulk sales.

114. The depositor accounts were taken over by Cache Valley Bank.

115. Cache Valley Bank also had a role in administering the liquidated assets on behalf of the FDIC.

116. Statements made by George Daines, a senior officer at Cache Valley Bank, to Mr. Durbano confirm the Bank's position that the assets were very valuable, as he told Mr. Durbano that the FDIC has not lost a dollar on the Bank's assets.

117. AWBM is also aware of the subsequent history of several of the Bank's loans and assets, and has seen a consistent pattern of these assets realizing at least as much as the Bank had valued them.

118. The seizure of the Bank affected a massive reallocation of wealth, as those who purchased the Bank's assets experienced significant profits from their resale.

119. The assets resold for a healthy profit and within a time period the Bank could have profitably realized upon the assets if it had not been seized.

FIRST CLAIM FOR RELIEF: BREACH OF CONTRACT BY UDFI

120. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 118, above.

121. Once the charter authorizing the Bank to operate was consummated, the Bank had a completed, consummated right to so operate.

122. The Bank's charter is an enforceable contract.

123. This contract was not terminable at will, was much more than a unilateral expectation of continued benefits, but instead constituted a claim of entitlement to continued benefits under the contract.

124. The Bank was also requested to raise more capital, which it did, with the promise that such would prevent the seizure of the Bank by the regulators and its ultimate ongoing success and profitability.

125. The Bank completed in good faith its obligations under the contract.

126. To the extent that UDFI alleges that the Bank did not complete its obligations under the contract, any alleged deficiencies resulted from UDFI's prior breaches which were done with the objective of depriving the Bank of the benefits of the contract.

127. By the actions complained of above, UDFI breached its contract with the Bank, substantially departing from the common objectives and agreements of the contract.

128. AWBM is entitled to a judgment in an amount to be determined at trial, plus pre-judgment and post-judgment interest, plus costs for maintaining this action for collection.

SECOND CLAIM FOR RELIEF: BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING BY UDFI

129. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 127, above.

130. UDFI owes the Bank a duty of good faith and fair dealing inherent in every contractual relationship.

131. UDFI has breached that duty, which was an act inconsistent with the common purpose of the parties and the Bank's justified expectations.

132. AWBM is entitled to a judgment in an amount to be determined at trial, plus pre-judgment and post-judgment interest, plus costs for maintaining this action.

THIRD CLAIM FOR RELIEF: VIOLATION OF PROCEDURAL DUE PROCESS (ALL DEFENDANTS)

133. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 131, above.

134. The Utah Supreme Court has established that "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." *America West Bank Members, L.C. v. State of Utah*, 2014 UT 49, ¶ 38.

135. These three prerequisites to a claim for monetary damages are discussed under appropriate headings below; i.e. a flagrant violation, inadequacy of existing remedies, and inadequacy of equitable relief.

**Flagrant Violation**

136. A flagrant violation is found when a defendant violates "'clearly established' constitutional rights 'of which a reasonable person would have known.'" *Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, ¶ 23, 16 P.3d 533 (quoting *Harlow v. Fitzgerald*, 457 U.S .800, 818 (1982)).

137. It is clearly established under Utah law that the validity of a seizure without a hearing is premised upon strict adherence to narrowly drawn statutory requirements. Utah Code § 7-2-1; *Brown v. Weis*, 871 P.2d 552, 567 (Utah App. 1994).

138. It is also clearly established under federal law that seizure of a bank without a hearing is only allowed where (i) the seizure is directly necessary to secure an important governmental interest, (ii) there is a special need for very prompt action, and (iii) the state actor

determined, under the standards of a narrowly drawn statute, that seizure was necessary and justified in the particular instance. *Fuentes v. Shevin*, 407 US 67, 91 (1972).

139. Accordingly, one of the fundamental and clearly established premises of allowing seizure without a prior hearing is that the seizing official strictly adheres to the statutory requirements.

140. Another fundamental premise is that the statutory requirements must be "narrowly drawn" in order to assure that a state actor does not have authority to seize a bank without a hearing unless a true exigency exists.

