

BEFORE FINRA DISPUTE RESOLUTION

R. Wayne Klein, as Court-Appointed Receiver
for FFCF Investors, LLC, Ascendus Capital
Management, LLC, and Smith Holdings, LLC,

Claimant,

vs.

Penson Financial Services, Inc.,

Respondent.

STATEMENT OF CLAIM

Case No. _____

THE PARTIES AND REQUEST FOR HEARING

1. On March 18, 2009, Claimant R. Wayne Klein (the "Receiver") was appointed by the Third District Court of Utah as Receiver for three companies controlled by Roger Taylor ("Taylor") and Richard Smith ("Smith"): FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus"), and Smith Holdings, LLC ("Smith Holdings") (collectively, "Receivership Entities"). Only Ascendus and FFCF are relevant to this case. On August 13, 2010, the state of Utah filed criminal charges against Taylor and Smith accusing them of securities fraud for their roles in operating Ascendus and FFCF. Those criminal charges are still pending.

2. Sixteen investors (the "Investors") who had brokerage accounts at Penson Financial Services, Inc. ("Penson") and who were involved with Ascendus or FFCF have assigned their claims against Penson to the Receiver (the "Assignments"). The claims asserted by the Receiver in this matter are brought pursuant to the Assignments.

3. Ten of the Investors who assigned claims to the Receiver live near Salt Lake City, Utah. One Investor lives in Utah, but 300 miles from Salt Lake City. The other five Investors

live in Arizona, Illinois, Louisiana, and Texas. The Receiver is based in Salt Lake City. The Receiver requests a hearing in Salt Lake City, Utah.

4. Penson is a FINRA-registered broker-dealer with its principal place of business in Texas.

NATURE OF CLAIM AND BRIEF OVERVIEW

5. Ascendus operated as a Ponzi scheme. Its manager, Taylor, claimed the ability to trade options in a way that would be extremely profitable, with minimal risk. From 2003 to early 2006, Taylor persuaded Investors to open brokerage accounts at Penson and give him authority to make trades in the Investors' accounts. This trading resulted in significant losses in the Investor's accounts at Penson. Notwithstanding these losses, Ascendus sent account statements to Investors reporting substantial gains. Based on the gains that were reported to Investors, Ascendus collected significant amounts from the Investors as commissions.

6. With the active assistance of Penson, Taylor and Smith defrauded the Investors out of millions of dollars. To create the illusion that the Investors' accounts at Penson had the amounts claimed by Taylor, Penson accepted money from Ascendus without Investor approval or knowledge, transferred securities from accounts of certain Investors into the accounts of others, and transferred funds based on forged and altered letters of authorization.

7. In early 2006, Penson withdrew millions of dollars of Investor money from the accounts at Penson and sent this money directly to bank accounts controlled by Taylor and Smith. The money from all of these customers was pooled and put into FFCF, a new Ponzi scheme. In July 2008, this new scheme collapsed completely, eventually resulting in the appointment of the Receiver.

8. Taylor and Smith were able to cover up losses sustained by the Investors while they were trading with Ascendus, to move these Investors' funds to a new fraud scheme at FFCF, and successfully solicit additional funds because of Penson's active assistance in deceiving the Investors.

9. If Penson had followed its compliance manual, refused to allow Taylor and Smith to engage in trading activity at Penson that Penson knew violated state securities laws, and had not actively deceived its customers, investment losses for the Investors would have been eliminated for most and substantially lowered for others.

THE RECEIVERSHIP AND ASSIGNED CLAIMS

10. As Receiver, the Claimant is charged by the court with taking control of the Receivership Entities and pursuing causes of action that will result in recoveries of funds for the Receivership Estate – for later distribution to victims of the Ponzi scheme. In carrying out that role, the Receiver has filed a number of lawsuits and obtained settlements with a variety of persons who owed funds to the Receivership Estate. Included in this category is a lawsuit filed by the Receiver against Penson for losses suffered by the Receivership Entities – separate and distinct from losses suffered by the victims of the Ponzi scheme.¹ The Receiver has distributed some funds to victims of the Ponzi scheme, amounting to approximately 30% of the losses of eligible claimants. Other lawsuits are still pending, from which the Receiver hopes to be able to make additional distributions to victims.

¹ The Receivership Court expressly authorized the Receiver to file suit against Penson. That lawsuit is still pending in the Third District Court of Utah, following prolonged procedural battles including a remand back to state court after Penson's removal to federal court, a motion to compel arbitration (discussed below), and an unsuccessful motion to dismiss the Receiver's case.

11. Sixteen Investors have assigned to the Receiver their individual claims against Penson, authorizing the Receiver to seek recovery from Penson based on particularized instances of misconduct by Penson. Information about each of the Investors is set forth below:

A. Doug Anderson ("Anderson") resides in Arizona. Anderson opened an account at Penson in or about August 2003, and, upon information and belief, signed a Limited Trading Authorization ("LTA"), which authorized Taylor to make trades using funds in his account. Anderson deposited approximately \$1,100,000.00 into his Penson account. Anderson paid \$69,196.99 in commissions to Ascendus.

