HOLLAND & HART LLP
Richard D. Flint (# 7525)
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: 801-799-5800
Fax: 801-799-5700

MAYER BROWN LLP
Mark G. Hanchet (Admitted *Pro Hac Vice*)
James Ancone (Of Counsel)
1675 Broadway
New York, New York 10019
Tel: 212-506-2500
Fax: 212-262-1910

Attorneys for Defendant Penson Financial Services, Inc.

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

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.	**MEMORANDUM IN SUPPORT OF DEFENDANT PENSON FINANCIAL SERVICES, INC.'S MOTION TO DISMISS THE COMPLAINT** Case No. 100924572 Judge Constandinos Himonas

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

Defendant Penson Financial Services, Inc. respectfully submits this memorandum in support of its Motion to Dismiss the Complaint.

PRELIMINARY STATEMENT

Penson Financial Services, Inc. ("Penson") hereby moves to dismiss the complaint ("Complaint") filed by plaintiff R. Wayne Klein, the court-appointed receiver ("Receiver") for Ascendus Capital Management, LLC ("Ascendus"), FFCF Investors, LLC ("FFCF"), and Smith Holdings, LLC, entities allegedly used by Roger E. Taylor ("Taylor") and his associates to perpetrate a Ponzi scheme. The Receiver brings this action against Penson seeking damages in excess of $7.5 million. The Receiver alleges that Taylor fraudulently induced sixteen investors ("Investors") to move monies from their Penson accounts to entities controlled by Taylor; he further alleges that Penson was complicit in, or aided and abetted Taylor's fraudulent scheme.

The Receiver's claims must be dismissed for several independent reasons. First, the Receiver lacks standing to pursue claims on behalf of the Receivership Entities because nowhere does the Complaint articulate how the Receivership Entities—as opposed to the Investors—were injured by Penson's alleged acts. Second, even if the Receiver had claims independent of the Investors, any such claims would be barred by the *in pari delicto* doctrine because the Receiver, standing in the shoes of the Receivership Entities, is attempting to recover damages arising from a fraudulent scheme of the Receivership Entities' own making. Third, even if he had standing and was not barred under the *in pari delicto* doctrine, the Receiver fails to plead essential elements of the asserted claims. Finally, the Receiver's claims are time-barred.

For all of these reasons, the Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND[1]

Penson is a clearing firm which provides clearing services for various broker dealers – sometimes referred to as "introducing brokers"—that choose to outsource the clearing functions of trade instructions that they receive from their customers. Great Eastern Securities ("Great Eastern") was an introducing broker that entered into a clearing agreement withPenson, which provided clearing services for Great Eastern's customers, including the Investors on whose behalf the Receiver purports to be suing. (Complaint, dated October 10, 2010 ("Compl.") ¶ 14 n. 1, attached as Ex. A to the Declaration of Richard D. Flint, dated October 21, 2011 ("Flint Decl.")). The Investors allegedly assigned their claims against Penson to the Receiver, (Compl. ¶ 83), and, on December 10, 2010, the Receiver filed its Complaint against Penson.

The Complaint

According to the Complaint, Taylor operated a Ponzi scheme through Ascendus, a company he controlled as "manager," reporting fictitious profits to investors and receiving lucrative commissions in the process. (Compl. ¶¶ 7, 17, 18). The Investors opened brokerage accounts at Penson. (Compl. ¶¶ 14, 84). In late 2005, Taylor's scheme started to unravel. (Compl. ¶¶ 25-26). Taylor decided to close Ascendus and form a new fund, FFCF, of which Taylor would be "managing member." (Compl. ¶¶ 26, 28). Taylor persuaded the Investors to transfer funds from their Penson accounts to FFCF and other entities. (Compl. ¶¶ 30, 31(c)). Penson allegedly transferred funds from the Investors' accounts at the direction of Taylor and

[1] For the purposes of this motion only, Penson assumes, as it must, that the facts alleged in the Complaint are true. However, Penson disputes many of these "facts" and stands ready to disprove them, if need be, at the appropriate juncture.

other third parties to various entities controlled by Taylor and his associates, including Ascendus, FFCF, and Consilium Trading Company, LLC ("Consilium"), based on allegedly forged authorizations. (Compl. ¶¶ 36-82). In July 2008, Taylor's scheme collapsed. (Compl. ¶¶ 9, 10).

