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

FEDERAL INSURANCE COMPANY, an Indiana corporation, **Plaintiff in Interpleader,** **v.** **DIANE A. THOMPSON, as Receiver for American Pension Services, Inc.; CURTIS L. DeYOUNG, an individual; and MICHELLE DeYOUNG, an individual,** **Defendants in Interpleader.**	***AMENDED* ORDER FOLLOWING ORAL RULING ON RECEIVER'S RENEWED MOTION FOR SUMMARY JUDGMENT [DKT. 67]** **Case No.: 2:16-cv-00023-RJS-EJF** **Judge Robert J. Shelby** **Magistrate Judge Evelyn J. Furse**

On November 30, 2017, the Court heard oral argument on Diane Thompson, Court-appointed Receiver for American Pension Services, Inc.'s ("APS") Renewed Motion for Summary Judgment and Memorandum of Law in Support of Motion [Dkt. 67] (the "Motion"). The Receiver was represented by Mark R. Gaylord and Melanie J. Vartabedian of Ballard Spahr LLP. Curtis DeYoung was represented by Jerome Mooney of Weston, Garrou, & Mooney. Michelle DeYoung was represented by Benjamin Grindstaff of BBG Law. The Court heard argument from counsel, made findings and rulings of law on the record, and directed the Receiver to prepare the order.

Based on the Motion, the memoranda filed in support and opposition thereof, and argument of counsel, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

SUMMARY JUDGMENT STANDARD AND FINDINGS OF UNDISPUTED MATERIAL FACTS

Under Federal Rule of Civil Procedure 56(a), the Court may grant the Receiver's motion for summary judgment on her cross-claims only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court determines the Receiver has met her burden because the parties do not genuinely dispute any material facts. DeYoung makes clarifications, argument, and unsupported objections, but no genuine disputes exist.[1]

DeYoung also purports to object to fact numbers 24, 32, 37, and 39. However, the Court concludes none of these present a genuine issue of material fact for the reasons discussed in the footnotes to each of these facts below.

Accordingly, the Court hereby adopts the Receiver's Statement of Undisputed Material Facts as presented in her Motion [Dkt. 67] with the slight modifications as noted below:

1. In August 2013, Federal issued the Policy, No. 8224-5977. (Complaint in Intervention ("Compl."), Dkt. 2, ¶ 9.)[2]

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[1] DeYoung purports to clarify Receiver's fact numbers 4, 5, 18, 38, and 46. However, many are immaterial and none present a genuine dispute of material fact precluding summary judgment. DeYoung responds to the Receiver's fact numbers 25, 26, 27, 31, 40, and 43 with argument, which is not a proper and correct way to create a genuine issue of material fact under FRCP 56, or the local rule. DeYoung argues fact numbers 34, 35, and 49 are irrelevant, but this does not leave the facts in dispute. DeYoung objects to the term "hidden assets" in fact 36, but does not dispute anything or explain the objection. Therefore, none of these present a genuine disputed issue of material fact.

[2] Curtis has admitted all allegations of the Complaint in Intervention in his answer. (*See* Answer of Curtis L. DeYoung, Dkt. 12.) These judicial admissions "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993) (internal quotation marks omitted); *see also Missouri Housing Dev. v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990).

2. The Policy is a contract that explains the rights and responsibilities of Federal, APS, and any other Insureds, as the term is defined by the Policy. (*See* Policy, Dkt. 2-1, Ex.1 to the Receiver's Motion.)[3]

3. The Policy has a $1 million maximum limit of liability for each claim or related claims, and $1 million aggregate limit of liability for all claims made by any "Insured" as defined in the Policy. (Policy, Dkt. 2-1at 5, 8.)

4. Federal received four competing tenders of defense against the Policy. (Compl., Dkt. 2, ¶¶ 24–28; Letter from Federal dated September 22, 2015, Ex. 2 to the Receiver's Motion.)

5. On October 21, 2014, the Receiver tendered the defense of APS in the SEC Action and requested indemnification for any claims made against APS. (Compl., Dkt. 2, ¶ 25.)

6. On February 11, 2015, the Receiver tendered the defense against a claim made by APS account owner Mary Katherine Rios and any other APS clients and requested indemnification for any claims made against APS. (Compl., Dkt. 2, ¶ 26.)[4]

7. On February 19, 2015, Curtis tendered his defense of the Receiver's lawsuit styled as *Diane A. Thompson, as Receiver for American Pension Services, Inc. v. Curtis DeYoung,* Case No. 2:14-cv-00870-RJS-DBP, United States District Court, District of Utah (hereinafter the "Receiver's Lawsuit."). (Compl. Dkt. 2, ¶ 27.)

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[3] The Policy is divided into multiple parts and page numbering on the Policy restarts frequently. Therefore, any reference to the Policy will be to Dkt. 2-1 and the page number will be the page number generated by the ECF system in the top right-hand corner of the document.

[4] The Receivership Order bars parties from suing the Receiver in her capacity as such for APS and freezes any pending litigation against APS. (SEC Action, Receivership Order, Dkt. 9, ¶¶ 33–38, Ex. 3 to Receiver's Motion.)

8. On March 11, 2015, Michelle tendered her defense of the Receiver's Lawsuit to Federal. (Compl., Dkt. 2, ¶ 28.)

9. On November 30, 2015, Michelle entered into a Settlement Agreement with the Receiver, pursuant to which Michelle agreed to "waive any and all interest or Claims in the Chubb Policy, and shall not take any action or make any Claim directly or indirectly to seek any remuneration or make any Claim on the Chubb Policy." (Settlement Agreement, Ex. 4 to Receiver's Motion, ¶ 11.) The Settlement Agreement defines the Chubb Policy as the Federal Insurance "Policy No. 8224-5977 and all endorsements insuring any insured person." (*Id.* ¶ g.)