B. Ned Bushnell ("Bushnell") resides in Orem, Utah. Bushnell opened an account at Penson in or about June 2004, and signed an LTA. Bushnell deposited approximately \$130,000.00 into his Penson account. Bushnell paid \$6,624.41 in commissions to Ascendus.

C. Kelly Cook ("Cook") resides in Mapleton, Utah. Cook opened an account at Penson in or about September 2003, and signed an LTA. Cook deposited approximately \$175,000 into his Penson account. Cook paid \$20,732.01 in commissions to Ascendus.

D. Annette Donnell ("Donnell") resided in San Diego, California while the facts giving rise to this action occurred; she now lives in Salt Lake City, Utah. Donnell opened accounts at Penson in or about May 2003, and signed an LTA. Donnell deposited \$98,000 in cash and \$683,436.69 in stock into her Penson accounts. Donnell paid \$159,867.99 in commissions to Ascendus.

E. Rodney Hulse ("R. Hulse") resides in Maplton, Utah. R. Hulse opened an account at Penson in or about October 2003, and signed an LTA. R. Hulse deposited approximately \$300,000 into his Penson account. R. Hulse paid \$25,269.28 in commissions to Ascendus.

F. Stan Hulse ("S. Hulse") resides in San Antonio, Texas. S. Hulse opened an account at Penson in or about September 2004, and signed an LTA. S. Hulse deposited \$50,000 into his Penson account. S. Hulse paid \$1,310.74 in commissions to Ascendus.

G. Roy Molina ("Molina") resides in Moab, Utah. Molina opened an account at Penson in or about March 2004, and signed an LTA. Molina paid \$9,060.47 in commissions to Ascendus.

H. Wayne Mortensen ("Mortensen") resides in Mapleton, Utah. Mortensen opened an account at Penson in or about September 2003, and signed an LTA. Mortensen deposited \$900,000 into his Penson account. Mortensen paid \$103,983.11 in commissions to Ascendus.

I. Rao Narra ("Narra") resides in Baton Rouge, Louisiana. Narra opened an account at Penson in or about January 2004, and signed an LTA. Narra paid \$140,118.82 in commissions to Ascendus.

J. Rod Petersen ("Petersen") resides in Mapleton, Utah. Petersen opened an account at Penson in or about January 22, 2004, and signed an LTA. Petersen deposited \$100,000 into his Penson account. Petersen paid \$13,459.73 in commissions to Ascendus.

K. Steve Rogers ("Rogers") resides in Pleasant Grove, Utah. Rogers opened an account at Penson in or about November 2003, and signed an LTA. Rogers deposited \$30,000 into his Penson account. In or about February 2004, Penson withdrew \$30,672 from Rogers's Penson account and transferred it to Ascendus. Rogers did not consent to the removal of these funds from his account.

L. Kathryn Rowley ("Rowley") resides in North Salt Lake, Utah. Rowley opened an account at Penson in or about August 2003, and signed an LTA. Rowley deposited

\$47,869 in stocks and \$310,450.10 in cash into her Penson account. Rowley paid \$11,893.14 in commissions to Ascendus.

M. Sharon Wilcox ("Wilcox") resides in Tucson, Arizona. Wilcox opened an account at Penson in or about May 2005, and signed an LTA.

N. Al Wirth ("Wirth") resides in Chicago, Illinois. Wirth opened an account at Penson in or about September 2003, and signed an LTA. Wirth deposited \$3,073,422.25 in stocks, and \$451,605.95 in cash into his Penson account. Wirth paid \$382,086.20 in commissions to Ascendus.

O. David Young ("D. Young") resides in Sandy, Utah. D. Young opened an account at Penson in or about March 2003, and signed an LTA. D. Young deposited \$150,000 into his Penson account. D. Young paid \$12,831.29 in commissions to Ascendus.

P. Richard Young ("R. Young") resides in Mapleton, Utah. R. Young opened an account at Penson in or about January 2004, and signed an LTA. R. Young deposited \$2,507,700.80 into his Penson account. R. Young paid \$68,349.73 in commissions to Ascendus.

12. Initially, the Receiver included these Investor claims in his lawsuit in Utah state court against Penson for losses incurred by the Receivership Entities, but Penson won a motion compelling arbitration of the assigned claims. Accordingly, this arbitration, on behalf of the Investors, is proceeding simultaneously with the Receiver's civil litigation against Penson for damages to the Receivership Entities.

BACKGROUND OF PONZI SCHEME

13. In early 2003, Taylor and Smith formed Ascendus. Ascendus became registered with the State of Utah as an investment adviser, with Taylor acting as the qualifying officer for

Ascendus. Taylor claimed special expertise in trading options, telling investors he had perfected a methodology for options trading that yielded high profits with little risk.