141. Strict adherence to the statute ensures that the seizing official is motivated by those factors peculiar to the banking industry which sometimes make quick action necessary. *Brown*, 871 P.2d at 567.

142. In *Brown*, after noting that a right to a pre-seizure hearing is the norm, the court identified those circumstances which can make seizure of a financial institution the exception: the important public interest in avoiding the catastrophic impacts of a bank failure, the need for very prompt action in relation thereto, and the fact that authorizing statutes are narrowly drawn and strictly adhered to. *Id.* at 566-67.

143. The *Brown* opinion identified these conditions as necessary prerequisites which must exist in order to seize a financial institution without a pre-seizure hearing.

144. The court considered the third element, compliance with statutory procedure, most relevant: "Most importantly, the Commissioner seems to have adhered to the strict statutory requirements and there has been no serious allegation to the contrary." *Id.* at 567.

145. The court repeated again, when affirming dismissal of plaintiff's federal claims under 42 U.S.C. § 1983 based on qualified immunity, that "[t]he Commissioner followed

statutory procedures, of the sort regularly upheld by the courts, prior to petitioning the district court . . . ." *Id.* at 569.

146. 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.

147. Further, the false statements and material omissions made by Commissioner Leary and UDFI to the court would constitute a violation of procedural due process. *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 96, 250 P.3d 465.

148. The facts actually available to Commissioner Leary and UDFI—which apparently were withheld from the court to which the Petition was made—would not support any of the twelve statutory pre-conditions to seizure.

149. Commissioner Leary also omitted material facts from its presentation to the court which would have caused the court to deny the Petition; as stated above.

150. Commissioner Leary knew or should have known that there was no need whatsoever for prompt action as the Bank was in a safe condition.

151. A reasonable Commissioner both before and particularly after *Brown* would take care to ensure strict adherence to the authorizing statute knowing that failure to do so would subject Commissioner Leary to scrutiny and liability.

152. *Brown* makes clear what should already have been blatantly obvious from the statute itself: that the Commissioner's power to act without regard to the normal requirements of due process is conditioned upon strict adherence to the authorizing statute.

153. *Brown* makes clear what a Commissioner already should know: that summary seizure is only available because a narrowly drawn statute has been enacted to address the need

for "very prompt action" to protect "against the economic disaster of a bank failure." *Brown*, 871 P.2d at 566 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).

154. Moreover, the sword of the authorizing statute is too large to think that a reasonable Commissioner would wield it with significant "forgetfulness, distractibility, or misjudgment." *Spackman*, 2000 UT 87, ¶ 23 (quoting *Bott v. Deland*, 922 P.2d 732, 739-40 (Utah 1996)).

155. Accordingly, and in light of the "unique capacity to harm" of one wielding such a sword, *Bott*, 922 P.2d at 739, the allowance for these frailties should be most carefully considered.

156. G. Edward Leary was the Commissioner at the time that the *Brown* decision was issued.

157. Here, Commissioner Leary did not strictly comply with the statutory requirements and was instead motivated by factors entirely unrelated to the stability of the Bank.

158. 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.

159. Accordingly, Commissioner Leary lacked the necessary "disinterestedness and restraint" upon which the validity of seizure without hearing is premised, and upon information and belief, Commissioner Leary did not make a good faith determination, through adherence to the strict statutory requirements, that summary seizure was necessary and justified in the particular instance.

160. Based on the foregoing, the conduct of Commissioner Leary and UDFI was so egregious and unreasonable that it constitutes a flagrant violation of due process.

**Existing Remedies Inadequate**

161. There are no other existing remedies that will redress the injuries caused by this flagrant violation of due process.

162. For example, there is no common law action available to AWBM which addresses its interest in due process.

163. Traditional common law causes of action are tailored to address private harms arising from private causes, as a private actor has no ability to put on a cloak of state authority when acting to the detriment of another's rights.

164. In contrast, when a state actor uses statutory authority to seize private property, but does so without complying with statutory prerequisites, both the cause of the harm and the nature of its impact are decidedly different.

165. When the "alternative" common law action addresses different policy considerations than those which should be addressed in awarding damages for the constitutional violation, there is not an "alternative" remedy allowing the court to "avoid the myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a constitutional violation." *Spackman*, 2000 UT 87, ¶ 24.

