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

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| R. WAYNE KLEIN, as Court-Appointed Receiver of FFCF INVESTORS, ASCENDUS CAPITAL MANAGEMENT, LLC and SMITH HOLDINGS, LLC,<br>Plaintiff,<br><br>vs.<br><br>PENSON FINANCIAL SERVICES, INC. and CONSILIUM TRADING COMPANY, LLC,<br><br>Defendants. | **MEMORANDUM IN OPPOSITION TO PENSON'S SECOND MOTION TO DISMISS**<br><br>Case No. 1000924572<br><br>Judge Constandinos Himonas |

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Plaintiff R. Wayne Klein (the "Receiver"), as duly court-appointed Receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus"), and Smith Holdings, LLC (collectively, the "Receivership Entities"), by and through undersigned counsel of record, respectfully submits this Memorandum in Opposition to Defendant Penson Financial Services, Inc.'s ("Penson") Second Motion to Dismiss.

## INTRODUCTION

Penson's Motion to Dismiss (the "Motion") is now on its second round of briefing. Rather than decide Penson's first Motion to Dismiss on the substance, the Court granted the Receiver leave to amend the Complaint to address the issues raised by Penson in its first motion. The Receiver thereafter filed an Amended Complaint, which Penson has moved to dismiss, on the same grounds as before. Although the briefing thus far has been voluminous, the resolution of the Motion will, in the main, come down to how the Court answers four questions:

1. Does the Receiver have standing to sue Penson when he has alleged that the Receivership Entities suffered harm because of liabilities to tort creditors due to the conduct of Penson?

2. Does the affirmative defense of *in pari delicto* bar the Receiver's claims against Penson when application of this doctrine would only benefit the alleged wrongdoer to the detriment of the Receiver?

3. Does Utah recognize claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty?

4. Is the four-year period for bringing claims under the Utah Fraudulent Transfer Act ("UFTA") a statute of limitations or a statute of repose, and is that period subject to equitable tolling under the doctrine of adverse domination?

The Receiver recognizes that the answers to these questions involve question of law that have not been established by Utah courts in every instance. The Receiver also recognizes that courts from other jurisdictions have dealt with similar facts and similar motions in different ways. The weight of authority and the better-reasoned decisions, however, support the Receiver's position that he has standing, his claims are neither barred by the statute of limitations nor the doctrine of *in pari delicto*, and he has pleaded claims that are recognized under Utah law. Thus, the Court should deny the Motion, and allow the parties to conduct discovery on the Receiver's claims against Penson.

## BACKGROUND

The following Background is taken from the well-pleaded allegations of fact contained in the Amended Complaint, which allegations the Court must accept as true for the purposes of assessing this Motion.

### Taylor's Role with FFCF and Ascendus

Roger E. Taylor ("Taylor") and Richard T. Smith ("Smith") jointly formed Ascendus in 2003. Amended Complaint ¶ 20. Taylor was the manager of Ascendus. *Id.* When Ascendus obtained a license as an investment advisor in 2003, Taylor was the designated official of the investments adviser and referred to himself as the registered investment advisor. *Id.* When Taylor closed down Ascendus in early 2006, he and Smith formed FFCF, which functioned as a

vehicle for pooling investors' funds which would be sent to another investment advisor, LBS Advisors ("LBS"). *Id.* ¶¶ 41-42. Taylor was the managing member of FFCF, and he was to earn commissions for the funds he delivered to LBS. *Id.* ¶¶ 42-43.

**Taylor and Smith Operated the Receivership Entities as a Ponzi Scheme**

Through Ascendus, Taylor claimed the ability to trade options in an extremely profitable way with minimal risk. From 2003-2006, Taylor persuaded investors to open brokerage accounts at Penson and to give him authority to conduct trades in their accounts. Amended Complaint ¶¶ 22-24. In fact, the trading resulted in substantial losses to the investors. Notwithstanding these losses, Ascendus sent account statements to investors reporting substantial gains, and Ascendus collected significant amounts from the investors as commissions. *Id.* ¶¶ 28-29. Ascendus also pooled investor money into a fund that allowed it to make illegitimate transfers to other investors or third parties from the fund to retain investors and attract larger investments. *Id.* ¶ 27. Thus, Ascendus operated as a Ponzi scheme. *Id.* ¶ 7.

When Taylor closed Ascendus in early 2006 and opened FFCF, Penson withdrew approximately $7.4 million from the investors' accounts and sent the money directly to bank accounts controlled by Taylor and his associates. Amended Complaint ¶ 9. Taylor convinced the investors to transfer their money from Ascendus to FFCF by presenting subscription agreements greatly overstating the value of the investors' accounts, which statements were made possible by Penson's malfeasance described below. *Id.* ¶ 47. FFCF was therefore insolvent from its inception because it did not have the funds to cover the difference between the account values

represented to the investors and the actual amounts in their accounts. *Id.* ¶¶ 47, 148. FFCF also operated as a Ponzi scheme, and it eventually collapsed in July 2008. *Id.* ¶ 9.

Taylor falsified the monthly account statements that Ascendus would send to the investors, and the investors paid commissions to Taylor based on these inflated monthly account statements. Amended Complaint ¶¶ 28-29, 35. By sending these false account statements to Ascendus' investors, Taylor caused Ascendus to become insolvent because the false account statements caused Ascendus to owe more to investors than its net worth. *Id.* ¶ 37-38. When Taylor and Smith sent these account statements that were materially false and misleading, and omitted material information, they breached their fiduciary duties to Ascendus, especially when these false or misleading statements allowed Taylor and Smith to receive commissions to which they were not entitled. *Id.* ¶ 40.

Taylor and Smith also accepted investors into Ascendus who did not meet the net worth standards required as part of Ascendus' investment advisory license, which made Ascendus liable to repay any investor who did not have $750,000 under management by Ascendus or who did not have a net worth of over $1.5 million, and Ascendus did not have the funds to make those payments. Amended Complaint ¶ 39. When Taylor closed Ascendus, in order to continue to receive compensation he had to persuade Ascendus' investors to move their money to LBS, at which point he would receive a commission from LBS. *Id.* ¶¶ 43-44.

**Penson Aided and Abetted Wrongdoing by Taylor and Smith**

Investors were told that if they opened an account at Penson, their money could not be withdrawn by Taylor or Ascendus, and the Limited Trading Authorization ("LTA") reinforced

this notion. Amended Complaint ¶¶ 69-71. The LTA forms were on file with Penson, meaning that Penson knew that customer funds could not be accessed by Taylor or Ascendus without permission from the investors. *Id.* ¶ 70. Penson's own policies prohibit the use of faxed, non-notarized wire request forms to effectuate the transfer of customer funds to a trader or any other third party. *Id.* ¶ 71. For example, a July 11, 2001 enforcement order by the Nevada Division of Securities, imposing disciplinary sanctions on Penson, notes that the policies and procedure of Penson required that all third-party wire transfer requests be signed by the customer and a representative of the branch office from where the transfer request originated and that it be notarized. *Id.* ¶ 71(b). Even though the investors in Ascendus believed that their money was safe with Penson, Penson transferred over $8.7 million from customer accounts to Ascendus and affiliated entities without following proper procedures and without obtaining the necessary approvals from its customers. *Id.* ¶¶ 72-73. Penson also transferred securities from customer accounts to other customers based on instructions from Ascendus, in violation of the LTA's and Penson's own policies. *Id.* ¶¶ 77-79. Many of these transfers were based on fraudulently-altered documents. *Id.* ¶¶ 63-67.