14. Taylor and Smith, through Ascendus, would be compensated from a percentage of profits earned by investors. The performance-based fees owed to Ascendus by the investors ranged from 10% to 30% of the trading profits earned. The higher the profits, the larger the percentage that was owed to Ascendus.

15. Most investors in Ascendus were instructed to open individual brokerage accounts at Penson and the investors sent their investment funds directly to Penson.² The Investors signed limited trading authorization forms (“LTAs”) authorizing Taylor to make trades using funds in their Penson accounts. Many of the LTAs were on forms provided by Penson. All the LTAs were, or should have been, on file at Penson in order for Penson to permit Taylor to make trades using funds in Investor accounts. These LTAs disclosed the performance-based fees due to Ascendus.

16. On a daily basis, Penson would inform Taylor of the aggregate buying power available to him, based on the funds available in the individual customer accounts governed by the LTAs. Taylor would trade options using these funds. If the options positions were closed before the end of the trading day, the sales proceeds were allocated to the various customer accounts on a pro-rata basis. If there were open positions at the end of the day, Taylor would instruct Penson on how to allocate the positions. In general, the open positions were allocated on a pro-rata basis.

17. Ascendus, Taylor, and Smith created their own account statements that were sent to investors on a monthly basis. These account statements falsely showed an unbroken string of

² Some investors were told their accounts were too small to justify opening individual accounts at Penson. Their money was sent to Ascendus where it was aggregated and traded in an account in the name of Ascendus. The funds in that account are not at issue in this arbitration.

profits. These account statements primarily informed Investors of the total amount of profit each Investor had earned during the month and the amount of performance-based fees the investors owed to Ascendus. Penson also sent monthly account statements to the Investors. These lengthy, detailed, and complex reports showed the actual results of trading. However, these statements were much more difficult to understand. When questioned about the discrepancies between the account statements from Ascendus and the ones from Penson, Penson said to ask Ascendus about the discrepancies. Ascendus gave a variety of explanations for the discrepancies, such as the Ascendus statements covered a different time period than the Penson statements, the Penson account statements were not well suited to reflect profits from options trading, and the Penson statements failed to show unrealized profits from open commodities trades.

18. Penson knew that the accounts being managed by Ascendus were losing money. Penson also knew that Ascendus was to be compensated only on a percentage of actual profits earned from trading. Penson knew, or should have known, that the Investors were paying performance-based fees to Ascendus despite consistent and sometimes dramatic losses in the customer accounts.

19. In late 2005, Taylor and Smith began telling Investors that changes in the securities markets made the options strategy less lucrative than it had been in the past. Taylor and Smith began urging Investors to move their funds out of Penson to a new investment program being promoted by Taylor and Smith. In order to induce the Investors to agree to the move, Taylor and Smith needed to create the illusion that the Investors' accounts were valued at the amounts shown on Ascendus account statements, rather than the amounts shown on the Penson account statements.

20. Penson took active steps to assist Taylor and Smith in deceiving the Investors into believing their Penson account values were higher than the actual value. Penson used a variety of actions to further these illusions, including:

A. Sending funds withdrawn from Investor accounts at Penson directly to Ascendus or another account controlled by Taylor and Smith instead of sending the Investor funds directly to the investor as required by Penson's compliance manual;

B. Accepting payments from Ascendus for deposit into Investor accounts at Penson (in violation of Penson's compliance manual), to inflate the account balances and create the illusion that the higher account balances were a result of trading profits;

C. Showing deposits from Ascendus into at least one Investor account as having been double the amount of the actual deposit, to artificially inflate the account value (and showing the inflated value on account statements created by Penson) until the Investor signed an agreement to move his funds over to Taylor's new investment program, at which time Penson reversed the double-counted deposit;

D. Transferring losing options positions out of the account of two Investors into the account of a different, unrelated customer; and

E. Crediting and debiting improper values to Investor accounts when securities were transferred, to create the illusion that account values shown on Penson's records were higher.

These actions are described in more detail below.

21. Because of these, and other, affirmative actions taken by Penson to create the false impression that account balances were higher, many Investors who had given LTAs to Taylor and Ascendus agreed to move their funds from Penson to FFCE, the new scheme being

promoted by Taylor and Smith. FFCF turned out to be a Ponzi scheme and the Investors lost significant amounts of their investments; in some cases, the Investors lost the entire balance of their investments.

22. This Statement of Claim seeks recovery from Penson rather than the introducing brokers on the accounts because it was Penson that was: i) receiving funds from and sending funds to Investors, ii) authorizing Taylor to access funds in Investor accounts, pursuant to the LTAs, iii) diverting Investor funds from client accounts to Ascendus, iv) creating and falsifying account statements for Investors, and v) moving cash and securities between the accounts of unrelated investors at the direction of Taylor.

SIX-YEAR ELIGIBILITY

23. Some of the transactions complained of in this Statement of Claim occurred more than six years before the filing of this Statement of Claim. However, these claims are still timely for two reasons. First, Penson specifically agreed to toll the expiration of any time limits as part of the tolling agreement(s) attached as Exhibit A. Second, FINRA Rule 12206 provides that the time limits do not apply when a court has compelled arbitration of a matter filed in civil court. Exhibit B is a copy of the court orders compelling arbitration of the claims covered in this Statement of Claim.