166. For example, a breach of contract claim does not redress AWBM's injuries, as the harm flowing from a breach of contract and policy considerations behind contractual damages are not the same as the harm flowing from a violation of due process.

167. Damages for breach of contract arise because an agreement between contracting parties creates expectations, the violation of which leads to a measure of damages calculated to put a party back in the position it would have been prior to the breach.

168. A violation of the right to due process has nothing to do with private contractual expectations, but instead has to do with the right to confront evidence, protect reputation, and not be subjected to the emotional impact of deprivations without process.

169. The decision of how to "remedy" such a violation cannot be channeled into the breach of contract analysis because there are no contractual expectations to guide a court in determining the measure of damages.

170. Punitive damages are also prohibited under the Utah Governmental Immunity Act of Utah Code § 63G-7-603, and would not even be available under a breach of contract theory.

171. In contrast, the violation of the right to due process could lead to a punitive damage award. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (noting availability of punitive damages under *Bivens* because punitive damages are "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights" and then noting that unavailability of punitive damages under statutory remedy weighed in favor of allowing action for damages).

172. Next, a Section 1983 action cannot redress Plaintiff's injuries for violation of the right to due process because a Section 1983 claim cannot be based upon the violation of *state* law rights.

173. As a matter of principle, the availability of a Section 1983 action based on federal rights should not eclipse a right to damages under a self-executing provision of the Utah Constitution.

174. Additionally, as a factual matter AWBM could not obtain redress of its injuries through a Section 1983 action because of the limitations on such an action:

175. First, AWBM could not sue the State of Utah or UDFI for violation of Utah law under Section 1983.

176. Second, AWBM could not have named the agents of the State of Utah in their official capacities under Section 1983.

177. Finally, under Section 1983 a suit against an individual in his or her personal capacity is subject to qualified immunity.

178. Accordingly, existing remedies are not adequate to address the harm suffered by AWBM.

**Inadequacy of Equitable Relief**

179. Equitable relief, such as an injunction, was and is wholly inadequate to protect the Plaintiff's rights or redress its injuries because the harm resulting from Defendant's unconstitutional and illegal seizure of the Bank was immediate and irreparable.

180. Equitable relief can be an appropriate remedy when the offending party can simply redo correctly the 'procedure' that allegedly lacked the mandated safeguards.

181. But while a post-seizure injunction is available to one whose financial institution has been seized, this is not a remedy that will protect rights or redress injuries because an injunction would not restore the public's confidence in the Bank which had been wrongfully destroyed by Commissioner Leary's actions.

182. From the first moment that Commissioner Leary took possession and simultaneously announced the failure of the Bank, equitable relief could not have undone the damage to AWBM.

183. The consequences of the seizure itself would ensure that if the court were to require Commissioner Leary to reevaluate the statutory requirements, he would certainly find

them satisfied at the subsequent hearing due to the loss of confidence in the Bank caused by Commissioner Leary's previous actions.

184. The injuries which AWBM suffered are similar to the injuries suffered by the prisoner in *Bott* as a violation of its rights under Article I, Aection 9 of the Constitution of the State of Utah in that irreparable injury accrues immediately upon the violation of the right—the injury is consummated contemporaneous with the violation.

185. At the point of injury, there was no way to undo the damage to AWBM in a way that could make Commissioner Leary retrace its steps, properly follow statutory procedures, and thereby protect AWBM's rights and redress its injury.

186. Immediately after the seizure of the Bank, AWBM took appropriate measures to determine how to obtain post-seizure relief, but concluded that to petition the court to undo the seizure would not provide any meaningful relief.

187. AWBM is therefore entitled to monetary damages, including punitive damages, to provide financial compensation for the Defendants' flagrant violation, in an amount to be determined at trial.

188. More specifically, AWBM is entitled to damages to compensate and to remediate the injury suffered as a result of the violation of procedural due process, including but not limited to 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.

FOURTH CLAIM FOR RELIEF: VIOLATION OF SUBSTANTIVE DUE PROCESS (ALL DEFENDANTS)

189. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 187, above.