The Complaint alleges in detail the amount of each Investor's initial deposit into his or her Penson accounts, the amount of commissions eachpaid Ascendus, and the amount of funds Penson allegedly transferred from each accounts to Ascendus, FFCF and Consilium. (Compl. ¶ 84(a)-(p)). The sum of these commissions and transfers equals $7,776,373.22. Significantly, this figure corresponds to the amount of damages that the Receiver seeks in the Complaint: "in excess of $7,500,000." (Compl. at 38).

The Receiver asserts six claims: (1) aiding and abetting violations of the Utah Uniform Securities Act (Compl. ¶¶ 101-107) (Count I); (2) fraudulent transfers under the Utah Uniform Fraudulent Transfer Act (Compl. ¶¶ 108-112) (Count II); (3) breach of contract (Compl. ¶¶ 101-107) (Count III); (4) breach of the implied covenant of good faith and fair dealing (Compl. ¶¶ 108-112) (Count IV); (5) aiding and abetting a breach of fiduciary duty (Compl. ¶¶ 113-121) (Count V); and (6) aiding and abetting fraud. (Compl. ¶¶ 123-131) (Count VI).[2]

Procedural History

On May 6, 2011, Penson moved to compel arbitration of all the Receiver's claims and stay the case pending arbitration. Penson argued that the Receiver was an assignee that "stood in the shoes" of the Investors, and was required to arbitrate all claims pursuant to the broad arbitration clauses contained in the customer agreements each Investor had signed. In

[2] The Receiver asserts Counts I, V, and VI against defendant Consilium, as well. (Compl. ¶¶ 6, 84(a)).

opposition, the Receiver asserted that he actually was bringing claims on behalf of the Receivership Entities in their own right, in addition to the claims that had been assigned by the Investors.[3]

Following oral argument on September 12, 2011, the Court ruled from the bench and granted Penson's motion with respect to Counts III and IV, which the Receiver conceded were assigned claims. The Court declined to stay the action with respect to the other four counts, which the Receiver claimed he was prosecuting on behalf of the Receivership Entities. Penson challenged that statement and advised that it would move to dismiss based, *inter alia*, on lack of standing. (*See* Transcript of September 12, 2011 Hearing, attached as Ex. B. to Flint Decl.). This motion follows.

ARGUMENT

I. THE RECEIVER LACKS STANDING BECAUSE THE COMPLAINT FAILS TO ALLEGE DAMAGES TO THE RECEIVERSHIP ENTITIES.

A. General Principles Of Pleading Standing.

Counts I, V, and VI are premised on the notion that Penson somehow facilitated Taylor's Ponzi scheme by improperly moving monies from Investors' accounts to entities controlled by Taylor. (Compl. ¶¶ 86-100, 113-131). These claims must be dismissed for lack of standing. The Receiver fails to plead how it is that Penson's alleged actions injured the Receivership Entities, as opposed to the Investors.

[3] To the extent the Receiver purports to bring Counts I, II, V, and VI on behalf of the Investors, just as the Court ruled with respect to Counts III and IV, these claims must be arbitrated in a FINRA proceeding.

Under Utah law, "[s]tanding is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties," *Jones v. Barlow*, 2007 UT 20, ¶ 12, 154 P.3d 808, 811, and the Receiver carries the burden to allege proper standing. *See Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 12, 73 P.3d 334, 339 (internal quotation marks omitted). "Utah's traditional standing test requires a showing of injury, causation, and redressability." *City of Grantsville v. Redev. Agency of Tooele City*, 2010 UT 38, ¶ 14, 233 P.3d 461, 466. "Under the first prong of the traditional test, 'the petitioning party 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." *Id.* (internal quotation marks omitted).[4] These general principles apply to deny the Receiver standing here.