SPECIFIC INSTANCES OF MISCONDUCT BY PENSON

24. The following paragraphs describe the specific types of misconduct by Penson that caused injury to the Investors:

PENSON IMPROPERLY DISTRIBUTED FUNDS FROM INVESTOR ACCOUNTS TO ENTITIES CONTROLLED BY TAYLOR AND SMITH, INSTEAD OF SENDING FUNDS DIRECTLY TO THE INVESTORS AS REQUIRED BY PENSON'S COMPLIANCE PROCEDURES.

25. Between February 6, 2006 and February 20, 2007, Penson wired 14 payments totaling \$6,028,277.08 directly to bank accounts controlled by Taylor and Smith.³ These payments are listed in the chart below. Nine of these payments, totaling \$4,453,156.22, were sent by Penson directly to Consilium, a company controlled by Taylor, Smith, and Newton Taylor – a convicted felon at the time and the father of Taylor. Five of these payments, totaling \$1,575,120.86, were sent by Penson directly to FFCF, a company controlled by Taylor and Smith.

26. These payments sent directly to FFCF and Consilium were made in violation of the terms of Penson's compliance manual, the Penson LTA forms signed by the customers⁴, the investment advisory license of Ascendus⁵, and explicit promises by Ascendus and Taylor to the customers in an Ascendus LTA⁶. The Receiver believes that Penson's compliance manual mandates that it send customer funds only to bank accounts controlled by its clients, unless the client provides a notarized signature directing Penson to send funds to another destination.

³ Penson made other payments to Consilium and FFCF that were not from the accounts of Investors in this action. The Receiver is not seeking a return of those payments in this matter.

⁴ The Penson LTA forms provided: "This authorization . . . does not afford the Authorized Agent authority to transfer securities and/or disburse funds from the undersigned's account." A copy of a Penson LTA form is attached as Exhibit C.

⁵ The Ascendus Form ADV said: "The Client does not transfer custody of any funds to the advisor. The client retains 100% custody and the Client gives authorization to the Advisor to Trade a specific strategy." A copy of the investment advisory Form ADV is attached as Exhibit D.

⁶ The Ascendus LTA said Ascendus was "not authorized to transfer funds or to conduct any Account activities except as stated in this document." A copy of an Ascendus LTA is attached as Exhibit E.

PAYMENTS BY PENSON TO CONSILIUM, FFCF

<i>Date</i>	<i>Investor</i>	<i>Assignor?</i>	<i>Consilium</i>	<i>FFCF</i>
2/6/2006	Young, Richard	Yes	1,179,065.42	
2/10/2006	Hulse, Rodney	Yes	239,713.84	
2/10/2006	Wilcox, Sharon	Yes	710,995.85	
2/10/2006	Wirth, Albert	Yes	1,382,545.85	
2/15/2006	Anderson, Doug	Yes	470,792.44	
2/15/2006	Donnell, Annette	Yes	332,037.10	
2/15/2006	Petersen, Rodney	Yes	63,685.52	
2/16/2012	Bushnell, Ned	Yes	39,559.67	
2/22/2006	Cook, Kelly	Yes		160,833.24
2/22/2006	Molina, Roy	Yes		48,155.71
2/22/2006	Mortensen, Wayne	Yes		800,031.98
2/22/2006	Young, David	Yes		101,685.31
2/28/2006	Wirth, Albert	Yes		464,414.62
2/20/2007	Hulse, Stan	Yes	34,760.53	
Total			4,453,156.22	1,575,120.86

27. Penson should not have sent these customer funds to Consilium, FFCF, or Ascendus. Instead, these payments should have gone from Penson to the bank accounts of its customers. Penson should be required to return all of these improperly-transferred funds to its customers.

PENSON MADE TRANSFERS OF SECURITIES AND CASH PAYMENTS OUT OF THE ACCOUNTS OF THE INVESTORS BASED ON FORGED AND ALTERED DOCUMENTS

28. The Receiver believes that Penson’s compliance manual requires that disbursements of funds from client accounts must be sent only to the bank account of the client, unless Penson receives a notarized original signature from its client directing Penson to send funds to another recipient. The Receiver believes that a similar requirement was in place for the transfer of securities from Investor accounts.

29. Despite these requirements, Penson transferred Investor money to FFCF and Consilium (such as those described in the preceding section), and made other transfers of cash and securities without receiving original notarized signatures from Investors. These include the following transfers of cash or securities:⁷

A. Penson may have transferred 2,000 shares of NFLX (short) from the account of Rowley to Wirth's account; however, the customer signature supposedly authorizing the transfer request are not valid. Transfer requests from Rowley are attached as Exhibit F.

B. Penson sent \$710,995.85 from Wilcox's account to an account at Consilium based on an altered document. A copy of the "FED Wire Request Form" allegedly from Wilcox is attached as Exhibit G.

