

OCT 04 2011

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

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and Smith Holdings, LLC*

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

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

Plaintiffs,

v.

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

Defendants.

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
PENSON FINANCIAL SERVICES,  
INC.'S MOTION TO STAY ACTION  
AND COMPEL ARBITRATION**

Civil No. 100924572

Judge Constandinos Himonas

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This matter came before the Court for hearing on September 12, 2011, on Defendant Penson Financial Services, Inc.'s Motion to Stay Action and Compel Arbitration (the "Motion"). Plaintiffs were represented by David C. Castleberry of Manning Curtis Bradshaw & Bednar LLC. Defendant Penson Financial Services, Inc. ("Penson") was represented by Mark G. Hanchet of Mayer Brown LLP and Richard D. Flint of Holland & Hart LLP. Having considered

the papers and pleadings on file, the memoranda submitted by the parties, and the arguments of counsel, it is HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART.

With respect to the Receiver's claims against Penson for: (1) Aiding and Abetting Violation of the Utah Uniform Securities Act Pursuant to Utah Code Ann. § 61-1-22; (2) Fraudulent Transfer; (3) Aiding and Abetting Breach of Fiduciary Duty; and (4) Aiding and Abetting Fraud (collectively the "Tort Claims"), the Motion is DENIED. The Receiver is not compelled to arbitrate the Tort Claims, nor are these claims stayed.

With respect to the Receiver's claims for (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing (collectively the "Contract Claims"), the Motion is GRANTED. The Receiver is compelled to arbitrate the Contract Claims, and these claims are stayed.

DATED this 4 day of <sup>October</sup> ~~September~~, 2011.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Constandinos Himonas

Approved as to form:

MANNING CURTIS BRADSHAW  
& BEDNAR LLC

  
\_\_\_\_\_  
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