B. The Receiver Lacks Standing To Assert Counts I, V, and VI Because These Counts seek to Redress Injuries Allegedly Suffered by the Investors, not the Receivership Entities.

The Receiver seeks damages "in excess of $7,500,000." (*See* Compl. at 38). As noted, that figure represents the monies allegedly transferred from the Investors' Penson accounts to entities controlled by Taylor. Thus, if the Receiver's theory of the case is correct, and Penson's conduct were held to be improper, any damages awarded would flow back to the Investors as redress for their injuries—damages would *not* be paid to the Receivership Entities. *See Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997) ("[T]he receiver

[4] This injury-in-fact requirement is no less applicable to the Receiver who purports to bring claims on behalf of the Receivership Entities. This is so because "a receiver has authority to bring a suit only if the entity in receivership could itself properly have brought the same action." *Goodman v. FCC*, 182 F.3d 987, 991-92 (D.C. Cir. 1999); *see also Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003) ("[R]eceivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action" because "they stand in the shoes of the entity in receivership[.]").

did not have standing to sue 'on behalf of' the Phoenix Pharynol account (meaning, as a practical matter, on behalf of the investors whose investments were deposited in that account), even though the account was an instrumentality of Tobin's fraud."); *see also Indemnified Capital Investments, S.A. v. R.J. O'Brien & Assocs.*, 12 F.3d 1406, 1409 (7th Cir. 1993) (finding that a corporation did not suffer an injury-in-fact because "the losses incurred by [its] customer accounts accrued only to [the corporation's] customers and are too attenuated to create standing for" the corporation).

Nowhere does the Complaint allege how Penson's conduct harmed the Receivership Entities apart from the most broad and conclusory allegations of harm, which state that "Penson's actions caused damages to the Investors and the Receivership Entities." (Compl. ¶ 89; *see also* Compl. ¶¶ 122, 127). But "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal[.]" *Foster v. Saunders*, No. 20040527-CA, 2005 WL 1356799, at *1 (Utah Ct. App. June 9, 2005) (internal quotation marks omitted). The Receiver cannot be permitted to hide behind these vague and conclusory allegations; he is required to explain his "personal stake in the outcome." The Complaint fails to do this. Counts I, V, and VI should be dismissed.

C. The Receiver Lacks Standing to Bring Claims for Aiding and Abetting a Violation of the Utah Uniform Securities Act (Count I) and the Aiding and Abetting a Fraud (Count VI).

In Count I, the Receiver alleges that Taylor committed securities fraud in violation of the Utah Uniform Securities Act and that Penson "materially aided" Taylor in his scheme by "allow[ing] the improper transfer of funds from the investors to third parties and at the request

from third parties." (Compl. ¶¶ 86-87). The Receiver also alleges that Taylor committed common law fraud by "provid[ing] statements to investors with Ascendus and FFCF that were materially false and misleading and that omitted material information" and that Penson provided assistance to Taylor in the commission of this fraud. (Compl. ¶¶ 124, 126). But the Complaint does not contain a single allegation that indicates that the Receivership Entities—as opposed to the Investors—were injured by Penson's conduct. The absence of these allegations is fatal to the Receiver's standing.

Courts have dismissed claims brought by receivers on behalf of receivership entities for lack of standing on motions to dismiss where the fraud alleged in the complaint injured the investors in the fraudulent scheme and not the entities that were used to perpetrate the scheme. For example, in *Scholas v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), the court dismissed a securities fraud claim and an aiding and abetting securities fraud claim asserted by the receiver for three corporate entities based on lack of standing. 744 F. Supp. at 1423-24. The court reasoned that "[f]raud on *investors* that damages those *investors* is for those *investors* to pursue-not the receiver. By contrast, fraud on the *receivership entity* that operates to *its* damage is for the *receiver* to pursue[.]" *Id.* at 1422 (emphasis in original). Applying this basic principle, the court held that the receiver lacked standing to pursue these claims on behalf of the receivership entities to the extent the fraudulent schemes alleged in the complaint were "framed in terms of alleged fraud on the investors." *Id.* 1423.