C. Penson sent \$39,559.67 from Bushnell's account to an account at Consilium based on an altered document. A copy of the "FED Wire Request Form" allegedly from Busnell is attached as Exhibit H.

D. Penson sent \$63,685.52 from Peterson's account to an account at Consilium based on an altered document. A copy of the "FED Wire Request Form" allegedly from Peterson is attached as Exhibit I.

E. Penson sent \$470,792.44 from Anderson's account to an account at Consilium based on an altered document. A copy of the "FED Wire Request Form" allegedly from Anderson is attached as Exhibit J.

F. Penson sent \$160,833.24 from Cook's account to an account at FFCF based on an altered document. A copy of the "FED Wire Request Form" allegedly from Cook is attached as Exhibit K.

⁷ There were additional transfers of cash based on forged and altered documents. These other forged transfers were with clients who are not victims in this arbitration. The documents relating to those transfers will be introduced to show a common scheme and pattern of misconduct by Penson.

G. Penson sent \$1,382,545.82 from Wirth's account to an account at Consilium based on an altered document. A copy of the "FED Wire Request Form" allegedly from Wirth is attached as Exhibit L.

30. It is likely that more or all of the payments described in the preceding section were based on forged or altered transfer requests. The Receiver expects that document production by Penson will reveal the extent to which additional transfers of cash and securities were based on altered documents.

31. These transfers would not have occurred if Penson had required original notarized signatures from its clients authorizing any transfers of their funds to third parties. The use of altered documents provides additional reasons Penson should be required to return these improper transfers to the Investors.

PENSON TRANSFERRED SECURITIES FROM THE ACCOUNTS OF SOME INVESTORS TO THE ACCOUNTS OF OTHER CUSTOMERS WITHOUT THE EXPRESS CONSENT OF THE INVESTORS AND IN VIOLATION OF ITS OWN POLICIES.

32. Penson's customer margin agreement gives Penson the right to "transfer securities and other property so held by [Penson] from or to any other of the accounts of the [customer]." Customer Margin and Short Account Agreement, attached as Exhibit M. However, Penson had no right to transfer securities from customer accounts to the accounts of others, as it did in the following circumstances involving Investors in this matter:⁸

A. Donnell, Annette Kay: The following improper transfers occurred in the account of Annette Kay Donnell:

⁸ There were additional improper transfers out of customer accounts into the accounts of others besides the ones listed here because these transfers were in the accounts of victims who have not assigned their claims to the Receiver.

1. On October 17, 2003, a 1,000 share short position in NFLX was created in Donnell's account (#1823) at a price of 42 ½. Her account was credited with \$42,452.91.

2. On November 5, 2003, the price of NFLX had risen to \$58.94, which would have obligated Donnell to pay \$58,940.00 to repurchase the shares – a loss of over \$16,000.00. On this date, Penson transferred the NFLX short position out of Donnell's account into the account of Al Wirth (#8455), another Ascendus client. Penson charged Donnell's account \$119,200.00 – twice the value of the transferred position.

3. On February 29, 2004, Penson finally credited Donnell with the excess \$59,600.00 it had wrongfully taken from her account.

4. Donnell is owed the losses she suffered between the time the short position was put into her account and transferred out of her account (\$16,487.09) as a sanction for permitting the improper transfer.

5. Donnell also should be paid interest in the amount of \$2,384 on the \$59,600.00 improperly taken from her account during this nearly four-month period.⁹

B. Cook, Kelly: The following improper transfer occurred in the account of Cook:

1. On October 17, 2003, a 2,000 share short position in NFLX was purchased in his account (#7978) at a price of 42 ½. His account was credited with \$84,950.82.

2. On November 4, 2003, the short position was transferred into the account of Al Wirth (#8455) at a price of \$58.45, and Cook's account was debited \$116,900.00.

⁹ This is calculated at 1% per month based on the statutory compensation rate provided in the Utah Securities Act (§61-1-22(1)(b)).

3. Cook should be repaid the losses he suffered between the time the short position was put into his account and transferred out of his account (\$31,949.18) as a sanction for permitting the improper transfer.

**PENSON IMPROPERLY REMOVED FUNDS FROM INVESTOR ACCOUNTS WITHOUT
THE KNOWLEDGE OR CONSENT OF THE INVESTORS**

33. In the following instances, Penson withdrew funds from the accounts of its customers without their knowledge or consent and without authority for removing the funds.¹⁰

A. Steven Rogers: On February 25, 2004, Penson wired \$30,672.00 from Rogers' account to Ascendus. Rogers did not consent to the transfer out of his account. Ascendus continued sending monthly account statements to Rogers stating that the money was still in his account. *See* Email from Warren Rosser to Steve Rogers, dated November 6, 2009, and Ascendus Account Statements from January, February and March 2004, attached as Exhibit N.