190. AWBM pleads in the alternative to its claim for violation of procedural due process a violation of substantive due process.

191. If the authorizing statute is applied here to authorize Defendants to seize the Bank without a hearing (even when failing to strictly adhere to the statute and withholding information from the court which would cause the court not to grant the Petition), the statute as applied authorizes conduct so unreasonable as to constitute a flagrant violation of substantive due process.

192. Such an interpretation would allow protected property rights to be automatically lost or impaired at the whim of a Commissioner, without any bearing on a rational or legitimate State purpose.

193. Moreover, heightened scrutiny is required because in the context of the arbitrary deviations complained of in failing to adhere to the narrow statutory requirements, those narrow requirements already represent a diminution or contraction of the normal procedural protections of due process.

194. For the reasons stated above in the context of the procedural due process claim, existing remedies are not sufficient to redress the violation, and equitable relief was wholly inadequate.

195. AWBM is therefore entitled to monetary damages, including punitive damages, to provide financial compensation for the Defendants' flagrant violation, in an amount to be determined at trial.

196. More specifically, AWBM is entitled to damages to compensate and to remediate the injury suffered as a result of the violation of substantive due process, including but not limited to 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.

FIFTH CLAIM FOR RELIEF: 42 U.S.C. SECTION 1983 AND 1988 AND THE UNITED STATES CONSTITUTION (DEFENDANT LEARY)

197. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 195, above.

198. Commissioner Leary is the Commissioner of Utah Department of Financial Institutions and is named in his individual capacity in this cause of action for damages.

199. At all times, the conduct and actions of Commissioner Leary complained of above were under the color of state law.

200. This action arises under the United States Constitution and 42 U.S.C. Section 1983.

201. This court has concurrent jurisdiction to hear this claim.

202. The procedural due process component of the Fourteenth Amendment entitles AWBM to notice and hearing before having its property seized.

203. The substantive due process component of the Fourteenth Amendment protects AWBM from executive action in regard to its property that shocks the conscience and from deliberate indifference to protected property interests.

204. As noted above and discussed further below, under Utah law the property interests seized by decision of Commissioner Leary are protected in that AWBM had a legitimate claim of entitlement to these interests and more than a mere expectancy.

205. Commissioner Leary acted intentionally and deliberately in depriving AWBM of its property without notice or a hearing.

206. AWBM's loss was neither random nor unpredictable.

207. There was no need for quick action by the State.

208. A pre-deprivation process for notice and hearing could have been provided by the State.

209. Commissioner Leary is not entitled to qualified immunity because he acted in violation of clearly established federal law, and his behavior was therefore not objectively reasonable.

210. A reasonable official in Commissioner Leary's position would understand that what he was doing violates the federal right to notice and hearing prior to seizure, because it is clearly established under federal law that seizure without notice and a hearing is only justified where: a) it is directly necessary to secure an important governmental or general public interest; b) there is a special need for very prompt action; and c) the State kept strict control over its monopoly of 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. *See Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

211. Federal law also clearly establishes that the seizure without notice and hearing is a heavy responsibility to be exercised with disinterestedness and restraint. *Fahey v. Mallonee,* 332 U.S. 245, 253-54 (1947).

212. As previously alleged, Commissioner Leary lacked the necessary "disinterestedness and restraint" upon which the validity of seizure without hearing is premised.

213. As previously alleged, Commissioner Leary did not adhere to the standards of the narrowly drawn statute.

214. As previously alleged, seizure without notice and a hearing was not directly necessary to secure an important interest.

215. As previously alleged, there was no special need for very prompt action.

216. The actions of Commissioner Leary complained of herein shock the conscience and reflect deliberate indifference to the protected property interests of AWBM.

217. AWBM was damaged due to the lack of process because the seizure of its property was an unjustifiable deprivation that resulted in the complete loss of the property interests previously identified, including injury to reputation suffered in conjunction with the deprivation of tangible interests.

218. AWBM is therefore entitled to monetary damages, including punitive damages, to provide financial compensation for Commissioner Leary's reckless indifference to AWBM's right to procedural and substantive due process.