Similarly, in *Knauer v. Jonathon Roberts Financial Group, Inc.*, 01-1168-C-K/T, 2002 WL 31431484 (S.D. Ind. Sept. 30, 2002), *aff'd*, 348 F.3d 230 (7th Cir. 2003), a Ponzi scheme

was orchestrated through the two receivership entities in which investors purchased unregistered securities. After the Ponzi scheme collapsed, the receiver for the receivership entities brought claims for, *inter alia*, securities fraud under federal and state law against various broker dealers who were complicit in the fraud. In ruling on the defendant's motion to dismiss, the court "conclude[d] that the [r]eceiver lack[ed] standing to maintain the federal and state securities claims . . . because those claims assert[ed] an alleged injury not to [the receivership entities] but only to the investors." *Knauer*, 2002 WL 31431484, at *7.

Here, as in *Scholas* and *Knauer*, the Receiver alleges that Taylor's fraud and Penson's alleged aiding and abetting of that fraud harmed the *Investors*—not the Receivership Entities. The Complaint alleges that Penson materially aided Taylor by transferring the Investors' funds to the Receivership Entities and to Consilium. (Compl. ¶¶ 84(a-p), 87). These allegations fail to show how Taylor's scheme injured the Receivership Entities; it is clear from the face of the Complaint that it is the Investors that have been injured by the alleged conduct, not the Receivership Entities.

Moreover, to the extent the Receiver premises the aiding and abetting fraud claim on the notion that Penson somehow assisted Taylor in making materially false statements regarding the investors' financial returns with Ascendus and FFCF (*see* Compl. ¶¶ 124-125), such actions, once again, did not injure the Receivership Entities. *See Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F. Supp. 2d 79, 94 (S.D.N.Y. 2004) ("The inclusion of misleading financial projections in ATI's prospectus did not injure ATI; it injured ATI's investors, who presumably purchased the bonds based on incorrect or misleading information.") (finding that

corporation lacked standing for failing to plead injury-in-fact); *Johnson v. Chilcott*, 590 F. Supp. 204, 209 (D. Colo. 1984) (holding that receiver lacked standing to assert claims on behalf of receivership entity because the Ponzi scheme perpetrator's fraud benefited receivership entity) ("Receivers in these cases, as in the case before me, have relied on misrepresentations to investors—misrepresentations that the receivers have no standing to assert and which did not harm but benefited the entities for whom they have sued.").

Because the Receiver does not adequately allege an injury-in-fact to the Receivership Entities, the claims for aiding and abetting a securities fraud (Count I) and aiding and abetting a fraud (Count VI) must be dismissed with prejudice.

D. The Receiver Lacks Standing to Bring the Claim for Aiding and Abetting a Breach of Fiduciary Duty (Count V).

In Count V, the Receiver purports to bring an aiding and abetting a breach of fiduciary duty claim against Penson. (Compl. ¶¶ 113-122). As the basis for this claim, the Receiver alleges that Taylor and Smith "owed fiduciary obligations to Ascendus and to the Investors." (Compl. ¶ 114). Taylor and Smith allegedly breached these fiduciary duties by "provid[ing] statements to investors in Ascendus and FFCF that were materially false and misleading and that omitted material information," allowing Taylor and Smith "to receive commissions to which they were not entitled." (Compl. ¶ 115). Without pointing to specific allegations regarding Penson's conduct, the Receiver alleges vaguely that Penson "provided assistance" to Taylor and Smith in breaching these fiduciary duties. (Compl. ¶ 117).