B. Annette Kay Donnell (AK Limitless, LLC)¹¹: On February 15, 2006, Penson wired \$332,037.10¹² from the account of Donnell to an account that Penson listed as belonging to Donnell/AK Limitless. Penson's documentation of the wire says that the recipient bank account (#3235) belonged to AK Limitless, "[f]or further credit to . . . FFCF Investors." In fact, AK Limitless was not the beneficiary of account #3235 and her name was not on the account. Moreover, FFCF Investors was not even a name related to that account; the account belonged to Consilium, a company not mentioned anywhere in Penson's wire instructions. Wire Transfer to AK Limitless LLC, attached as Exhibit O.

34. Both these amounts should be returned.

¹⁰ There were additional transfers from the accounts of customers who have not assigned their claims as part of this arbitration.

¹¹ AK Limitless was Donnell's company and was the name on one of her Penson accounts.

¹² This is the same transaction listed in paragraph 26 above.

PENSON PROVIDED FALSE ACCOUNT INFORMATION TO THE INVESTORS, LEADING THEM TO BELIEVE THEIR ACCOUNTS HAD INCREASED IN VALUE, IN TURN LEADING THE INVESTORS TO AGREE TO INVEST IN FFCF

35. During the time leading up to Taylor's efforts to persuade Investors to move their money from Ascendus to FFCF, Penson sent falsified account statements to some of the Investors, misleading the customers into believing that their accounts had trading profits instead of trading losses. Penson used several different devices to mislead its customers.

36. Penson's policy was that it would not accept checks for deposit into the Investor accounts unless the checks were drawn on a bank account in the same name as the Penson account. Investors were told this when they opened accounts at Penson. On numerous occasions, Penson accepted funds from Ascendus and deposited those funds into Investor accounts, creating the illusion that the account had trading profits during that month. The instances involving Investors represented in this arbitration are listed in the following chart:

FALSE ACCOUNT INFORMATION PROVIDED BY PENSON
Amounts Deposited into Customer Accounts by Non-Customers

<i>Date</i>	<i>Amount</i>	<i>Customer</i>	<i>Ck #</i>	<i>Source</i>
8/23/2005	12,662.35	Hulse, Rodney	6021	Ascendus
12/14/2005	25,531.62	Hulse, Rodney	6578	Ascendus
6/24/2004	4,656.14	R.C. Troy/Young, Richard	4098	Ascendus
8/4/2004	7,218.00	R.C. Troy/Young, Richard	4320	Ascendus
12/29/2004	5,826.66	R.C. Troy/Young, Richard	4896	Ascendus
1/24/2005	2,605.24	R.C. Troy/Young, Richard	5017	Ascendus
7/6/2005	4,125.13	Cook, Kelly	5811	Ascendus
11/21/2005	13,213.96	Cook, Kelly	6464	Ascendus
11/8/2005	41,434.08	Cook, Kelly	6418	Ascendus

37. Accepting these deposits to artificially inflate the account values and sending reports to Investors that created the false appearance of trading gains was an essential component of the Investors wanting to continue to invest with Taylor and Smith and to move their funds to FFCF.

38. Beginning in November 2005, Taylor and Smith were trying to persuade investors to move their funds out of Penson to FFCF. For some investors, such as Kelly Cook, this required making his Penson account balance seem as high as the account balance that Ascendus had been reporting to him. In the case of Cook, this involved making his Penson account balance appear to be over \$200,000.00, when the actual account balance was only approximately \$110,000.00. The following shows the transactions Penson recorded in Cook's account to create this illusion.¹³

A. On November 1, 2005, Cook had a balance of approximately \$110,000 in his Penson account.

B. On November 11, 2005, a deposit of \$41,434.08 was made into Cook's account. Cash History from 11/01/2005 to 02/28/2006 for Kelly Cook, attached as Exhibit P.

C. On November 23, 2005, a deposit for \$13,213.96 was made into Cook's account. *Id.*

D. On December 6, 2005, a duplicate deposit of \$41,434.08 was made into Cook's account. *Id.*

E. As a result, Cook's Penson account statement showed that he had \$201,934.58 as of January 31, 2006. Statement of Account, attached as Exhibit Q.

F. On February 5, 2006, Cook signed a Subscription Agreement with FFCF Investors, LLC. Subscription Agreement FFCF Investors, LLC is attached as Exhibit R.

G. On February 16, 2006, the reverse duplicate deposit was removed from Cook's account. Cash History, Exhibit P.

H. On February 22, 2006, Penson transferred \$160,833.24 of Cook's funds to FFCF. *Id.*

¹³ This is the same transaction as the November 8, 2005 transaction listed in the preceding chart.

39. These false entries induced Cook to agree to move his money to FFCF.

40. When Penson disbursed funds from Investor accounts, it sent letters to the Investors notifying them of the disbursement. In the instances where Penson sent money directly to Consilium or FFCF, Penson sent letters to the customers falsely stating that funds had been sent to accounts in the name of the customer and that they were *not* third party disbursements. *Compare* Letters from Penson to Cook, Wilcox, and Osburn *with* Cash Disbursements, attached as Exhibit S. These false entries likely were made to reduce the potential for discovery of the improper payments being sent by Penson to FFCF and Consilium instead of to Investors.