Taylor and Penson utilized a number of fraudulent devices to artificially inflate the value stated in the Penson accounts. For example, Penson transferred funds and securities out of the accounts of one customer and into the accounts of customers unrelated to the first customer. Amended Complaint ¶ 45(a), (d). To create the illusion that the accounts had earned profits which in fact had not been earned, Penson received money from Ascendus and deposited those funds into investor accounts, contrary to Penson's own internal policies. *Id.* ¶¶ 45(f), 86-98.

Penson recorded fictitious deposits into customer account records to create the false impression that the accounts had values greater than their true value, which deposits were reversed after the investors agreed to move their investments to FFCF/LBS. *Id.* ¶ 45(g). Penson reported false information in records sent, or made available, to its customers including reporting trades differently in online, paper, and end-of-year statements; reporting to customers that distributions from their accounts were not sent to third parties; and reporting false account balances to its customers. *Id.* ¶¶ 45(h), 100-06.

All in all, when Taylor closed Ascendus and opened FFCF, Penson withdrew more than $7.4 million of funds directly from the brokerage accounts of customers and sent this money directly to bank accounts controlled by Taylor and his associates. Amended Complaint ¶ 9. The fraudulent account information made possible by Penson's actions, however, indicated that the investors' account balances totaled at least $12,819,451.19. This reflected $5,233,723.58 in fictitious investment deposits that were purportedly invested in FFCF. *Id.* ¶ 48.

Penson knowingly permitted Taylor to trade securities in customer accounts where Taylor and Ascendus would be granted performance-based fees, where those fees were barred by state or federal law, including the Utah Securities Act. Amended Complaint ¶¶ 109-14. Taylor's fraudulent investment scheme could only succeed with the tacit or active assistance of Penson, including Penson's false reports to its customers. *Id.* ¶ 46. The fraud perpetrated by Taylor would not have been possible but for Penson's role in the fraud. *Id.* ¶ 107.

**Penson's Dominion and Control Over the Funds in the Accounts**

Penson exhibited dominion and control over the funds in the investors' accounts in a number of ways. First, Penson transferred money and securities out of customer accounts and into the accounts of other customers without proper authorization. Amended Complaint ¶¶ 45(a)-(b), (d)-(e), & 58. Second, Penson wired funds out of the investors' accounts and directly to accounts controlled by Taylor and Smith, again without proper authorization. *Id.* ¶¶ 45(c), 63-68. Third, Penson recorded fictitious deposition into customer accounts and then reversed those deposits once the investors moved their funds from Ascendus to FFCF. *Id.* ¶ 45(g). Fourth, by its terms, Penson's own contract with the investors entitled it to dominion and control over the funds in the account. For example, Penson could demand that account holders deposit additional funds into the accounts, Penson had a first priority lien on all property in the accounts, and Penson was authorized to sell and/or purchase any and all securities in the accounts and to transfer those securities without notice to pay off any lien. *Id.* ¶¶ 51-55.

**Penson's Dominion and Control Over the Funds it Received Directly From the Receivership Entities**

The Amended Complaint alleges fifteen fraudulent transfers in the amount of $206,561.97. Amended Complaint ¶ 88. Each of these transfers was made by cashier's check from the Receivership Entities payable to Penson. *Id.* ¶ 87. Penson accepted these checks and subsequently deposited those amounts into the investor accounts, to fraudulently boost the investors' account values. *Id.* ¶ 89. Penson violated its own procedures by accepting these funds from the Receivership Entities and using them as it did. *Id.* ¶ 90.

**Penson's Actions Caused the Receivership Entities Damage**

The Receivership Entities sent funds to Penson, which Penson then deposited into its customer accounts to make it appear as if the accounts had earned trading profits when in fact they had not. Amended Complaint ¶¶ 45(f), 86-98. These transfers were inherently fraudulent because they were made as part of a Ponzi scheme, and were made with the intent to hinder, delay, or defraud the creditors and/or investors of the Receivership Entities. *Id.* ¶ 146. None of the Receivership Entities received a reasonably equivalent value from Penson in exchange for these transfers. *Id.* ¶ 147. The Receivership Entities were insolvent at the time the transfers were made to Penson. *Id.* ¶ 148. Thus, the Receivership Entities were damaged to the extent of these fraudulent transfers.

Furthermore, and as explained above, the investors in Ascendus were told that their money would be safe in Penson accounts. Amended Complaint ¶¶ 69-71. Penson, however, violated its own policies and accepted fraudulently-altered documents that allowed the principals of Ascendus and FFCF to defraud their investors. *See generally id.* ¶¶ 56-61, 63-67, & 69-71. By failing to follow its policies, Penson aided and abetted Taylor's and Smith's fraud upon the investors and breaches of their fiduciary duties to the Receivership Entities. *Id.* ¶¶ 75-76. Each month, Ascendus prepared account statements for its investors, purporting to report how much profit had been earned from options trading in their accounts and how much commission was owed to Ascendus as a result. *Id.* ¶ 28. In some instances, these commission payments were wired directly from the investors' Penson accounts by Penson to Taylor or entities he controlled.

*Id.* Penson aided and abetted Taylor's fraud on the investors by facilitating the payment of commissions to Ascendus knowing that Ascendus should receive compensation only if the trading in the investors' accounts was profitable and with the further knowledge that the accounts were losing money, not earning profits. *Id.* ¶¶ 46(d), 110-11.

Significantly, Ascendus accepted investors contrary to the conditions imposed on Ascendus' investment license, making Ascendus liable to repay any such investor's funds, and Ascendus was without the funds to do so. Amended Complaint ¶ 39. When Taylor sent false account statements to investors, Ascendus became liable to pay its investors -- now tort creditors of Ascendus -- the amounts by which the reported account values exceeded the actual account values. *Id.* ¶¶ 38, 40. Similarly, FFCF became liable to its investors by the amounts of the fictitious deposits, which was over $5,000,000.00 at the time the FFCF scheme began. *Id.* ¶¶ 48-50. Penson was complicit in and enabled these false reports to the Ascendus investors and the fictitious deposits of the FFCF investors, because, inter alia, Penson accepted fraudulent transfers of money from the Receivership Entities which it deposited into the accounts of investors to create the false impression that these investors had gained more from the trading of Ascendus than had actually occurred and it allowed the improper transfer of funds from investors to third parties at the request of third parties. *Id.* ¶¶ 8, 45(f), & 86-89. By these acts, the Receivership Entities became liable to the tort-creditor investors for the fraud and fiduciary breaches aided and abetted by Penson. *Id.* ¶¶ 127, 136.

In short, the investors in the Receivership Entities lost significant funds as a result of the fraud and fiduciary breaches aided and abetted by Penson. Amended Complaint ¶¶ 118-22. As a

result of Taylor's and Smith's wrongful acts, enabled by Penson, the Receivership Entities became liable to the investors for these losses. *Id.* The Receivership Entities' liability to the investors includes damages for inflated account values reported to the investors, *id.* ¶ 118; payments to Taylor and Smith for unearned commissions, *id.* ¶ 119; unauthorized transfers out of the investors' accounts and to accounts controlled by Taylor, *id.* ¶ 120; fictitious deposits which allowed Taylor to convince investors to transfer their investments to FFCF, which were subsequently lost in their entirety, *id.* ¶ 121; and for funds that were sent directly to Penson for which the Receivership Entities received no reasonably equivalent value in return, *id.* ¶ 122.

## RESPONSE TO PENSON'S STATEMENT OF FACTS

To the extent Penson's statement of facts conflict with those in the Amended Complaint, the Court is obligated on a Rule 12(b)(6) motion to accept as true the well-pleaded allegations in the Amended Complaint. It should be noted that Penson's alleged "transcripts" of the earlier hearings on the Motion to Compel Arbitration and the Motion to Dismiss, attached as Exhibits C and D to the Flint Declaration, contain many inaccuracies. For example, in Exhibit C, Mr. Hanchet's argument at the beginning of the hearing is attributed to Mr. Castleberry at pages 2 through 6. In Exhibit D, statements by Mr. Hanchet are also inaccurately attributed to Mr. Castleberry and also to Mr. Garrett. Finally, the transcripts contain the term "inaudible" throughout. Based on the inaccuracies and "inaudible" words, the utility of the transcripts is limited.