The Receiver lacks standing to bring this claim because the Complaint is completely devoid of any allegation regarding how it is that the Receivership Entities were harmed by Penson purportedly assisting Taylor and Smith in providing false statements to the Investors. In fact, the Complaint itself states that "Penson's actions caused damages to the *Investors*." (Compl. ¶ 118 (emphasis added)). This is so because the Investors paid Taylor commissions based on the fabricated profits contained in their monthly statements. (Compl. ¶¶ 115). *See Coroles v. Sabey*, 2003 UT App 339, ¶¶ 33-34, 79 P.3d 974, 983 (finding that plaintiff failed to allege how corporation was damaged in support of aiding and abetting breach of fiduciary duty claim); *see also Am. Tissue*, 351 F. Supp. 2d at 94; *Johnson*, 590 F. Supp. at 209. For these reasons, the claim for aiding and abetting a fraud also must be dismissed with prejudice.

II. THE *IN PARI DELICTO* DOCTRINE BARS THE RECEIVER FROM ASSERTING COUNTS I, II, V, AND VI AGAINST PENSON.

A. Under Well-Established Utah Law, The Receiver is Barred From Bringing Claims That Seek to Recover Damages Arising from a Fraudulent Scheme that the Receivership Entities Took Part In.

Even assuming, *arguendo*, that the Receiver had standing (he does not), the Receiver is barred from asserting Counts I, II, V, and VI by Utah's *in pari delicto* doctrine because the Receiver, who is subject to the same defenses applicable to the Receivership Entities, cannot recover for a fraud that the Receivership Entities themselves perpetrated.

As articulated by the Utah Supreme Court, under the *in pari delicto* doctrine, Utah courts will not provide redress to a plaintiff who is at fault for an illegal transaction against a defendant who was allegedly complicit in that illegal transaction:

> Both parties to the contract were parties to the illegal arrangement, each having entered into it voluntarily, without undue influence or coercion; and therefore both are in pari delicto, and the law leaves them where it finds them. . . . The general rule undoubtedly is that courts will not interpose to aid parties concerned in unlawful transactions or agreements[.]

Haddock v. Salt Lake City, 65 P. 491, 492 (Utah 1901); *see State v. Garcia*, 866 P.2d 5, 7 (Utah Ct. App. 1993) ("[C]ourts generally will not grant relief in cases involving such contracts when the parties are equally at fault, or in pari delicto[.]") (internal quotation marks omitted); *see also Mosier v. Callister, Nebeker, & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008) ("[T]he equitable defense of *in pari delicto* . . . is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct.").[5]

Courts have applied the *in pari delicto* doctrine at the motion to dismiss stage to bar claims brought by a corporate receiver where, as here, the complaint alleged that the receivership entities had been used by their corporate agents to perpetrate a Ponzi scheme. *See Hays v. Pearlman*, No. 2:10-CV-1135-DCN, 2010 WL 4510956, at *7 (D.S.C. Nov. 2, 2010) ("[P]laintiff receiver's claims are barred by the doctrine of *in pari delicto*."); *Knauer*, 2002 WL 31431484 ("Receiver has pled allegations which reveal that his remaining claims against the Broker Dealers are barred by the doctrine of *in pari delicto*."); *Myatt v. RHBT Fin. Corp.*, 370

[5] This Court may properly consider Penson's *in pari delicto* defense on this Rule 12(b)(6) motion. Under Utah law, affirmative defenses, such as *in pari delicto*, "may be raised by a 12(b)(6) motion where the facts of the complaint raise the defense." *Foster v. Saunders*, No. 20040527-CA, 2005 WL 1356799, at *2 (Utah Ct. App. June 9, 2005) (citing *Tucker v. State Farm Mut. Auto. Ins., Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947, 950); *see also Bennion v. Amoss*, 500 P.2d 512, 515 (Utah 1972) (describing *in pari delicto* as an affirmative defense). As explained below, the allegations in the Complaint provide the basis for Penson's *in pari delicto* defense.

S.C. 391, 395-97 (S.C. Ct. App. 2006) (affirming dismissal of corporate receiver's claims against bank based upon *in pari delicto* doctrine).

In *Knauer*, the corporate agents of the two receivership entities defrauded investors of millions of dollars by promising high rates of return on securities investments and delivering phony monthly statements that reflected these purported profits. 2002 WL 31431484 at *1-*2. After the scheme collapsed, the receiver for the receivership entities brought claims against a group of broker-dealer companies through which some of the fraudulent securities transactions had occurred.