41. In its online account records, Penson reported to Annette Kay Donnell that \$88,532.10 was disbursed from her account via wire transfer on May 25, 2006. When Donnell asked Penson, in August 2008, to identify the recipient of those funds and requested documentation showing who authorized the disbursement, Penson responded that there had been no disbursement. *See* Email exchange between Penson and Donnell and Account Summary as of 06/01/2006, attached as Exhibit T. If this amount was taken from her account, it should be returned.

**PENSON AIDED AND ABETTED TAYLOR AND SMITH IN PAYING COMMISSIONS
TO ASCENDUS THAT WERE PROHIBITED.**

42. Penson assisted Ascendus in receiving prohibited performance-based fees. Ascendus was registered as an investment adviser with the Utah Division of Securities during the time that Ascendus was trading customer funds placed with Penson. Rule R164-2-1 under the Utah Securities Act prohibits investment advisers from being paid performance-based fees except for accounts where the client has at least \$750,000.00 under management. Penson affirmatively assisted Ascendus in receiving performance-based fees in violation of this rule as demonstrated by the following:

A. Penson knew that Ascendus was to be paid performance-based fees because the LTAs – which had to be on file with Penson in order to permit Taylor to make trades in the accounts of Penson customers – expressly describes that Ascendus will be compensated based on a percentage of profits earned in the account. Ascendus LTA, attached as Exhibit E.

B. Penson knew the account balances for each of its customers that had told Penson to give LTA authority to Taylor. As such, Penson knew that only five of the 16 Investors had assets under management above \$750,000.00.

C. Based on the pattern of payments from the Investor accounts, Penson knew or should have known that monthly withdrawals from these accounts were to pay performance-based fees to Ascendus.

D. Penson should have refused to honor any LTAs for Ascendus for the 11 customers whose investment balances were below \$750,000.00 because Penson knew the LTAs were being utilized as part of a plan to earn performance-based fees.

43. Penson should be required to reimburse all trading losses incurred in the accounts of the 11 customers with less than \$750,000.00 under management, where the trades were pursuant to LTAs granted to Ascendus.

44. Penson knew or should have known that Ascendus was improperly collecting performance-based fees when the accounts were incurring losses. Penson knew, or should have known, that Ascendus was getting compensated based on non-existent profits, as shown by the following:

A. Penson knew that all trading being conducted by Ascendus pursuant to the LTAs entitled Ascendus to be paid fees only if the accounts earned trading profits during a month.

B. The accounts of the 16 Investors lost money during most months.

C. Some of the customers who granted LTAs to Ascendus called Penson to ask why the Penson account statements showed losses when the Ascendus account statements showed gains each month. This put Penson on notice that: i) the entity exercising LTA authority (Ascendus) was telling Penson customers the trading was profitable, and ii) the trading in the accounts serviced by Ascendus were losing money.

D. Each month, customers of Ascendus regularly withdrew funds in a pattern indicating these withdrawals were to pay performance-based fees to Ascendus.

45. Penson should have refused to honor the Ascendus LTA when it was on notice that Ascendus was having customers pay fees based on non-existent profits. Instead, Penson allowed trading to continue because Penson earned significant fees from the high volume of trading conducted by Ascendus. Penson should be required to pay damages for the losses Investors incurred from the LTA trading and for any commissions paid to Ascendus by the Investors.

PENSON'S MISCONDUCT CAUSED LOSSES TO INVESTORS

46. Penson was an integral part of the Ascendus fraud scheme. The Ascendus fraud scheme succeeded only because of Penson's affirmative acts in support of the scheme. This support was given so Ascendus would continue its high volume trading at Penson.

47. Indicators of Penson's indispensable role (and complicity) in the fraud include:

A. Ascendus could not have access to the accounts of Penson's customers without the consent of Penson.

B. Ascendus could not have conducted any trading in 11 of the 16 Claimant accounts if Penson had refused to honor the LTAs because the 11 accounts lacked sufficient assets under management to qualify for the performance-based fees described in the LTAs.

C. FFCF and Consilium would not have received over \$6 million of Investor monies from Penson if Penson had followed its compliance manual and disbursed Investor funds only to Investors.

D. The Investors would not have consented to liquidating their Penson accounts and sending money to FFCF if they had realized their accounts had values tens or hundreds of thousands of dollars less than the amounts reported to them by Ascendus. The Investors would have known that the Ascendus account statements were fictitious if Penson had disbursed their account balances directly to the Investors instead of to FFCF and Consilium.