10. The Court approved the Receiver's settlement agreement with Michelle by its order dated December 3, 2015. (*See SEC v. Am. Pension Servs.*, No. 2:14-cv-00309-RJS-DBP (the "SEC Action"), Minute Entry, Dec. 3, 2015, Dkt. 673, Ex. 5 to Receiver's Motion.)

11. On April 4, 2017, Michelle's counsel confirmed in open court that Michelle had "settled and waived" any rights to the Policy Proceeds and would "withdraw her opposition" to the Receiver's initial Motion for Summary Judgment, which sought the same relief as this Motion. (Hearing Tr., Apr. 4, 2017 at 83-84, Ex. 6 to Receiver's Motion.)

12. On April 4, 2017, Federal's counsel confirmed in open court that Federal had "waived any intent or right to assert any exclusion or any issue relating to the policy, the insureds, coverage and any related issue in exchange for the other declarations" and that "Federal had no intention of trying to claw back . . . or assert any exclusions or anything of that nature." (Hearing Tr., Apr. 4, 2017 at 76-77.)

13. On April 6, 2017, Federal was dismissed from this action. The dismissal order states that Federal "has waived any intent or right to assert any coverage issue related to the

Interpleader Defendants, including any exclusions in the policy" and that Federal and "will not attempt to recover or 'claw back' the proceeds of the policy, regardless of the outcome of this interpleader action." (Order Following Oral Rulings, Dkt. 58, Apr. 6, 2017, at 2.)

14. By May 4, 2017, Federal deposited with the Court the entire $1 million in Policy proceeds. (Notice of Deposit of Policy Proceeds, Dkt. 64.)

15. Michelle, despite confirming through her counsel that she has waived any claims or rights to the Policy proceeds, has not been dismissed from this action at the time the Receiver filed her Motion. (Order Following Oral Rulings, Dkt. 58, Apr. 6, 2017, at 2.)

16. Curtis has not been dismissed from this action and continues to assert a right to a portion of the $1 million in interpleaded Policy proceeds. (*See, e.g.*, Answer of Curtis L. DeYoung to Diane A. Thompson's Counterclaim and Crossclaim for Entirety of Policy Limits, Dkt. 14; Defendant Curtis DeYoung's Memorandum in Opposition to Receiver's Motion for Summary Judgment, Dkt. 41.)

17. Federal issued the Policy in August of 2013. (Compl., Dkt. 2, ¶ 9; Policy, Dkt. 2-1 at 6.)

18. The Policy was issued to APS as the named insured with an inception date of November 1, 2013 and an expiration date of November 1, 2014. (Policy, Dkt. 2-1 at 5.)

19. The Policy has a $1 million maximum limit of liability for each Claim or Related Claims, and $1 million aggregate limit of liability for all Claims made by any "Insured" which the Policy defines as "the Insured Organization and any Insured Person." (Policy, Dkt. 2-1 at 5, 8.)

20. The Policy states that Federal "shall pay Loss on behalf of the Insureds resulting from any Claim first made against such Insureds and reported to the Company in writing during the Policy Period, or any Extended Reporting Period, for Wrongful Acts committed by the Insureds solely in the performance of or failure to perform Insured Services . . . ." (Policy, Dkt. 2-1 at 7.)

21. The Policy defines "Insured Organization" as the "Parent Organization" which the Policy, in turn, defines as APS. (Policy, Dkt. 2-1 at 5, 7-9, §§ II(H), (M).)

22. The Policy defines "Insured Person(s)," in relevant part, as "any past, present or future person director, officer, partner, or Employee of the Insured Organization, but only while such person was, is or shall be acting within the scope of his or her duties as such." (Policy, Dkt. 2-1 at 8, § II(I).)

23. A Wrongful Act is defined under the Policy as "any actual or alleged negligent act, error or omission committed, attempted, or allegedly committed or attempted, solely in the performance of or failure to perform Insured Services, by an Insured Organization or by an Insured Person acting in his or her capacity as such and on behalf of an Insured Organization." (Policy, Dkt. 2-1 at 10, § 2(T).)

24. Loss is defined under the Policy as:

(L) **Loss** means the total amount which any **Insured** becomes legally obligated to pay as a result of any **Claim** made against such **Insured**, including:

(1) damages;

(2) judgments and settlements;

(3) pre-judgment and post-judgment interest; and

(4) **Defense Costs**."

(Policy, Dkt. 2-1 at 8, § II(L) (emphasis in original).)[5]

25. The Policy states that no Policy coverage is available for a Claim against an Insured that is either (1) "based upon, arising from, or in consequence of any fraudulent act or omission or any willful violation of any statute or regulation by such Insured, if a final and non-appealable judgment or adjudication adverse to such Insured establishes such a fraudulent act or omission or willful violation" or (2) "based upon, arising from, or in consequence of such Insured having gained in fact any profit, remuneration or advantage to which such Insured was not legally entitled." (Policy, Dkt. 2-1 at 10-11, §§ 3(A)14 & 15.)

26. Further, under the Policy, there is a specific exclusion for claims against an Insured "based upon, arising from, or in consequence of any actual or alleged violation of the Securities Laws." (Policy, Dkt. 2-1 at 11, § 3(A)11.)

27. The Policy further states "[n]o Insured shall settle or offer to settle any Claim, incur any Defense Costs, or otherwise assume any contractual obligation or admit any liability with respect to any Claim without the Company's prior written consent, which shall not be unreasonably withheld. The Company shall not be liable for any settlement, Defense Costs, assumed obligation or admission to which it has not given its prior written consent." (Policy, Dkt. 2-1 at 14, § 11(C).)