## ARGUMENT

Under the familiar standard for a 12(b)(6) motion to dismiss, the Court must "accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995). Rule 8 requires only that a complaint contain a "short plain statement of the claim showing that the pleader is entitled to relief." Utah R. Civ. P. 8. Thus, "under rules 8 and 12, a complaint must provide fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 17, 221 P.3d 194 (quotation omitted). Importantly, "the purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." *Archuleta v. St. Mark's Hosp.*, 2010 UT 36, ¶ 5, 238 P.3d 1044 (quoting *Whipple v. Am. Fork Irr. Co.*, 910 P.2d 1218, 1220 (Utah 1996)). The "granting of a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure," *Baur v. Pac. Fin. Corp.*, 383 P.2d 397, 397 (Utah 1963), and such a motion should not be granted unless "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 20, 232 P.3d 999 (quotation omitted). Penson has not met this high standard, and the Motion should therefore be denied.

Penson contends the Amended Complaint should be dismissed for four reasons: First, Penson argues, based on a misunderstanding of the damages alleged in the Amended Complaint, that the Receiver does not have standing because the Amended Complaint does not plead that the

Receivership Entities suffered damages. Second, Penson claims that the affirmative defense of *in pari delicto* serves to bar any recovery. Third, Penson contends that the fraudulent transfer claims are both time barred and do not allege dominion and control over the funds Penson received. Fourth, Penson posits that certain of the causes of action in the Amended Complaint are not recognized under Utah law. Each of these contentions is incorrect.

## I. THE AMENDED COMPLAINT ADEQUATELY PLEADS DAMAGES INURING TO THE RECEIVERSHIP ENTITIES.

To establish standing under Utah law "requires a showing of injury, causation, and redressability . . . ." *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 14, 233 P.3d 461 (quotation omitted). Penson challenges the Receiver's standing only on the grounds that the Amended Complaint does not allege injury to the Receivership Entities distinct from the investors. *See* Memorandum in Support the Motion ("Memo."), at 3-4. To show injury, a plaintiff "must allege that it has suffered or will suffer [] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute." *Grantsville*, 2010 UT 38, ¶ 14 (quotation omitted). As shown below, the Amended Complaint adequately alleges that the Receivership Entities themselves suffered damages.

### A. The Motion Relies on a Misconception of the Type of Damages Alleged in the Amended Complaint.

The Receiver has standing to pursue his claims against Penson. The fraudulent and wrongful actions of Taylor and Smith, aided and abetted by Penson's wrongful actions, caused Ascendus and FFCF to owe money to each of their investors who lost money in the fraudulent schemes. Each underpaid investor became a tort creditor to Ascendus and FFCF. *See*, *e.g.*,

*Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) ("But *defrauded* investors, as we have pointed out, are tort creditors."); *Donell v. Kowell*, 533 F.3d 762, 770, 777 (9th Cir. 2008) ("The Receiver has standing to bring this suit because, although the losing investors will ultimately benefit from the asset recovery, the Receiver is in fact suing to redress injuries that [the entity placed in receivership] suffered when its managers caused [it] to commit waste and fraud."); *Hays v. Adam*, 512 F. Supp.2d 1330, 1341 (N.D. Ga. 2007) ("The injured investors in this case are . . . tort creditors of the receivership.").[1] If an entity placed in receivership has standing to sue those who committed waste and fraud, the entity placed in receivership surely has standing to sue those who aided and abetted the wrongdoers.

In *Hays*, a receiver, who was appointed to oversee an entity that had engaged in Ponzi scheme, sued third parties involved in the Ponzi scheme. *Hays*, 512 F. Supp.2d at 1333-34. In response, some of the defendants moved to dismiss the receiver's claims. *Id.* at 1332. As an initial matter, the *Hays* court held that the receiver enjoyed standing to pursue his claims. *Id.* at 1340-1341. The court noted that "[a]lthough it is clear that the receiver cannot bring claims directly on behalf of third-parties, such as investors, those parties may nonetheless indirectly benefit from the receiver's action as creditors of the receivership." *Id.* The court then acknowledged that the "injured investors in this case are, or are potentially, tort creditors of the

[1] *Hays* was decided under Georgia law, 512 F. Supp. 2d at 1341. Although the Georgia Supreme Court has not spoken on the issue of deepening insolvency (a point raised by Penson that is addressed below), courts both prior to and after the *Hays* decision have rejected "deepening insolvency" under Georgia law both as an independent cause of action. *In re Avado Brands, Inc.*, 358 B.R. 868 (Bankr. N.D. Tex. 2006), and as a theory of damages. *In re Maxxis Group, Inc.*, Adversary No. 06–06554–MGD, 2009 WL 6527594 (Bankr. N.D. Ga. Sept. 30, 2009). This demonstrates that deepening insolvency and the creation of tort creditors are two distinct types of damages, and that the holding in *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974, does not preclude the damages sought by the Receiver in this case.

receivership" and the "Receiver, on behalf of [the receivership entity], is entitled to seek return of these funds for the benefit of the receivership, so that it may reimburse its creditors and/or victims of its tortious actions." *Id.*

Although the causes of action asserted by the Receiver are different than those asserted in *Hays* (aiding and abetting fraud and breach of fiduciary duty versus unjust enrichment), the import for the case as concerns the Receiver's standing is the same. In both cases, the innocent investors had tort claims against the receivership entities due to the wrongful acts of the Ponzi scheme operators. *Compare id.* at 1341; *with* Amended Complaint ¶¶ 118-22. In both cases, the receiver sought or seeks to recover damages from third parties who were involved in the wrongful acts of the Ponzi scheme operators so that those funds could be ultimately distributed to the investors. *Id.* Thus, under the tort-creditor theory recognized in *Hays* and other cases cited above, the Receiver has alleged a direct harm to the Receivership Entities and therefore has standing to pursue his claims against Penson.

Penson argues that where the harm can ultimately be traced to the investors, then the damages necessarily were not suffered by the Receivership Entities. Memo. at 4-8. This argument is a non-sequitur in the context of a receivership, where the entire purpose of a receivership is to recover funds for the purpose of repaying defrauded investors. *See Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) ("[I]t is irrelevant to the issue of standing that 'a successfully prosecuted cause of action [will result in] an inflow of money to the estate that will immediately flow out again to repay creditors.'" (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348–49 (3d Cir. 2001))). Moreover, well-reasoned

decisions from courts in other jurisdictions have recognized that standing exists to pursue third parties responsible for generating liability to the receivership entity even if the harm alleged is also suffered by the investors. *See, e.g.*, *Reneker v. Offill*, Case No. 3:08-CV-1394-D, 2009 WL 3365616, at *3 (N.D. Tex. Oct. 20, 2009) (recognizing standing for receiver where "the harm that [the receiver] pleads is that, but for Godwin Pappas' negligence, the [receivership entities'] liability would have been reduced, because the [receivership entities] would have ceased their securities-laws violations at an earlier date"); *id.* ("[A]llegations that [the defendants'] actions increased the [receivership entity's] liability to third parties or caused the [receivership entity] to be liable to third parties when they otherwise would not have been are sufficient to allege an injury that is concrete, actual, and distinct from the investors' injury."); *Mosier v. Stonefield Josephson, Inc.*, Case No. 11–2666 PSG, 2011 WL 5075551, at *4 (C.D. Cal. Oct. 25, 2011) ("While certain allegations in the FAC could conceivably be said to allege injury to investors as well, this does not necessarily vitiate the Receiver's standing to pursue claims on behalf of the receivership entities. Rather, . . . so long as an entity in receivership has suffered harm, an equity receiver has standing to pursue a claim for such injuries—even if the creditors of the receivership entity may also have a claim arising from the same underlying misconduct."); *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002–04 (9th Cir. 2005) (noting the fact that the "dissipation of assets limited the firm's ability to repay its debts ... is not, however, a concession that only the creditors, and not [the corporate entity] itself, have sustained any injury. [I]t is a recognition of the economic reality that any injury to an insolvent firm is necessarily felt by its creditors."); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1126-27 (D. Ariz. 2006) ("The defrauded investors in

this case are tort-creditors of the receivership. Mid-America is entitled to seek return of these funds for the benefit of the receivership, so that it may reimburse its creditors and/or victims of its tortious actions."). Based on this weight of authority, the Court should recognize the existence of liability owed to tort creditors as a viable theory of damages under Utah law.