PARTICULAR CLAIMS PRESENTED

48. Aiding and Abetting Violation of the Utah Uniform Securities Act. As more fully described above, Taylor and Smith violated the Utah Uniform Securities Act, Utah Code Ann. § 61-1-22, by, *inter alia*, making untrue statements of material fact and omitting to state material facts to the Investors in a scheme that operated as a fraud and deceit upon the Investors in furtherance of the scheme. Penson is a broker-dealer that materially aided in the sale or purchase of securities as it acted as the clearing broker for Investors, and materially aided Taylor and Smith as they conducted their fraudulent scheme when, *inter alia*, it allowed the improper transfers of funds from the Investors to third parties and at the request from third parties. Penson either knew, or in the exercise of reasonable care should have known, of its role in the fraudulent scheme perpetrated by Taylor and Smith. Penson's actions caused damages to the Investors. As

a result, the Receiver is entitled to damages from Penson for its aiding and abetting of violations of the Utah Uniform Securities Act by Taylor and Smith as outlined below.

49. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

Before the Investors in Ascendus were allowed to deposit their funds with Penson, Penson required that they complete various authorizations, forms, and agreements (the "Agreements") that provided protection to the Investors and to the money they deposited with Penson. Each of the Investors performed all conditions, covenants, and promises required to be performed in accordance with the terms and conditions of the Agreements. The contracts and agreements referenced above imposed a duty of good faith and fair dealing to avoid actions that prevent the realization of the purpose of the agreements. As described above, Penson breached the LTAs and other Agreements with the Investors by, *inter alia*, transferring funds and securities based on forged documents; by transferring funds and securities based on altered documents; by transferring Investor funds directly to Ascendus and other affiliated entities; by transferring securities from Investor accounts to accounts of other Investors based on instructions from Ascendus; by withdrawing funds from the accounts of Investors without their knowledge or consent; by accepting deposits from Ascendus to boost improperly the value of Investor accounts; by recording fictitious deposits in a customer account; by reporting false information to Investors; by allowing the Investors to pay performance-based fees for commissions when it knew that the trading by Ascendus was not profitable; and by engaging in other actions to assist the fraud being perpetrated by Taylor and Smith. Penson's breaches of the Agreements and the implied covenant of good faith and fair dealing damaged the Investors. As a result of the breach of the Agreements by Penson, the Receiver is entitled to damages as outlined below.

DAMAGES AND REMEDIES

Compensatory Damages

50. The Investors suffered damages as follows: (1) the amounts wrongfully transferred to Consilium or FFCF from Investors' accounts for use in the FFCF fraud in the amount of \$6,028,277.08, (2) the commissions paid to Ascendus from the Investors in the amount of \$1,024,7813.91, and (3) trading losses suffered by Investors while their money was traded by Ascendus.

51. With respect to claims assigned to the Receiver by Donnell, the Receiver also seeks damages for:

A. \$16,487.09 in relation to the losses in NFLX position removed from her account improperly;

B. \$2,384.00, which is for the interest on \$59,600.00 improperly debited on her account for four months; and

C. \$88,532.00, which is for the money reported as taken from her account.

52. With respect to claims assigned to the Receiver from Cook, the Receiver also seeks damages for \$31,949.18, which are for the losses in NFLX position removed from his account improperly.

53. With respect to claims assigned to the Receiver from Rogers, \$30,672.00, which is for the amount transferred from his account to Ascendus without his consent.

Treble Damages

54. Treble damages, together with interest, costs, and attorney fees, as allowed by Utah Code Ann. § 61-1-22, should be awarded against Penson because the violations by Penson were reckless and/or intentional.

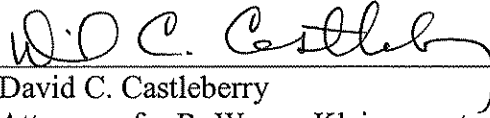
55. The Receiver seeks treble damages because many of the specific types of misconduct described in this Statement of Claim were the subject of a 2001 disciplinary order issued against Penson by the Nevada Securities Division. That order references 28 unauthorized third-party wire transfers made by Penson based on “faxed copies of the ‘Fed Wire Request Form’” that were submitted by an agent of one of Penson’s introducing brokers. The order recites that Penson “amended its policies and procedures manual to require delivery of an original transfer request form to [Penson] before transfers may be effected in a customer account” As part of the sanction, Penson agreed to “maintain and reasonably follow written policies and procedures” A copy of this order is attached as Exhibit U.

56. Because Penson told regulators that it adopted new procedures in 2001 that would have prevented most of the losses described in this statement of claim, but either did not maintain those procedures or did not enforce them – after being sanctioned by the Nevada Division of Securities – Penson should pay treble damages to the Receiver to impress upon Penson the importance of not only having adequate policies and procedures but also of complying with disciplinary orders entered against it.

WHEREFORE, as a direct and proximate result of the foregoing conduct by Penson, the Claimant is entitled to damages in an amount in excess of \$7,000,000.00, plus treble damages, interest, attorneys' fees, and costs from the Respondent.

DATED this 11th day of July, 2012.

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**

A handwritten signature in black ink, appearing to read "D.C. Castleberry", is written over a horizontal line.

David C. Castleberry
Attorneys for R. Wayne Klein, court-appointed
Receiver for FFCF Investors, LLC, Ascendus
Capital Management, LLC and Smith Holdings,
LLC