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5 DeYoung purports to dispute fact number 24 on the grounds that the Policy's definition of Loss should be quoted from the Policy, rather than the Receiver's characterization of that language as initially included in fact number 24. The Court agrees and has revised fact number 24 in this Order. However, this does not create a genuine issue of material fact.

28. On April 24, 2014, the Court issued an Order Appointing Receiver, Freezing Assets, and Other Relief ("Receivership Order") and appointed the Receiver "for the purposes of marshaling and preserving all assets of [APS] and all assets of Curtis L. DeYoung," collectively defined as the "Receivership Assets." (SEC Action, Receivership Order, Dkt. 9, at 1-2, Ex. 3 to Receiver's Motion.)

29. The Receivership Order further authorizes the Receiver "to assert, prosecute and/or negotiate any claim under any insurance policy held by or issued on behalf of the Receivership Defendants [defined as APS and Curtis L. DeYoung] or their officers, directors, agents, employees, or trustees, and to take all appropriate steps in connection with such policies." (SEC Action, Receivership Order, Dkt. 9, ¶ 32.)

30. The Receivership Order bars parties from suing the Receiver in her capacity as such for APS and freezes any pending litigation against APS. (SEC Action, Receivership Order, Dkt. 9, ¶¶ 33–38.)

31. In furtherance of her duties under the Receivership Order, the Receiver has made substantial efforts to recover all available funds from the assets of APS, Curtis, or any culpable third parties for the benefit of the more than 5,500 defrauded APS clients.[6]

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[6] *See, e.g.,* SEC Action, First Quarterly Report of Receiver, Dkt. 169, § 3(A), Ex. 24 to Receiver's Motion; SEC Action, Second Quarterly Report of Receiver, Dkt. 311, § 3(B)(4)&(5), Ex. 25 to Receiver's Motion; SEC Action, Third Quarterly Report of Receiver, Dkt. 425, § 3(B)(4)&(5), Ex. 26 to Receiver's Motion; SEC Action, Fourth Quarterly Report of Receiver, Dkt. 523, § 3(B)(4)&(5), Ex. 27 to Receiver's Motion; SEC Action, Fifth Quarterly Report of Receiver, Dkt. 579, § 3(B)(3)&(4), Ex. 28 to Receiver's Motion; SEC Action, Sixth Quarterly Report of Receiver, Dkt. 640, § 3(B)(3)&(4), Ex. 29 to Receiver's Motion; SEC Action, Seventh Quarterly Report of Receiver, Dkt. 699, § 3(B)(3)&(4), Ex. 30 to Receiver's Motion; SEC Action, Eighth Quarterly Report of Receiver, Dkt. 750, § 3(B)(3)&(4), Ex. 31 to Receiver's Motion; SEC Action, Ninth Quarterly Report of Receiver, Dkt. 796, §§ 4 & 5, Ex. 32 to Receiver's Motion; SEC Action, Tenth Quarterly Report of Receiver, Dkt. 831, §§ 4 & 5, Ex. 33 to Receiver's

(continued...)

32. In 2014, the SEC filed a lawsuit against Curtis and APS to recover the approximately $24.7 million that he allegedly misappropriated from his clients' individual retirement accounts. (SEC Action, Complaint, Dkt. 1, Ex. 7 to Receiver's Motion.) The SEC alleged Curtis and APS had violated Sections 17(a)(1), and 17(a)(3) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5(a) and (c) thereunder. (*Id.* ¶¶ 99–107.)[7]

33. In February of 2015, Curtis was indicted on charges of mail fraud based on allegations that, acting as APS's CEO he mailed false APS account statements to all APS clients containing inflated cash balances year after year. (*United States v. DeYoung*, No. 2:15-cr-00104-DN (the "Criminal Case"), Indictment, Dkt. 1, Ex. 8 to Receiver's Motion.)

34. In both the SEC Action and in the Criminal Case, Curtis failed to provide a truthful financial statement, violated numerous court orders, and lied to both courts. (SEC Action, First Quarterly Status Report of the Receiver, Dkt. 169, at 3 & n.3, Ex. 24 to Receiver's Motion; SEC Action, Notice of Non-Compliance With Receivership Order, Dkt. 748, Ex. 9 to Receiver's Motion; Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 1, Ex. 10 to Receiver's Motion; Criminal Case, Detention Order, Dkt. 85, Ex. 11 to Receiver's Motion; Criminal Case, Superseding Indictment, Dkt. 63, at 7-8, Ex. 12 to Receiver's Motion; Criminal

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Motion; SEC Action, Eleventh Quarterly Report of Receiver, Dkt. 856, §§ 4 & 5, Ex. 34 to Receiver's Motion; SEC Action, Twelfth Quarterly Report of Receiver, Dkt. 907, §§ 4 & 5, Ex. 35 to Receiver's Motion.

[7] DeYoung objects and clarifies that the SEC Action was filed not only against DeYoung, but also against APS. The Court agrees and has revised fact number 32 in this Order. However, this clarification is not material and does not create a genuine issue of material fact.

Case, Government Position with Respect to Sentencing Factors, Dkt. 102, at 2-3, Ex. 13 to Receiver's Motion.)

35. Curtis also concealed Receivership assets with an appraised value of approximately $50,000—which included precious gems, mint gold and silver coins, and jewelry—in the ceiling of a building owned by Michelle's employer. (Criminal Case, Superseding Indictment, Dkt. 63, at 8.)