Penson fundamentally misunderstands the nature of the damages alleged in the Amended Complaint for the aiding and abetting fraud and breach of fiduciary duty causes of action. Penson contends that the Receiver alleges damages by "deepening insolvency," a theory of damages rejected by the Utah Court of Appeals in *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974. The plaintiffs in *Coroles* were a group of investors who provided funds to a company (Ganter USA) designed to bring the products of a German brewery to the United States. *Id.* ¶ 2. The plaintiffs sued both the German beer company, and its principals, and the principals in Ganter USA on one side, as well as the attorneys who represented Ganter USA and provided an offering memorandum which allegedly contained fraudulent information, on the other. *Id.* ¶¶ 3-4. The plaintiffs brought claims assigned from Ganter USA for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, and breach of the covenant of good faith and fair dealing. *Id.* ¶ 7. It was with respect to these latter assigned claims that the Court of Appeals declined to recognize deepening insolvency as a form of damages. *Id.* ¶ 33.

In *Coroles*, the "complaint alleges that the money Plaintiffs invested was used to 'buy out' other investors and to pay such things as 'unpaid attorneys fees and other unpaid creditors,'" rather than for the purposes the plaintiffs were told that the funds would be used. *Id.* In that context, the Court stated that "we fail to see how Ganter USA, the supposed victim of the

assigned claims, was harmed by having its past-due bills and other listed expenses paid." *Id.* In summary fashion, the court explained, "Although deepening insolvency might harm a corporation's shareholders, it does not, without more, harm the corporation itself." *Id.*

These are not the type of damages alleged in the Amended Complaint. The Amended Complaint does not allege that Penson, as it aided and abetted Taylor and Smith in their fraud, provided benefits to Ascendus or FFCF. To the contrary, Ascendus and FFCF are victims of the scheme perpetrated by Taylor and Smith with the assistance of Penson, and they have suffered damages as a result of the wrongful actions by Penson because each investor in Ascendus and FFCF is now a tort creditor who has a claim against the Receivership Entities. The Amended Complaint alleges damages to Ascendus and FFCF as a result of Penson's wrongful actions, and for this reason, the Receiver has standing to pursue his claim on their behalf.

*1. The Receivership Entities suffered damages because of Penson's acts, which, in concert with Smith and Taylor, resulted in the Receivership Entities' liability to tort creditors.*

The Amended Complaint alleges that Penson's conduct caused the Receivership Entities to suffer damages in the form of the creation of tort creditors to the entities themselves. As shown above, Courts have repeatedly recognized in the receivership context that a receiver has standing to pursue a defendant where that party's conduct results in the creation of tort creditors to the entity in receivership. The facts alleged in the Amended Complaint demonstrate that Penson aided and abetted Taylor's and Smith's fraud and fiduciary breaches, which damaged the Receivership Entities.

The Amended Complaint contains a number of allegations demonstrating that Penson's acts resulted in liability to tort creditors. First, the Amended Complaint alleges that Penson would inform the investors that their accounts had more funds than they did, by sending fraudulent account statements, which had the effect of keeping Taylor's fraudulent and tortious conduct hidden. Amended Complaint ¶¶ 8, 45(f), & 86-89. Second, the Amended Complaint alleges that Penson enabled Taylor and Smith to send fraudulent account statements from Ascendus to the investors by accepting funds from Ascendus for deposit into the accounts contrary to its policies and the LTAs, *id.* ¶ 45(f), by recording fictitious deposits which deposits were later reversed, *id.* ¶ 45(g), and by transferring funds and securities into and out of accounts based on forged and altered documents. *Id.* ¶45(a)-(b), (d). The sending of these fraudulent account statements, enabled by Penson's conduct, constituted a breach of Taylor's and Smith's fiduciary duties to the Receivership Entities. *Id.* ¶¶ 56-68. Third, the Amended Complaint alleges that Penson, in conjunction with Taylor and Smith, used a variety of fraudulent devices to inflate the values in the investors' accounts so that the funds could be transferred from Ascendus to FFCF. *See, e.g.*, *id.* ¶ 45. Fourth, the Amended Complaint alleges that Taylor and Smith were only able to perpetrate these frauds on the investors because Penson failed to follow the terms of the LTAs and its own internal procedures for safeguarding the investors' funds. *Id.* ¶ 50, 69-71. Fifth, the Amended Complaint alleges that Penson was made aware that Taylor was sending fraudulent account statements on behalf of Ascendus investors, and that Penson knowingly participated in that fraud by allowing Taylor to continue to trade in the investors' accounts after being so informed. *Id.* ¶ 32. Sixth, the Amended Complaint alleges that Penson directly

benefitted from these fraudulent acts because it received in excess of $1 million in commissions from the accounts opened by Ascendus investors, establishing its motive to facilitate Taylor's and Smith's fraud and fiduciary breaches. *Id.* ¶ 25. Finally, these damages resulted in liability to the investors as tort creditors, which the Receivership Entities are liable to repay. *Id.* ¶¶ 118-22. Based on the above allegations, the investors became tort creditors of the Receivership Entities for the torts that Taylor and Smith, in conjunction with Penson, committed against them while Taylor and Smith were in charge of the Receivership Entities.

*2. Penson's reliance on the* Knauer *case for the proposition that the Receiver lacks standing to assert aiding and abetting fraud claims is misplaced.*

Penson argues that the decision *Knauer v. Jonathon Roberts Financial Group, Inc.*, stands for the proposition that "Courts have dismissed claims brought by receivers . . . where, like here, the fraud alleged in the complaint injured the investors in the fraudulent scheme and not the entities that were used to perpetrate the scheme." Memo. at 7 (citing *Knauer*, Case No. 01-1169-C-K/T, 2002 WL 31431484 (S.D. Ind. Sept. 30, 2002)). In *Knauer*, the receiver asserted causes of action against a broker-dealer (like Penson) for, inter alia, breach of state and federal securities laws. *See Knauer*, 2002 WL 31431484, at **6-7. The portion of the *Knauer* decision relied upon by Penson, however, simply stands for the non-controversial point that a receiver cannot pursue state and federal securities claims because such claims may only be brought only by the actual buyer or seller of securities. *See id.* Indeed, the Receiver recognized as much earlier in this case by voluntarily suggesting that his claims for breach of the Utah Securities Act should be compelled to arbitration because they belong to the investors and not

the Receivership Entities. *Knauer* should not be read so broadly as to say that whenever a Receiver brings an action for aiding and abetting fraud or breach of fiduciary duties that the injury is to the investors, instead of the entity. *Knauer* is in fact noticeably silent on this point, and Penson's reliance on it is therefore misplaced.[2]

### B. The Amended Complaint Alleges Damages to the Receivership Entities Through Improper Payments to Penson.

The Amended Complaint alleges that Penson accepted fraudulent transfers of money from the Receivership Entities and deposited those funds into the accounts of investors to create the false impression that these investors had gained more from the trading of Ascendus than had actually occurred. Amended Complaint ¶¶ 45(f), 87-90. Thus, the Amended Complaint alleges that direct transfers of money, which should never have occurred, flowed from the Receivership Entities to Penson, and that the Receivership Entities were harmed by these transfers. These allegations form the basis for Penson's fraudulent transfer claims against Penson. Indeed, Penson does not appear to genuinely challenge the Receiver's standing to pursue these claims. *See Wing v. Hammons*, Case No. 2:08-CV-00620, 2009 WL 1362389 (D. Utah May 14, 2009) (relying on *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), the Utah federal district court held the receiver of a company that conducted Ponzi scheme before his appointment had standing under Utah's Uniform Fraudulent Transfer Act to assert claims for fraudulent transfer against third parties). Therefore, the Receiver also has standing to pursue the Third Cause of Action in the Amended Complaint.