Based on the complaint's allegations, the court concluded that the corporate agents' fraudulent acts were imputed to the receivership entities and that the receiver, standing in the shoes of these entities, was barred from asserting claims attempting to recover damages for these same fraudulent acts:

> The Complaint expressly alleges that [the receivership entities] participated in the Ponzi scheme and had knowledge of the fraudulent activities of [the Ponzi scheme operators] involving the deposit of investor funds in the Lincoln account, the commingling of investor funds, and the misuse of the funds of [the receivership entities] and the Lincoln account to operate the Ponzi scheme and pay Payne, Danker, Smith, Brooks–Kiefer, Heartland, JMS. Thus, even when read liberally and with all reasonable inferences drawn in the Receiver's favor, the Complaint leads to the inescapable conclusion that [the receivership entities] participated in the Ponzi scheme and knew of the conversion of [the receivership entities'] funds by [the Ponzi scheme operators] and others. The court concludes that the Receiver has pled allegations which reveal that his remaining claims against the Broker Dealers are barred by the doctrine of *in pari delicto*.

Id. at *8. The Seventh Circuit affirmed this decision on appeal. *See Knauer v. Jonathan Roberts Fin. Group, Inc.*, 348 F.3d 230, 238 (7th Cir. 2003) ("The doctrine of *in pari delicto* thus applies to defeat the receiver's claims.").

The application of well-established Utah law to the facts alleged in the Complaint in this case compels the result reached by the court in *Knauer*. The Complaint alleges that, from 2003 to early 2006, "Ascendus operated as a Ponzi scheme" by instructing investors to open brokerage accounts over which Taylor had trading authority and by using the funds of new investors to make payments to earlier investors to create the illusion of trading profits. (Compl. ¶¶ 7, 16). Although Taylor's "trading resulted in significant losses in the investor accounts," Ascendus "sent account statements to investors reporting substantial gains." (Compl. ¶ 7). In 2006, Taylor persuaded investors to transfer money into FFCF, "a new Ponzi scheme," which operated until its downfall in July 2008. (Compl. ¶ 9; *see also* Compl. ¶¶ 27-30).

Because Taylor acted as Ascendus' "manager" and FFCF's "managing member," (Compl. ¶¶ 7, 28), there can be no question that Taylor's illegal acts must be imputed to Ascendus and FFCF. "Under longstanding Utah law, 'the knowledge of [an] agent concerning the business which he is transacting for his principal is to be imputed to his principal.'" *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 16, 61 P.3d 1009, 1014 (quoting *First Nat'l Bank v. Foote*, 42 P. 205, 207 (Utah 1895)). And, because the Receiver stands in the shoes of the Receivership Entities, he is subject to the same defenses as the Receivership Entities would have been. *See Burningham v. Burke*, 245 P. 977, 985, 986 (Utah 1926) (recognizing that a "receiver stands merely in the shoes of the corporation" and "any defense which would have

been good against the corporation may be asserted against the receiver"); *see also* 16 Fletcher Cyc. Corp. § 7852.10 (2006) (stating that "any claim brought by a receiver is subject to the same defenses that could have been raised in a suit by the corporation").