36. Shortly after the hidden assets were discovered by the Receiver, both the SEC Action and the Criminal Case progressed toward a conclusion. (SEC Action, Consent of Curtis L. DeYoung to Entry of Judgment, Dkt. 745, Ex. 14 to Receiver's Motion; Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 1.)

37. In the SEC Action, Curtis agreed to a Consent Judgment that permanently enjoins him from violations of the Securities Act and Exchange Act, and further orders the disgorgement of $24,586,593, plus $5 million in prejudgment interest. (SEC Action, Consent of Curtis L. DeYoung to Entry of Judgment, Dkt. 745, at 1–2, ¶2, Ex. 14 to Receiver's Motion.)[8]

38. In the Criminal Case, Curtis pleaded guilty to committing mail fraud in violation of 18 U.S.C. § 1341 and making a false declaration before a Court of the United States in violation of 18 U.S.C. § 1623. (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 1.)

39. As part of Curtis's plea bargain and in his Opposition brief [Dkt. 70], he admits that he misappropriated APS client funds in order to make high-risk investments and that he did

[8] DeYoung disputes that he was ordered to disgorge $30 million and instead clarifies that he was ordered to disgorge $24,586,593, and then pay $5 million in prejudgment interest. The Court accepts those facts and has revised fact 37 in its Order. However, this does not create a genuine issue of material fact that impairs summary judgment here.

so without receiving client authority. He then admits "[m]ost of these investments failed and the funds were lost." (Criminal Case, Statement by Defendant in Advance of Plea of Guilty and Plea Agreement Pursuant to Fed. R. Crim. P. 11(c)(1)(C), Dkt. 96, at 4–5, Ex. 15 to Receiver's Motion; Opposition [Dkt. 70] at 10 and 26.)[9]

(a) DeYoung also agreed and admitted under oath in the Plea Agreement: that he devised and intended to devise a scheme to defraud; and to obtain money and property from APS customers; that he acted with specific intent to defraud; and that he did that in his capacity as president of APS in which he misappropriated nearly $25 million from the APS Master Trust Account; that he did that to make high-risk investments; that he took the money without notifying APS customers and without their authority; that for many years prior to and up to and continuing through January of 2014 he caused to be mailed to APS account holders account statements that reported cash balances that were higher than the amount of cash available in the APS Master Trust Accounts; and that he did that knowing that APS customers would rely on those account statements in determining the amount of cash available to them; and that he admitted that he then sent those account statements that he knew were false and material; and that he acted alone in misappropriating the funds; and that he alone had knowledge that the APS Account statements were incorrect.

[9] DeYoung disputes the Receiver's initial fact 39 only insofar that he undertook the actions described in fact 39 *with the goal of benefiting himself*. This fact has been revised above. As discussed in this Order, the dispute concerning whether Curtis misappropriated his client's funds *with the goal of benefiting himself* is immaterial to the Court's decision and does not preclude summary judgment.

40. The Criminal Judgment orders Curtis to pay to the Receiver $24.998,422.65 as restitution for his crimes and provides that if Curtis receives more than "$200 ***from any outside source*** in any calendar month during the period of incarceration, ***all funds received in excess of $200 that month shall be paid toward restitution***." (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 6-8 (emphasis added).)

41. The Criminal Judgment identifies the Receiver as the sole "restitution payee" for any restitution payments made by Curtis. (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 6-7.)

42. The payments under the Restitution Order will be distributed by the Receiver to the victims of Curtis's crimes. (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 7.)

43. Even if the entire $1 million in Policy proceeds are distributed to the Receiver, APS will still remain a bankrupt entity as a result of Curtis's crimes and APS will still owe approximately $22 million to the more than 5,500 APS account holders who were victims of Curtis's crimes. (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 6.)

44. As of the date of the Receiver's Motion, the Receiver had recovered a total of $2,121,066 which had been credited to the restitution balance payable by Curtis. (Declaration of M. Hashimoto at ¶ 7, Ex. 16 to Receiver's Motion.)

45. Any Policy proceeds awarded to the Receiver, who stands in the shoes of APS, will be equitably distributed to benefit the more than 5,500 APS account holders who were victims of Curtis's crimes. (Criminal Case, Judgment in a Criminal Case, Dkt. 108, at 7.)

46. Not only did Curtis cause direct damage to APS, but Curtis's actions have caused APS to be sued in a class action lawsuit alleging negligence for the same acts and omissions that

gave rise to the SEC Action. (Class Action Complaint, *Oliver v. Am. Pension Servs., Inc.*, No. 140407746 (Utah 3d Jud. Dist. Ct.) (dated June 6, 2014), Ex. 17 to Receiver's Motion.)

47. Shortly after the SEC Action was filed, Curtis employed counsel to defend him against the SEC's charges. (SEC Action, Motion to Release Profits of APS for Payment of Attorney Fees, Dkt. 65, Ex. 18 to Receiver's Motion; SEC Action, Second Motion to Release Portion of Revenues and Assets of APS for Payment of Attorney Fees, Dkt. 147, Ex. 19 to Receiver's Motion; SEC Action, DeYoung's Third Motion to Release Funds for Payment of Attorney Fees, Dkt. 313, Ex. 20 to Receiver's Motion.)

48. On September 12, 2014, APS was ordered to release $157,559.44 from its operating account to cover Curtis's defense costs through the preliminary injunction stage. (SEC Action, Order Following Oral Ruling, Sept. 15, 2014, Dkt. 217, Ex. 21 to Receiver's Motion; Hearing Tr., Sept. 12, 2014, at 84-85, Ex. 22 to Receiver's Motion.)

49. Due to the strength of the SEC's showing of a securities law violation by Curtis at the preliminary injunction stage, the Court did not authorize any additional payment by APS to cover Curtis's defense costs. (*Id.*).