[2] The same can be said for *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), also relied upon by Penson. Memo. at 7. There, the court similarly dismissed securities law claims because they belonged to the individual investors in the securities, not the entity in receivership. *Scholes*, 744 F. Supp. at 1423-24.

## II. THE AFFIRMATIVE DEFENSE OF *IN PARI DELICTO* SHOULD NOT BE CONSIDERED ON A MOTION TO DISMISS AND IN ALL EVENTS IS INAPPLICABLE TO THIS CASE.

### A. The Appointment of a Receiver Wipes Away the Receivership Entities' Prior Bad Acts Such that *In Pari Delicto* Does Not Apply.

In the typical case, a party's wrongdoing would preclude its ability to recover from a fellow wrongdoer under the *in pari delicto* doctrine. The reason for this is that a party should not benefit from its own wrongdoing. However, in a receivership, the wrongdoer has been "ousted from control," and "removed . . . from the scene." *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995). By the Receiver's appointment, Taylor and Smith have been removed, and the Receivership Entities are no longer their "evil zombies. Freed from [their] spell, they become entitled to the return of the moneys–for the benefit not of [Taylor and Smith] but of innocent investors . . . ." *Id.* Thus, "*in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id.*

*Scholes* concerned a claim for fraudulent transfer. The *in pari delicto* doctrine, however, is equally inapplicable to the Receiver's aiding and abetting tort claims. The supposed distinction between a tort claim and a fraudulent transfer claim is a "distinction without a difference." *In re Edgewater Med. Center*, 332 B.R. 166, 178 (Bankr. N.D. Ill. 2005) ("Although *Scholes* concerned an Illinois fraudulent transfer action, and the instant case concerns actions in tort and contract, for present purposes, this is a distinction without a difference."); *see also FDIC v. O'Melveny & Myers*, 62 F.3d 17, 19 (9th Cir. 1995) ("[T]he equities between a party asserting an equitable defense and a bank are at such variance with the equities between the

party and a receiver of the bank that equitable defenses good against the bank should not be available against the receiver. To hold otherwise would be to elevate form over substance-something courts sitting in equity traditionally will not do."). In both cases, when a receiver has been appointed, the wrongdoer has been removed and the "rationales for these equitable defenses lose their meaning." *In re Edgewater Med. Center*, 332 B.R. at 178; *see also Mosier*, 2011 WL 5015551 (C.D. Cal. Oct. 25, 2011) (holding *in pari delicto* inapplicable in a case brought by a receiver asserting, inter alia, aiding and abetting conversion claims, where the receiver "was not a party to any of the alleged misconduct" and recognizing that application of the defense would "hurt[] innocent third-party creditors, while benefitting an alleged wrongdoer").

Further, Penson relies heavily on *Knauer v. Jonathan Roberts Fin. Group, Inc.*, 348 F.3d 230, 236 (7th Cir. 2003) to support its argument that the Receiver's claims are barred by the equitable affirmative defense of *in pari delicto*. Memo. at 10-11. The *Knauer* case, however, involves significantly different allegations than those in this case. In *Knauer*, the receiver sought to hold the defendant broker dealers liable even though their "involvement in the Ponzi scheme as a whole was quite minor." 348 F.3d at 237. The only allegations against the defendant broker dealers involved their failure to supervise two employees, the same individuals who operated the Ponzi schemes as president and vice president of the two companies placed in receivership. *Id.* The *Knauer* court held that the *in pari delicto* affirmative defense barred the receiver's claims against the broker dealers because the employees were "more closely associated with Heartland and JMS [the companies running Ponzi schemes and now in receivership] than with the broker dealers." 348 F.3d at 237.

When considering the equities, the facts as alleged in the Amended Complaint do not compel the same result here. The Receiver is not trying to hold Penson liable because Taylor and Smith were its employees and it failed to supervise properly their actions as was the case in *Knauer*. The Amended Complaint instead alleges that Penson's malfeasance directly contributed and resulted in the loss of millions of dollars belonging to the investors, which funds it was supposed to safeguard. *See* Part I.A.i, *supra*. The Amended Complaint further alleges that Penson directly benefited from its aiding and abetting because it received upwards of $1 million in commission from the Ascendus accounts. Amended Complaint ¶ 25.[3] Penson should not be able to avoid all liability for the fraud and fiduciary duty breaches to which it contributed and from which it benefited based on an equitable defense. Under the facts alleged in the Amended Complaint, Penson aided and abetted Taylor's wrongdoing, and it should be made to account in equity for the losses it directly caused.

Importantly, even the cases cited by Penson admit that at Court must consider the equities when evaluating the affirmative defense of *in pari delicto*. The *Knauer* case recognizes that evaluating the *in pari delicto* defense, even in the case where a receiver asserted a tort claim against a third party, required an "equitable balancing" before any result could be reached. 348 F.3d at 236. That case did not establish a per se rule against receivers asserting tort-based claims

[3]Indeed, courts have rejected the application of *Knauer* where a party asserting the *in pari delicto* defense benefitted from the challenged conduct. *See Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 144 (D. Mass. 2008) ("In *Knauer*, there was no allegation that the broker dealers received any benefit from Payne and Danker's fraudulent transactions. In this case, by contrast, Bleidt's fraud led to the deposit of a large sum of money with the bank. It received some $26,800 in fees over the life of the ′545 account . . . . If Sovereign knew of Bleidt's fraud or was willfully blind to it, one might infer that its motivation was the use of the deposit—an inference that would arguably justify imposing liability in this case. This, however, is a question best left until the facts become clear at trial.")

against third parties, as Penson seems to imply. The *Knauer* court recognized that it would have reached a different result if the broker dealers had been directly involved in the wrongful actions. *Id.* at 237, n. 6.

In undertaking such an equitable inquiry, it is clear that the defense should not apply based on the facts as they are alleged in the Amended Complaint. Should the Court dismiss the Amended Complaint on the grounds that *Scholes* on its face concerned only a fraudulent transfer claim, this would allow the wrongdoer here, Penson, to escape free when it must admit that it acted wrongly to establish the defense claimed. *See State v. Garcia*, 866 P.2d 5, 7 (Utah Ct. App. 1993) (defense of *in pari delicto* requires equal wrongdoing by all parties involved). Such a result is clearly inequitable and not warranted in the case where Taylor and Smith have been removed. *See O'Melveny & Myers*, 61 F.3d at 19 ("Moreover, when a party is denied a defense under such circumstances, the opposing party enjoys a windfall. This is justifiable as against the wrongdoer himself, not against the wrongdoer's innocent creditors."); *see also Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 143 (D. Mass. 2008) (the Court may "allow a receiver to avoid the defense if the equities so required. . . . It would thereby reinstate the legal separation between [the Ponzi scheme operator] and the [company in receivership], formerly 'evil zombies,' now released from his control"). Therefore, the doctrine of *in pari delicto* does not preclude the Receiver at the pleading stage from pursing his claims against Penson.