219. AWBM also seeks an award of interest and reasonable attorney's fees and costs expended in this action, pursuant to the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988(b) and other relevant statutes.

SIXTH CLAIM FOR RELIEF: TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION – UTAH CONSTITUTION ARTICLE I SECTION 22 (DEFENDANT UDFI)

220. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 219, above.

221. AWBM pleads in the alternative to its claims for violation of procedural and substantive due process a takings claim.

222. Under the Takings Clause, even if the Defendants could have acted legitimately procedurally and substantively, AWBM is entitled to just compensation for the taking of a protectable interest in property.

223. The definition of "protectable interest" is certainly broad enough to encompass AWBM's property interest in the Bank, as comprised by its capital, accounts, investments, going concern, and the goodwill arising therefrom.

224. Additionally, once the charter authorizing AWBM to operate the Bank was consummated, AWBM had a completed, consummated right to so operate.

225. The charter is a contract, a contract is property, and like any other property, must be compensated when taken for public use. It is a species of intangible rights that are protected.

226. The contract was not terminable at will.

227. The rights under the contract to operate the Bank, being tantamount to an exclusive franchise or license, created a vested, legally enforceable interest to continue to so operate.

228. The property interest thus created by contract was much more than a unilateral expectation of continued benefits, but instead constituted a claim of entitlement to continued benefits under the contract.

229. Accordingly, the right to operate the Bank under the contract, and the assets which would inevitably be built and developed as a result, each constituted vested, legally enforceable interests in a completed, consummated right for present and future enjoyment.

230. While the contractual interest had the prospect of being subject to statutory control, because UDFI did not act in compliance with the statute in seeking and obtaining the Petition, it had the power, but not the right, to affect the seizure and liquidation of the Bank without just compensation.

231. The operation of the Bank at the time of the Petition was not per se injurious and the business thereof was capable of being conducted, and actually was being conducted in a reasonable and non-negligent manner.

232. UDFI did not act to prevent imminent public catastrophe that was extreme, imperative, or of overwhelming necessity, nor would a *permanent* invasion be justified in the case of such necessity even if it existed.

233. Moreover, to the extent that UDFI claims that the Bank's capital levels constituted overwhelming necessity, those capital levels were arrived at only by use of erroneous methodology.

234. Further, the State played a part in creating any alleged sense of necessity by impeding the Bank's ability to function as an ongoing concern.

235. The Petition of UDFI as granted, and the ensuing liquidation after appointment of the FDIC as receiver, wholly deprived AWBM of both the profitable use and enjoyment of its rights under the contract and the valuable assets (including notes, trust deeds, accounts, investments, going concern, and good will) which AWBM had developed in operation of the Bank.

236. UDFI, by seeking and obtaining possession of the Bank, physically and permanently invaded and occupied the protectable interest which AWBM had in the Bank, the right to operate the Bank under its contract, and the valuable assets which AWBM had developed in operation of the Bank.

237. UDFI's actions were so onerous as to affect a direct appropriation or ouster.

238. As a result of UDFI's invasion and occupation, these valuable and protectable interests were made available for use by others.

239. Although UDFI did not seize and liquidate the Bank in compliance with those statutory provisions which relate to the financial health of the Bank (to prevent imminent public catastrophe), UDFI did seize the property for a public use.

240. By the actions complained of herein, UDFI substantially interfered with private property and thereby destroyed its value, completely abridging and destroying AWBM's right to use and enjoy its property.

241. When the government takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the owner.

242. A constitutional takings claim is AWBM's remedy for the foregoing actions of the State because there is no statutory enactment which affords Plaintiff the full complement of constitutional protections.

243. AWBM is therefore entitled to monetary damages, including interest, in an amount to be determined at trial.

Wherefore, AWBM requests relief on its claims for breach of contract, breach of the duty of good faith and fair dealing, violations of procedural and substantive due process, and taking of

private property without just compensation, as enumerated above, along with such other relief as the court finds appropriate.

**DATED and SIGNED this 23rd day of March 2016.**

**DURBANO LAW FIRM, P.C.**

**/s/ Douglas M. Durbano**
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