50. For the entire duration of the Criminal Case, Curtis was represented by a public defender based on his claims of impecuniosity. (Criminal Case, Minute Entry, March 25, 2015, Dkt. 6, Ex. 23 to Receiver's Motion.)

Based on the foregoing Findings of Undisputed Material Fact, the Court makes the following CONCLUSIONS OF LAW:

CONCLUSIONS OF LAW

51. The Receiver prevails on her cross-claim for declaratory relief and the Court grants the Receiver's cross-claim on her second and third claims for declaratory relief against Curtis and Michelle DeYoung.

52. The Declaratory Judgment Act, 28 U.S.C. 2201, provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought...." 28 U.S.C. 2201(a).

53. To prevail on a claim for declaratory relief, four elements must be satisfied: "(1) a justiciable controversy, (2) parties whose interests are adverse, (3) a legally protectable interest residing with party seeking relief, and (4) issues ripe for determination." *Miller v. Weaver*, 2003 UT 12, ¶ 15, 66 P.3d 592.[10]

54. The parties do not dispute that the first, second, and fourth elements for declaratory relief are satisfied here, and the Court agrees.

(a) The Receiver and DeYoung have adverse claims to the funds that Federal interpled; the issue is fit or ripe for determination;

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[10] *See Cincinnati Ins. Co. v. AMSCO Windows,* 921 F.Supp.2d 1226, 1230 (D. Utah 2013) ("In a diversity action, including one seeking declaratory relief, we apply the substantive law of the forum state . . . ." (citation and quotation marks omitted)).

(b) Federal has deposited $1 million into the account with the Court and disclaimed any further interest in it;

(c) the Receiver is moving forward with a final distribution plan in the receivership and would like to recovery the policy proceeds on behalf of APS account holders;

(d) DeYoung has bills from his legal counsel for fees that he incurred in connection with what he claims to be his entitlement to the policy proceeds.

55. With respect to the third element, whether the Receiver alone is entitled to the policy proceeds, the Court determines that the Receiver alone is entitled to the full $1 million policy proceeds for the following reasons.

The Receiver is Entitled to Summary Judgment on her Cross-Claim for Declaratory Relief Against Michelle DeYoung.

56. As an initial matter, the Court concludes that the Receiver is entitled to summary judgment on her second claim for relief in which she seeks Declaratory Relief against Michelle DeYoung. (Receiver Diane A. Thompson's Answer to Plaintiff's Complaint and Counterclaim and Cross- claim in Interpleader and for Declaratory Relief ("Cross-claim"), Dkt. 13 at ¶¶ 41-42.)

57. The Receiver's Cross-claim against Michelle DeYoung seeks a declaration that she "has waived her right to assert any and all interests or claims in the Federal Insurance Company Policy and is not entitled to take any action or seek any remuneration from the Policy or Policy Proceeds." (*Id*. at ¶ 42.)

58. "Waiver is an intentional relinquishment of a known right." *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶ 61, 289 P.3d 369. Waiver may be decided on a motion for summary judgment if under the totality of the circumstances no reasonable fact finder could disagree on the issue. *See IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶¶ 18–19, 196 P.3d 588.

59. The Court concludes as a matter of law that Michelle DeYoung has clearly waived any interest she might otherwise claim in the proceeds of the Policy for many reasons, and there is no dispute concerning the facts and evidence underlying the reasons:

(a) Michelle DeYoung is a party to this case;

(b) When the Receiver filed this Motion [Dkt. 67], the Receiver served Michelle DeYoung's counsel with the Motion and Michelle DeYoung has filed no opposition;

(c) It is undisputed that on November 30, 2015 Michelle DeYoung entered into a settlement agreement with the Receiver under which she expressly waived any interest in the Policy and vowed not to take any action to seek payment under it (*see* fact 9 *supra*);

(d) At the April 7, 2017 oral argument on the Receiver's initial motion for summary judgment [Dkt. 37], Michelle DeYoung, through her counsel, withdrew her opposition to that motion and agreed with the Court's statement: "and Mrs. DeYoung's out because she settled and waived." (Dkt. 59 p. 84; *see also* fact 11 *supra*).

60. Based on these undisputed facts, Michelle DeYoung has waived her rights to any insurance proceeds at issue in this matter. The Receiver is entitled to summary judgment on her

second claim for relief for a declaration that Michelle DeYoung has waived her right to assert any and all interests or claims in the Policy and is not entitled to take any action or seek any remuneration from the Policy or Policy Proceeds.

61. Michelle DeYoung shall be dismissed from this case.

The Receiver is Entitled to Summary Judgment on her Cross-Claim for Declaratory Relief Against Curtis DeYoung.

An Interpleader Action is Governed by Equitable Principles.

62. Federal has deposited $1 million with the Court and the funds have been disclaimed by the insurer. (*See* fact 14 *supra*). Federal has been dismissed as a party to this case. (*Id.* ¶ 13.) Therefore, it is left to the Court to decide how to distribute those funds between the two claimant defendants—the Receiver and Curtis DeYoung.

63. The Court first looks to principles from both receivership law and interpleader cases. That law suggests that the distribution determination the Court must make with regard to the money Federal has already deposited with the Court is guided by equitable principles. The Tenth Circuit states "[i]t is generally recognized that the district court has broad powers and wide discretion to determine relief in an equity receivership." *SEC v. DeYoung,* 850 F.3d 1172, 1182 (10th 2017) (quoting *SEC v. Vescor Capital Corp.,* 599 F.3d 1189, 1194 (10th Cir. 2010) (citation omitted). "This discretion derives from the inherent powers of an equity court to fashion relief." *Id.*

64. The Tenth Circuit also holds that "an action of interpleader is equitable in nature and is controlled by equitable principles." *Burchfield v. Bevans*, 242 F.2d 239, 241 (10th Cir. 1957). Additionally, "equity will follow the law." *Id.* In *Burchfield*, the Court evaluated

whether some claimants to an insurance fund had an enforceable lien giving them priority under Oklahoma law. *Id*. at 241-243. The Court concluded that they did not and went on to affirm the district court's use of a percentage formula for the distribution of funds. *Id*.