Penson's reliance on the *in pari delicto* defense suffers from one final flaw. In essence, Penson's argument is that the defense bars the Receivership Entities from pursuing any third parties for any cause of action other than a fraudulent transfer. *See* Memo. at 9. The logical

extension of this argument is that the Receiver could not even pursue Taylor and Smith for their tortious conduct, because as their acts would be presumably imputed to the Receivership Entities under Penson's agency theory, *see* Memo. at 11, the Receivership Entities would be *in pari delicto* to them as well. Indeed, this is the direct implication of Penson's argument as the causes of action alleged against Penson to which it is asserting the *in pari delicto* defense are for aiding and abetting the conduct of *Taylor and Smith*. In other words, Penson argues it should be relieved of liability because Taylor's and Smith's acts make the Receivership Entities *in pari delicto*, when it is *those very acts* Penson is alleged to have aided and abetted in the Amended Complaint. Such an absurd and inequitable result is the reason for the rule in *Scholes*, that once the person who is *in pari delicto* is eliminated, the defense loses its "sting." *Scholes*, 56 F.3d at 754.

### B. *In Pari Delicto* Is an Affirmative Defense and the Resolution of that Defense on a Motion to Dismiss Is Improper Under the Circumstances of this Case.

Penson concedes, as it must, that *in pari delicto* is an affirmative defense, and that a Rule 12(b)(6) typically does not permit the Court to dismiss a complaint on the basis of an affirmative defense. *See* Memo. at 9 n.12; *Zoumadakis v. Uintah Basin Med. Center, Inc.*, 2005 UT App 325, ¶ 10 n.6, 122 P.3d 891 ("[A]ffirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6)." (quotations and citation omitted)). There exists a narrow exception under Utah law, but only where the "inefficacy of a claim under the [affirmative defense] appear[s] unambiguously on the face of the complaint." *Ashby v. Ashby*, 2008 UT App 254, ¶ 10 n.2, 191 P.3d 35, *aff'd in part*

*and rev'd in part on other grounds by Ashby v. Ashby*, 2010 UT 7, 227 P.3d 246. Because the Amended Complaint does not allege facts sufficient to "unambiguously" establish the defense of *in pari delicto*, consideration of that affirmative defense at this time is procedurally improper under Rule 12(b)(6).

Under Utah law, the *in pari delicto* defense applies only "when the parties are equally at fault." *State v. Garcia*, 866 P.2d 5, 7 (Utah Ct. App. 1993); *see also* 30A C.J.S. Equity § 111 (updated Sept. 2011) ("As to parties *in pari delicto*, the principles cognate with the clean hands maxim include: equity will not relieve one party against another when both are in pari delicto; where both are equally in the wrong, defendant holds the stronger ground; where the fault is mutual, the law will leave the case as it finds it."). Here, the Amended Complaint alleges that, in large part, the wrongdoers were *Taylor and Smith* acting contrary to the interests of the Receivership Entities. Thus, in order to establish its defense on this Motion, Penson must go outside the pleadings to demonstrate that Penson and the *Receivership Entities*, not Taylor and Smith, were equally at fault.[4] This type of extra-pleading investigation is prohibited on a Rule 12(b)(6) motion. *Zoumadakis*, 2005 UT App 325, ¶ 10 n.6; *see also Pearlman v. Alexis*, Case No. 09–20865–CIV, 2009 WL 3161830, at *3 (S.D.Fla. Sept. 25, 2009) ("Even to the extent that the amended complaint alleges wrongdoing by the Receivership Entities, an essentially equitable

[4] Penson makes much of the fact that the Amended Complaint omits the allegation that Taylor and Smith faced criminal charges for their conduct in running the Receivership Entities, and assumes this omission was to avoid the *in pari delicto* defense. *See* Memo. at 13. To the contrary, the criminal indictments attached as Exhibit F to the Flint Declaration were dismissed in 2010. The Amended Complaint thus omitted any allegation of criminal charges because they had been dismissed. It has subsequently come to the attention of the Receiver that the criminal charges were re-filed in September 2011, a fact about which the Receiver had no knowledge at the time the Amended Complaint was filed.

and necessarily fact-bound apportionment of responsibility between them and the defendants in this case would be an inappropriate exercise for a court ruling on a motion to dismiss.").

Beyond this failure, *in pari delicto* is an equitable defense, and to resolve it will require the Court to entertain evidence concerning where the fault should lie, a question which becomes even more difficult in the context of a Ponzi scheme and equity receivership. *See Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 144-45 (D. Mass. 2008) ("Moreover, the general appropriateness of allowing Sovereign to assert the *in pari delicto* defense depends on the degree to which it is responsible for the harms suffered by all the plaintiffs. Where a major fraud like Bleidt's has been perpetrated, allegedly facilitated in part by Sovereign, for what percentage of fault for the overall harm must Sovereign be responsible in order to justify liability despite the in pari delicto principle? It is not a question that is easy for the Court to answer on this record. Like comparative negligence, it may be a question best left to the jury."). Even if fact discovery could show that Penson, Taylor, Smith, and the Receivership Entities are all equally at fault, under Utah law the Court can choose to avoid the defense on public policy grounds. *See Gorringe v. Read*, 63 P. 902, 904 (Utah 1901). The public policy exception is particularly apropos in a case such as this, where the application of the defense would allow a wrongdoer to go free to the detriment of the Receiver and the innocent investors. *Id.* ("Even where the contracting parties are in pari delicto, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent . . . ."). For all of

these reasons, which will involve the weighing of equities impossible at this point in the case and the consideration of facts outside those alleged in the Amended Complaint, resolution of the equitable defense of *in pari delicto* is inappropriate on a motion to dismiss.

## III. THE FRAUDULENT TRANSFER CLAIMS ARE NOT TIME-BARRED AND ARE PROPERLY PLEADED.

### A. Under the Doctrine of Adverse Domination, the Limitations Period on the Receiver's Claims Against Penson Was Tolled Until the Receiver's Appointment on March 18, 2009.

Penson argues the Receiver's fraudulent transfer claims are barred as a matter of law. Penson is mistaken. Under "the common law doctrine of adverse domination, the statute of limitations for an entity's claim is tolled when the entity is controlled or dominated by individuals engaged in conduct that is harmful to the entity." *Warfield v. Carnie*, Case No. 3:04-cv-633-R, 2007 WL 1112591, at *15 (N.D. Tex. April 13, 2007) (citing *FDIC v. Jackson*, 133 F.3d 694, 698 (9th Cir. 1998)); *see also Scholes*, 56 F.3d at 756. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield*, 2007 WL 1112591, at *15; *see also Farmers & Merchants Nat. Bank v. Bryan*, 902 F.2d 1520, 1522-23 (10th Cir. 1990) (recognizing "the theory of 'adverse domination' as another equitable vehicle under federal common law for tolling the statute of limitations"); *F.D.I.C. v. Hudson*, 673 F. Supp. 1039, 1041-42 (D. Kan. 1987) (recognizing doctrine of adverse domination tolls statute of limitations) *cited with approval by Saunders v. Sharp*, 793 P.2d 927,

932 (Utah Ct. App. 1990) (but refusing to extend doctrine "beyond the limitation of actions against corporate wrongdoers" on procedural grounds).

In this case, the Amended Complaint alleges that the Receivership Entities were dominated by wrongdoers. *See generally* Amended Complaint ¶¶ 11-13. The appointment of the Receiver removed Taylor and Smith from the scene, and the Receivership Entities only then ceased to operate as their "evil zombies." *Scholes*, 56 F.3d at 756. The equitable doctrine of adverse domination therefore applies to toll the statute of limitations until the Receiver's appointment because prior to his appointment "it would have been impossible for the receivership entities to have asserted their legal rights . . . ." *Warfield*, 2007 WL 1112591, at *17.

