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U.S. DISTRICT COURT

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DISTRICT OF UTAH

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and Smith Holdings, LLC*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

R. WAYNE KLEIN, AS COURT-
APPOINTED RECEIVER FOR FFCF
INVESTORS, LLC, ASCENDUS CAPITAL
MANAGEMENT, LLC, AND SMITH
HOLDINGS, LLC,

Plaintiff,

vs.

PENSON FINANCIAL SERVICES, INC.;
CONSILIUM TRADING COMPANY, LLC.

Defendants.

**ORDER TO REMAND
TO STATE COURT**

Civil No. 2:11-cv-00059

Judge Tena Campbell

Plaintiff R. Wayne Klein (the "Receiver"), as court-appointed receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus"), and Smith Holdings, LLC ("Smith Holdings") instituted this action against Penson Financial Services, Inc. ("Penson") and Consilium Trading Company, LLC ("Consilium") in the Third Judicial District

Court, Salt Lake County, State of Utah. In his Complaint, the Receiver alleges that Penson and Consilium, among other things, aided and abetted the fraud and securities violations committed by Roger Taylor ("Taylor") and Richard Smith ("Smith"), the two individuals who operated the Ascendus and FFCF fraudulent schemes.

Penson removed this action under this Court's diversity jurisdiction, asserting that the Receiver fraudulently joined the non-diverse defendant Consilium for the sole purpose of defeating diversity jurisdiction and avoiding removal. Penson also filed with the Court a Motion to Stay Action and Compel Arbitration ("Motion to Compel Arbitration"). In response, the Receiver submitted a Motion for Remand to State Court (the "Motion"). For the reasons set forth below, the Court grants the Receiver's Motion and remands this action to state court for further proceedings.

I. ANALYSIS

"Removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001). To establish fraudulent joinder, Penson must show by clear and convincing evidence that the Receiver cannot possibly succeed in any of his claims for relief against Consilium. See *Wormuth v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1500113, *3 (N.D.Okla. 2007) (citing *Town of Freedom, Oklahoma v. Muskogee Bridge Co.*, 466 F.Supp. 75 (W.D.Okla.1978)).

Penson has not met its burden. Penson argues, among other things, that the Receiver lacks standing to pursue claims against Consilium, which is another means of alleging fraudulent

joinder. As outlined in the Complaint and as explained in the Receiver's memoranda filed in support of the Motion, the Receiver alleges that Penson transferred money directly from Ascendus investors' brokerage accounts at Penson to Consilium. The Receiver also alleges that Taylor and Smith used Consilium and Penson to hide from Ascendus investors the true amounts in their accounts at Penson, which allowed Taylor and Smith to then transfer money from the Ascendus scheme to the FFCF scheme. Based on the allegations in the Complaint, it is clear that Penson has not met its burden of establishing fraudulent joinder. Further, no amount of jurisdictional discovery would alter this outcome.

II. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion, and REMANDS this action to state court for further proceedings. Further, because the Court has no jurisdiction to decide matters in this action, the Court will not issue any ruling on the Motion to Compel Arbitration.

Tena Campbell

Tena Campbell
United States District Court Judge

April 27, 2011