65. Following these general principles, the Court concludes the allocation of the Policy proceeds in this proceeding is guided by equity, not strictly contract law. Interpleading the Policy funds into Court does not alter this conclusion.

66. The Court determines the Policy terms are relevant to the Court to determine whether there might be coverage for the competing claimants before it, and the Court will consider the Policy terms and engage in a limited coverage analysis under Utah insurance law.

67. If there is coverage for both claimants, or if there is coverage for no claimant, then the coverage analysis will not answer the question about how to disperse the proceeds and equity will control. *Burchfield*, 242 F.2d 239, 242-43; *Marine Indem. Ins. Co. of Am. v. Lockwood Warehouse & Storage*, 115 F.3d 282, 287 (5th Cir. 1997).

Neither Curtis DeYoung Nor APS are Entitled to Coverage Under the Policy.

68. Turning to the analysis of coverage for DeYoung and APS, the Receiver argues that DeYoung is not entitled to receive proceeds under the Policy because he is not an Insured Person under the Policy, because exclusions bar coverage in view of the claims asserted against him, and because he failed to comply with Policy requirements to obtain pre-approval before incurring defense costs. (Receiver's Motion [Dkt 67], at 24-30).

69. DeYoung argues he is covered, but that if he is not covered, then neither is APS. (Opposition [Dkt 70] at 24-26).

70. A court sitting in equity may reference a contract to give effect to equitable principles. *See, e.g., Gen. Elec. Capital Corp. v. Future Media Prods., Inc.*, 536 F.3d 969, 974 (9th Cir. 2008); *Kennedy Elec. Co., Inc. v. U.S. Postal Serv.*, 508 F.2d 954, 957 (10th Cir. 1974). Equitable considerations prevail, of course, when they favor a different outcome than a contract analysis. *Kennedy Elec. Co., Inc*., 508 F.2d at 957 (altering the terms of a contract to subordinate one party's claim to give effect to equitable principles).

71. It is axiomatic that an insurance policy is construed pursuant to the same rules applied to ordinary contracts. *Vestin Mortg., Inc. v. First Am. Title Ins. Co.*, 2006 UT 34, ¶ 8, 139 P.3d 1055. Hence, when interpreting a contract, the court must look to the four corners to determine the parties' intentions. *Id.* Courts applying the provisions of an insurance policy in an interpleader context consider all of the policy provisions, including exclusions. *See, e.g., Amica Mut. Ins.,* 55 F.3d at 1096; *U.S. Specialty Ins. Co. v. Estate of Schurrer*, No. 4:09CV353, 2010 WL 2598269, at *5–6 (E.D. Texas June 24, 2010).

72. Additionally, the Utah Supreme Court holds that "[w]hen we engage in a duty-to-defend analysis, we focus on two documents: the insurance policy and the complaint. An insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint." *Benjamin v. Amica Mut. Ins. Co*., 140 P.3d 1210, 1214 (Utah 2006) (citation omitted).

73. Under this analysis, the Court concludes there is no coverage for either DeYoung or APS.

74. DeYoung fails to establish that he is an insured under the Policy.

75. The Policy defines an **Insured** as the "**Insured Organization** and any **Insured Person**." (*See* fact 19 *supra* (emphasis in original.) **"Insured Organization** means the **Parent Organization**." (*Id.* ¶ 21 (emphasis in original.) The Declarations page of the Policy (at p. 1) lists APS as the "Parent Organization." (*Id.*) Accordingly, APS meets the first threshold of showing it is an Insured under the Policy.

76. "Insured Person means any past, present or future natural person director, officer, partner, or Employee of the Insured Organization [i.e. APS], *but only while such person was, is or shall be acting within the scope of his or her duties as such*." (*Id.* ¶ 22 *supra* (italicized emphasis added).) Mr. DeYoung was the CEO of APS. However because he was acting outside the scope of his duties at APS, the Court rules that DeYoung is not an Insured under the Policy.

77. DeYoung states in his Opposition that he "agrees that he 'misappropriated' APS client funds in order to make 'high-risk' investments and that he did so without receiving client authority." (Opposition [Dkt. 70], Response to Fact No. 39.) DeYoung goes on to contend that he did not undertake these actions with the goal or intent of benefitting himself, but instead intended to benefit APS. (*Id.*) He then admits "[m]ost of these investments failed and the funds were lost." (Opposition [Dkt. 70] at 26.) DeYoung also argues the investments were done while "acting in his capacity as the President of APS and under the color of the policy." (*Id.*) DeYoung's argument lacks merit.

78. DeYoung cites no support that can be found in the record for his contention that he did not undertake these actions *with the goal or intent of benefitting himself*, but that he instead intended to benefit APS, nor has the Court been able to locate any support for his statement.

79. The Court finds the Receiver's arguments in her Reply Memorandum [Dkt. 76 at 7-11] clear and persuasive on this point, and adopts them as part of the Court's rationale for this ruling.