Judge Anthony Quinn of this Court has already applied adverse domination in another suit brought by the Receiver in this receivership. *See* Order Denying Defendant's Motion for Partial Summary Judgment, *Klein v. Murillo*, Case No. 090921814, entered May 3, 2010, attached hereto as Exhibit 1 ("The Receivership Entities were under the adverse domination of their principals [and] [u]nder adverse domination, the statute of limitations does not begin to run on any claims that the Receivership Entities have against [defendant] until the Receiver was appointed."). Thus, the four-year statute of limitations began to run no earlier than March 18, 2009, when the Receiver was appointed and therefore the fraudulent transfer claims are timely brought.

### B. The Utah Fraudulent Transfer Act Contains a Discovery Rule, Tolling the Statute of Limitations.

The Utah Fraudulent Transfer Act contains within it a statutory discovery rule which states that a fraudulent transfer claim is "extinguished" if not brought "within four years of the allegedly fraudulent transfer *or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant*." Utah Code Ann. § 25-6-10(1) (emphasis added). The facts as alleged in the Amended Complaint do not plainly reveal that the Receiver's fraudulent transfer claims have been extinguished under the applicable statute of limitations.[5]

As alleged in the Amended Complaint, the transfers to Penson were made as part of a Ponzi scheme with actual intent to defraud. Amended Complaint ¶ 146; *see also Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) ("[M]ere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud."). *In re Cohen*, 199 B.R. 709, 717 (9th Cir. BAP 1996) ("Proof of a Ponzi scheme is sufficient to establish the Ponzi operator's actual intent to hinder, delay, or defraud creditors for purposes of actually fraudulent transfers . . . ."). Because the transfers at issue to Penson were made with actual fraudulent intent, the discovery rule allows the Receiver to avoid all of the transfers by the Receivership Entities to Penson within one year of their discovery. *Rappleye v. Rappleye*, 2004 UT App 290 ¶ 19, 99 P.3d 348. The facts alleged in the Amended Complaint do not "plainly reveal" that the Receiver did or could have reasonably discovered that the transfers to Penson were fraudulent more than one year prior to the filing of

[5] To the extent Penson claims the statute of limitations has run on any other cause of action, adverse domination would apply to preserve those claims as well. *See* Memo. at 20 n.20 (contending the aiding and abetting claims have expired).

the Amended Complaint. In fact, the Amended Complaint is appropriately silent on that matter as a complaint need not predict and refute affirmative defenses in order to avoid dismissal under Rule 12(b)(6). *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). Rather, to answer this question would require the Court to go outside the facts alleged in the Amended Complaint. Penson argues that on the day the Receiver was appointed, he knew all of the facts concerning the Receivership Entities and somehow knew of the claim against Penson. Memo. at 21. Such an argument does not pass the straight face test when considering the transfers at issue and the complex nature of the Ascendus and FFCF schemes. If anything, the Amended Complaint alleges that the Receiver could not have known about his claims against Penson until August 2010, at the earliest. *See* Amended Complaint ¶¶ 17-19. This case was then filed in December 2010, well within the applicable statutes of limitation.

### C. Utah Law Is Plain that the Four-Year Limitations Period Is a Statute of Limitations Not a Statute of Repose.

Relying on Idaho case law, Penson claims that the four-year limitations period in the UFTA cannot be tolled because it is a statute of repose inasmuch as it contains the word "extinguished," and is not a statute of limitations. *See* Memo. at 22 (citing *Klein v. Capital One Fin. Corp.*, Case No. 4:10-CV-00629, 2011 WL 3270438 (D. Idaho July 29, 2011)). This argument is without merit because whether the statute contains the word "extinguished" or not does not affect the analysis under Utah law. The Utah Court of Appeals has already decided that the time periods in the UFTA are statutes of limitations, not statutes of repose. *See Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1259 (Utah Ct. App. 1996) ("Because a claim under 25-

6-6(2) does not accrue until the event causing the injury, the time limit in section 25-6-10(3) is a statute of limitation."). In *Selvage*, the Court of Appeals laid out the Utah law for determining when a limitations period is a statute of limitations versus a statute of repose:

> Utah courts have consistently followed the same test for determining whether a time limit is a statute of repose or one of limitation. Simply put, a statute of repose begins to run from a date or event independent and unrelated to the date of legal injury. By contrast, a statute of limitation does not begin to run until the cause of action has accrued.

*Id.* at 1258. The Court of Appeals then held that because a cause of action for fraudulent transfer does not accrue until the event causing the injury takes place (i.e., the transfer of funds), the one-year time limitation on a claim for fraudulent transfer to an insider for payment of an antecedent debt was a statute of limitations and not a statute of repose. *Id.* at 1258-59. Penson's efforts to distinguish this case, on the grounds that it concerns a different subsection, is without substance. *See* Memo. at 23 n.23. Thus, *Selvage* is controlling authority for the propostion that the UFTA's time periods are statutes of limitation not statutes of repose.

### D. The Statute of Limitations Is an Affirmative Defense and Should Not Be Considered on a Motion to Dismiss Under the Facts Alleged in the Amended Complaint.

Pleading the statute of limitations is an affirmative defense. Utah R. Civ. P. 8(c). As described above, "complaints do not have to anticipate affirmative defenses to survive a motion to dismiss," and the defense is appropriately considered on a motion to dismiss only if "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that an action is untimely under the governing statute of limitations." *Lewis*, 411 F.3d at 842 (quoted in *Zoumadakis*, 2005 UT App 325, ¶ 61).

At the very least, the question of whether the discovery rule applies in this case is a question of fact which cannot be resolved on a motion to dismiss. *See Ottens v. McNeil*, 2010 UT App 237, ¶ 57, 239 P.3d 308 (applicability of discovery rule is a question of fact); *Richards Irr. Co. v. Karren*, 880 P.2d 6, 10 (Utah Ct. App. 1994) (cannot resolve question of fact on motion to dismiss).

### E. The Amended Complaint Adequately Pleads a Cause of Action for Fraudulent Transfer Because Penson Exhibited Dominion and Control Over the Funds it Received.

To state a claim for fraudulent transfer with actual intent to defraud, the Receiver must allege (1) that a transfer was made, (2) with actual intent to hinder, delay, or defraud any creditor of the debtor. *See* Utah Code Ann. § 25-6-5(1)(a). In order to state a claim for constructive fraudulent transfer, the Receiver must allege (1) a transfer was made, (2) while the Receivership Entities were insolvent; and (3) the Receivership Entities did not receive reasonably equivalent value in exchange for the transfer. *See id.* § 25-6-5-(1)(b). Penson does not and cannot contend that the Amended Complaint does not adequately allege those elements, and thus the Amended Complaint does state a claim under the UFTA and this should end the Court's inquiry. Rather, Penson raises a fact dispute that Penson did not exercise dominion and control over the transfers it received. Memo. at 17-19.

Penson relies on case law holding that broker-dealers typically are not "transferees," but rather are financial conduits through which the funds flowed. *Id.* The fundamental flaw in Penson's argument is that it wholly disregards the actual allegations in the Amended Complaint. First, the Amended Complaint alleges that Penson exercised dominion and control over the funds

in the individual investors' accounts by, inter alia, transferring funds into, out of, and between those accounts without the proper authorization, Amended Complaint ¶¶ 45(a)-(e), & 58; by wiring funds out of the investors' accounts and directly to accounts controlled by Taylor and Smith, again without proper authorization, *id.* ¶¶ 45(c), 63-68; and recording fictitious deposition into customer accounts and then reversing those deposits once the investors moved their funds from Ascendus to FFCF, *id.* ¶ 45(g).