80. In general, to fall within the scope of employment, the conduct of an officer or employee must: "(1) 'be of the general kind the employee is employed to perform', (2) 'occur within the hours of the employee's work and the ordinary spatial boundaries of the employment,' and (3) 'be motivated, at least in part, by the purpose of serving the employer's interest.'" *Clark v. Pangan*, 998 P.2d 268, 272 (Utah 2000) (quoting *Birkner v. Salt Lake Cty*, 771 P.2d 1053, 1057 (Utah 1989); *Berhow v. Peoples Bank*, 423 F.Supp.2d 562, 572 (S.D. Miss. 2006).

81. First, for conduct to be within the scope of employment, an employee must be performing the general kind of work they are hired to perform. *Clark*, 998 P.2d at 272. In other words, acts not connected with the objectives of a person's employment are outside the scope of his or her employment. *Id.* A classic example of an illegal act by an employee that may fall within the scope of employment is a bouncer or security guard who commits assault or battery, as the duties of these types of employees include the use of physical force. *See, e.g., Fauntleroy v. EMM Grp. Holdings LLC,* 20 N.Y.S.3d 22, 23–24 (N.Y. App. Div. 2015).

82. DeYoung cannot meet the first prong—that his conduct was of the general kind the employee is employed to perform—when he was "investing" his clients' funds without their permission or authority.

83. DeYoung had no duty or authority to make investment decisions in his role at APS. Curtis's sole responsibility as President and CEO of APS was to administer retirement accounts, the investments in which were to be "self-directed" by the account owners, not APS.

(Receiver's Motion [Dkt. 67] at exhibit 15 thereto, ¶ 11(a) (explaining "APS Acted as a third-party administrator of self-directed [IRA's]."); Reply Memorandum [Dkt. 76] at 8-9 and exhibit 2 thereto.)

84. Stealing and misappropriating money from APS's clients to make unauthorized investments (whether in his own name or APS) was outside Curtis's duties and responsibilities as President and CEO of APS, as stated clearly in the IRS Form 5305 attached to the Receiver's Reply Memorandum [Dkt 76].

85. Curtis also acted outside the scope of employment and is not an Insured under the Policy due to his acts that he agreed and admitted to under oath in the Plea Agreement (Exhibit 15 to the Receiver's Motion [Dkt. 67]): that he devised and intended to devise a scheme to defraud; and to obtain money and property from APS customers; that he acted with specific intent to defraud; and that he did that in his capacity as president of APS in which he misappropriated nearly $25 million from the APS Master Trust Account; that he did that to make high-risk investments; that he took the money without notifying APS customers and without their authority; that for many years prior to and up to and continuing through January of 2014 he caused to be mailed to APS account holders account statements that reported cash balances that were higher than the amount of cash available in the APS Master Trust Accounts; and that he did that knowing that APS customers would rely on those account statements in determining the amount of cash available to them; and that he admitted that he then sent those account statements that he knew were false and material; and that he acted alone in misappropriating the funds; and that he alone had knowledge that the APS Account statements were incorrect.

86. The Court also determines that the Policy's Securities Law exclusion bars coverage for the claims. The Policy states "[n]o coverage will be available under this Policy for any Claim against an Insured: . . . (11) based upon, arising from, or in consequence of any actual or alleged violation of the Securities Laws." (*See* fact 26 *supra*).

87. The SEC Action and the Receiver's Ancillary Action arise out of and are wholly related to Curtis's violation of federal securities laws.

88. Curtis concedes that if the Securities Law exclusion applies, it bars coverage for him. (Opposition [Dkt. 70] at 25.) Curtis also correctly asserts the exclusion would apply with equal force to APS.

89. Therefore, the Court finds and concludes that the Securities Law exclusion bars coverage for both DeYoung and APS based on the nature of the claims.

90. The Court rejects DeYoung's argument that the Court should not apply the Securities Law exclusion because it was only Federal's exclusion to assert and Federal has been dismissed from this action. The Court finds DeYoung has waived this and similar objections in his papers that are directed at the sufficiently of Federal's satisfaction of its obligations under the Policy because:

(a) DeYoung did not object to this interpleader action when it was filed; DeYoung did not object when Federal sought to interplead the funds; and DeYoung did not object when Federal asked to be dismissed from the case for that reason.

(b) If DeYoung wanted to raise and assert claims directed at Federal's actions, he was required to raise them when they could have been addressed by Federal, i.e. when Federal was still a party in this case.

(c) DeYoung understood or should have understood that the Court was transitioning from a contract case to one in equity when Federal interpleaded the funds and asked to be excused and dismissed from this case.

91. The Court also rejects DeYoung's argument in his papers that because other Policy exclusions might not clearly apply to bar coverage, coverage is not barred under the Securities Law exclusion. The existence of an unambiguous and plainly applicable exclusion applies to bar coverage even if coverage is triggered, or, as DeYoung contends, simply not otherwise barred by other Policy provisions. *See Pollard v. Truck Ins. Exch.*, 2001 UT App 120 ¶ 12 (noting "[a]n insurer may limit its obligation to provide coverage by 'exclusions phrased in language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.") (citations omitted); *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272, 1275 (rejecting insureds' argument that all risk homeowners policy was ambiguous and that the insurer must therefore provide coverage for flooding and soil erosion damage caused by broken pipes where although policy generally covered broken pipes, exclusion barred coverage for loss due to "earth movement;" declining to adopt a rule that would "render an exclusion invalid simply because it conflicts with the stated coverage in some way."); *Vestin Mortg., Inc. v. First Am. Title Ins. Co.*, 2004 UT App 379 ¶ 18 (rejecting title insured's argument that though coverage may not have been initially triggered under the policy, because there was an applicable exception to a policy exclusion, the policy was ambiguous and should be read to provide coverage; noting that "[t]he exclusions, and the exception . . . are applicable only if [the insured's] claims are covered by the insuring clauses of the policies. If [they] are not covered, then we need not reach the exclusions. [The insured] fails

to demonstrate how an exception to an exclusion is tantamount to coverage . . . ." (*aff'd* 2006 UT 34 (noting "[i]f there is *no* coverage, then an exception that prevents the application of an exclusion from coverage has no application.")).