Moreover, the Amended Complaint alleges that Penson's own contract with the investors entitled it to dominion and control over the funds in the account, because it allowed Penson to demand that account holders deposit additional funds into the accounts, gave Penson a first priority lien on all property in the accounts, and entitled Penson to sell and/or purchase any and all securities in the accounts and to transfer those securities without notice to pay off any lien. Id. ¶¶ 51-55. Thus, the Amended Complaint alleges that Penson had dominion and control over the investors' accounts. This allegation is important because the fraudulent transfers Penson is alleged to have received, which were sent directly from Ascendus to Penson, were then deposited into the investor accounts by Penson. *Id.* ¶ 89. The Amended Complaint therefore alleges that Penson was able to use the funds for its own purposes in two ways: First, because it received direct transfers of money which it then chose to deposit into the investors accounts; and second, because it had the right to control that money once deposited into the accounts.

Penson's citation to authority holding that broker-dealers typically are not considered "transferees" are not on point with the facts alleged in the Amended Complaint. Rather, the facts alleged in the Amended Complaint establish that Penson received direct transfers of funds from

Ascendus, which it then deposited into the investor accounts, for the purposes of inflating the account values so that it could continue to receive commissions from the accounts. Amended Complaint ¶¶ 25, 45. Moreover, courts have held that where brokers such as Penson reserve for themselves the right to use the funds in the account to protect themselves from losses, they exhibit dominion and control over the funds in the accounts. *See In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 18-21 (S.D.N.Y. 2007) ("Even assuming that Bear Stearns's control of the transferred funds was merely 'incidental' to its economic well-being, the degree of decision-making authority Bear Stearns possessed with respect to the funds demonstrates a level of 'dominion and control' sufficient to create transferee liability."). Indeed, in *In re Manhattan Inv. Fund Ltd.*, Bear Sterns had reserved to itself many of the same rights reserved by Penson in its contracts with the investors: Bear Sterns could use the funds in the account to close short positions, it could require the account holders to put more money into the account, and had a lien on the account funds. *Id.* at 18-20. Similarly, Penson could demand that account holders deposit additional funds into the accounts, Penson had a first priority lien on all property in the accounts, and Penson was authorized to sell and/or purchase any and all securities in the accounts and to transfer those securities without notice to pay off any lien. Amended Complaint ¶¶ 51-55. Thus, based on the well-pleaded facts which must be accepted as true, the Amended Complaint sufficiently alleges that Penson exhibited dominion and control over the funds it received to survive a motion to dismiss.

## IV. THE AMENDED COMPLAINT STATES A CLAIM FOR AIDING AND ABETTING FRAUD AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY.

### A. Utah Law Recognizes or Would Recognize a Claim for Aiding and Abetting Fraud.

Relying on a 2002 slip opinion from Judge Leslie Lewis, Penson contends that Utah law does not recognize a cause of action for aiding and abetting fraud. *See* Memo. at 25-26 (citing *Coroles v. Sabey*, Case No. 010903873, Slip. Op. Feb. 27, 2002). The following year, the Utah Court of Appeals in *Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, 78 P.3d 616 reversed a trial court's dismissal of a fraud claim where the allegation was that the defendant "schemed with the Appellees to commit fraud and later agreed to conceal the fraud in furtherance of the scheme." *Id.* ¶ 35. Thus, Utah courts recognize a claim for aiding and abetting fraud. *See also id.* ¶ 33 ("Furthermore, '[p]arties who *knowingly join a fiduciary in fraudulent acts*, whereby the fiduciary breaches his or her fiduciary duties, are jointly and severally liable with that fiduciary.'" (quoting 37 Am. Jur. 2d, Fraud and Deceit § 306 (2001) (emphasis added)). Moreover, the Restatement of Torts recognizes the tort of aiding and abetting tortious conduct, including fraud, *see* Restatement (Second) of Torts § 876(b), and the Utah Court of Appeals has recognized this section of the Restatement in the context of a claim for aiding and abetting a sexual assault. *See D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 4 (Utah Ct. App. 1994), *declined to extend on other grounds by Clark v. Pangan*, 2000 UT 37, 998 P.2d 268. Thus, even if the Utah appellate courts have not expressly recognized the tort of aiding and abetting fraud,

there is every indication that they would. The authority cited by Penson is neither binding nor is it an accurate statement of Utah law, and the Court should deny the Motion on these grounds.

### B. Utah Law Recognizes or Would Recognize a Claim for Aiding and Abetting Breach of Fiduciary Duty, and the Amended Complaint Alleges Damages Flowing from the Breach.

Relying on the same 2002 district court slip opinion which has been abrogated by more recent appellate court decisions, Penson also claims that Utah law does not recognize a cause of action for aiding and abetting breach of fiduciary duty. *See* Memo. at 24. Again, the *Russell/Packard Dev. Inc.* case clearly demonstrates that Utah law does in fact recognize this cause of action. *See* 2003 UT App 316, ¶ 35 ("Furthermore, '[p]arties who *knowingly join a fiduciary* in fraudulent acts, *whereby the fiduciary breaches his or her fiduciary duties*, are jointly and severally liable with that fiduciary.'" (quoting 37 Am. Jur. 2d, Fraud and Deceit § 306 (2001) (emphasis added)). The 2003 *Coroles* decision cited by Penson is not to the contrary. In that case, another panel of the Court of Appeals, in a decision issued less than one month after the *Russell/Packard* case, stated merely that "if" the cause of action does exist, the "Plaintiffs have not adequately pleaded it." *Coroles*, 2003 UT App 339, ¶ 37 n.20. As with a cause of action for aiding and abetting fraud, the Restatement (Second) of Torts recognizes a cause of action for aiding and abetting breach of fiduciary duty, and the United States District Court for the District of Utah also recognizes the cause of action. *See Farm Bureau Life Ins. Co. v. Am. Nat. Ins. Co.*, 505 F. Supp. 2d 1178, 1189 (D. Utah 2007) ("The substantial support from other jurisdictions and the Restatement (Second) of Torts are persuasive. It appears that the Utah state courts, if faced with the issue, would recognize such a cause of action."). Thus, even if the Utah

appellate courts have not explicitly recognized the tort of aiding and abetting breach of fiduciary duty, the foregoing law indicates that they would if squarely presented with the issue.

Furthermore, Penson contends that damages is an essential element of a cause of action for breach of fiduciary duty, and that the Receiver has not alleged damages flowing from the breach. *See* Memo. at 18-19. Penson's argument is simply a rehash of its prior contention that the Amended Complaint does not allege damages to the Receivership Entities, which is dispelled in Part I of this Opposition.

## CONCLUSION

For the foregoing reasons, the Receiver respectfully requests the Court to deny Penson's renewed Motion to Dismiss.

DATED this 29th day of March, 2012.

**MANNING CURTIS BRADSHAW & BEDNAR LLC**

/s/ David C. Castleberry
David C. Castleberry
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Attorneys for Receiver for FFCF Investors, LLC, Ascendus Capital Management, LLC and Smith Holdings, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of March, 2012, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN OPPOSITION TO PENSON'S SECOND MOTION TO DISMISS** upon the following:

| | | |
|---|---|---|
| ___ | VIA FACSIMILE | R. Wayne Klein |
| ___ | VIA HAND DELIVERY | 299 South Main, Suite 1300 |
| ___ | VIA U.S. MAIL | Salt Lake City, UT 84111 |
| ___ | VIA FEDERAL EXPRESS | *Court-Appointed Receiver* |
| _x_ | VIA EMAIL | |
| ___ | VIA FACSIMILE | Richard D. Flint |
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