92. The Court declines to address the Policy's fraudulent acts exclusion as unnecessary in view of the ruling the Court has made.

93. The Court rejects the Receiver's argument that the Receiver and APS retain coverage.

Under an Equitable Standard, the Receiver is Entitled to Summary Judgment on her Cross-Claim for Declaratory Relief Against Curtis DeYoung.

94. As noted above, interpleader is an equitable action and is controlled and governed by equitable principles. The Receiver is the only party before the Court who made arguments concerning equity, and the Court finds the Receiver's arguments compelling.

95. The Court agrees with and adopts the Receiver's equitable arguments in her Motion [Dkt. 67] and Reply [Dkt. 76] as rationale for this equitable decision, including that: DeYoung committed criminal acts against APS clients, who will benefit from the Policy proceeds distributed to the Receiver from the interpleader action; APS has already paid for DeYoung's defense through the critical stages of the SEC Action; DeYoung should not be entitled to profit any further from his criminal acts and misappropriation, especially since he does not dispute that the Receiver is entitled to the Policy proceeds under an equitable analysis; and that DeYoung spent the last three plus years obstructing the Receiver's efforts to recover assets for the benefit of the APS clients. (*See* Receiver's Motion at 21-23). The Court notes that DeYoung made no equitable argument.

96. Even if the Court is mistaken in this decision and order, and DeYoung is entitled to coverage or reimbursement for defense costs for some claim, this is an equitable proceeding and there could be no different result as a matter of equity. Given the sworn statements and admissions by DeYoung, with the Court's benefit of several years of involvement in this case and seeing firsthand DeYoung's involvement, both his criminal, intentional misconduct while running APS, his deceit in the Court proceedings that followed, and his obstruction in the Receiver's attempts to retain and obtain assets to distribute to injured investors, this Court could not, following equitable principles and the law that applies, find that requiring payment of money to DeYoung for the purpose of paying his lawyers in a wasting policy that would further injure the investors of APS economically is a result that could be reached in equity.

97. Even if DeYoung was entitled to coverage under the Policy, this Court would still order in connection with this proceeding in equity that the money be remitted to APS for the repayment of the loss of the money to investors. DeYoung should not profit from his intentional and criminal misconduct, even if there was at some time a contractual right.

ORDER

Based on the Court's review of the parties' papers [Dkts. 67, 70. 76], the arguments of counsel and the findings of fact and conclusions of law stated herein, and good cause appearing therefore, IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

A. The Receiver's Renewed Motion for Summary Judgment [Dkt. 67] is GRANTED.

B. The Receiver's Cross-claim for declaratory relief against Michelle DeYoung [Dkt. 13] (second claim for relief) is GRANTED. The Court hereby declares that Michelle DeYoung has waived her right to assert any and all interests or claims in the Federal Insurance Company Policy and is not entitled to take any action or seek any remuneration from the Policy or Policy Proceeds. Michelle DeYoung shall be dismissed from this case.

C. The Receiver's Cross-claim for declaratory relief against Curtis DeYoung [Dkt. 13] (third claim for relief) is GRANTED. The Court hereby declares that (1) DeYoung is not entitled to the benefits of the Policy proceeds due to his wrongful acts and misappropriation and due to the exclusions and non-coverage under the Policy and (2) the Receiver is the only party entitled to the entire $1 million Policy proceeds on deposit with the Clerk of Court.[11]

D. The Receiver and Curtis DeYoung shall be dismissed from this case and this case shall be CLOSED in its entirety.

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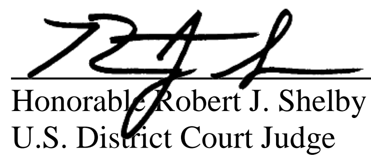
[11] The Receiver initially sought three additional declarations: (1) that Curtis has committed wrongful acts and misappropriated approximately $24.7 million from APS account owners that was held for their benefit in the APS Master Trust Accounts; (2) that the APS account owners have been damaged in the amount of approximately $24.7 million due to Curtis's wrongful acts and misappropriation, which could be reduced to a judgment in the amount of approximately $24.7 million and that this judgment creates liabilities of APS to APS account owners in excess of Policy limits and available Policy proceeds; and (3) that the Policy and its Proceeds are Assets of the Receivership Estate. (Cross-claim, Dkt. 13 at ¶¶ 44–46). The first two declarations are no longer necessary in light of the Court's Consent Order and Judgment and the Restitution Order which establish these facts as a matter of law. The third declaration is not necessary because the Receivership Order provides that all assets of APS ***and Curtis*** are "Receivership Assets" and that the Receiver is authorized "to assert, prosecute and/or negotiate any claim under any insurance policy held by or issued on behalf of the Receivership Defendants [i.e. APS and Curtis] . . . and to take all appropriate steps in connection with such policies." (Fact ¶ 29 *supra* (emphasis added).) Even if Curtis had some claim to the Policy proceeds, those proceeds by operation of law immediately inure to the Receiver's benefit.

E. The Clerk of Court is directed to remit the $1,000,000.00 currently on deposit with the Clerk of Court, plus any accrued interest, to **American Pension Services, Inc.,** 201 S. Main Street, Suite 800, Salt Lake City, Utah 84111, Federal ID Number 87-0397141.

DATED this 22nd day of December, 2017

BY THE COURT



Honorable Robert J. Shelby
U.S. District Court Judge