This result is consistent with the decisions of courts from around the country—including the Tenth Circuit and the U.S. District Court for the District of Utah—that have barred trustees from asserting claims on behalf of debtor entities under the doctrine of *in pari delicto* where it is clear that the debtor entities seeking relief participated in the fraudulent acts about which they complain. *See Mosier*, 546 F.3d at 1276 (affirming dismissal of trustee's claims against third-party law firm and, stating "it well established that *in pari delicto* may bar an action by a bankruptcy trustee against third parties who participated in or facilitated wrongful conduct of the debtor"); *Terlecky v. Hurd (In re Dublin Secs., Inc.)*, 133 F.3d 377, 381 (6th Cir. 1997) ("We conclude that the equitable principles of the doctrine of *in pari delicto* were properly interposed in this matter to prevent recovery by debtors who conspired with the defendants to defraud innocent investors."); *Sender v. Buchanan (In re Hedged-Investments Assocs.)*, 84 F.3d 1281, 1285 (10th Cir. 1996) (affirming dismissal of claims brought by trustee for debtor corporations based on *in pari delicto* doctrine); *Mosier v. Quinney & Nebeker, P.C.*, No. 2:06-CV-519, 2007 WL 2688245, at *1 (D. Utah Sept. 11, 2007) ("Because the officers and directors of [the debtor corporation], acting on behalf of the [the debtor corporation], were active participants in the scheme, the doctrine of *in pari* delicto which prevents a plaintiff from asserting a claim against a defendant if the plaintiff bears fault for the claim—bars the Trustee's claims.").

Accordingly, here, as in *Knauer*, the Complaint's allegations affirmatively establish the Receivership Entities' central role in the Ponzi scheme. The Receiver is thus barred by the *in pari delicto* doctrine from asserting Counts I, II, V, and VI against Penson. These claims must be dismissed with prejudice.

B. *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995) Does Not Prevent The Application of The *In Pari Delicto* Doctrine Here.

Penson anticipates that the Receiver will argue that the *in pari delicto* doctrine does not apply against him based on *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995). The Receiver is wrong.

In *Scholes*, Michael Douglas ("Douglas") conducted a Ponzi scheme through three corporations and caused them to create limited partnerships in which the corporations would be the general partners and would sell limited-partner interests to unsuspecting investors. After the scheme collapsed, the district court appointed an equity receiver, who brought fraudulent conveyance claims against defendants who benefited from Douglas's diversions of the corporations' assets. The defendants asserted that the receiver was barred from asserting his fraudulent conveyance claim on behalf of the receivership entities by the *in pari delicto* doctrine because the receivership entities had participated in the fraud.

In rejecting this argument, the Seventh Circuit stated that "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Scholes*, 56 F.3d at 754.

The court reasoned that the receiver's fraudulent conveyance claim was merely seeking to recover funds "to maximize the value of the corporations for the benefit of their investors and any creditors," who would receive distributions from the receivership estate. *Id.* at 755.

Scholes is inapposite to the facts of this case and should not be followed for several reasons. First, *Scholes* does nothing to rebut the argument that the *in pari delicto* doctrine should apply to bar the Receiver's tort-based claims in Counts I, V, and VI. Indeed, courts interpreting *Scholes*, including the Seventh Circuit, have applied it narrowly, stating that its analysis is applicable to fraudulent conveyance claims only. *See Knauer*, 348 F.3d at 236 ("The key difference, for purposes of equity, between fraudulent conveyance cases such as *Scholes* and the instant case is the identities of the defendants. The receiver here is not seeking to recover the diverted funds from the beneficiaries of the diversions (*e.g.*, the recipients of Douglas's transfers in *Scholes*). Rather, this is a claim for tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to blame for their occurrence") (affirming dismissal of receiver's tort claims based on *in pari delicto* doctrine); *Hays*, 2010 WL 4510956, at *7 (rejecting application of *Scholes* to receiver's claims of malpractice and breach of fiduciary duty and stating "[p]laintiff receiver seeks tort damages from defendant Pearlman who derived no alleged benefit from Parish's Ponzi scheme"); *Myatt*, 370 S.C. at 397 ("[R]elying on the *Knauer* decision, we hold that, in the absence of a fraudulent conveyance case, the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud.").

Second, even with respect to the Receiver's fraudulent transfer claim (Count II), the Receiver does not allege how Penson benefited from these purported transfers. The court in *Scholes* based its holding, in part, on the fact that the third parties who had received the diversions of corporate assets had directly benefited from these funds. *See Scholes*, 56 F.3d at 754 ("Douglas caused the corporations to pay out the money they received to himself, his ex-wife, his favorite charities, and an investor[.]"); *see also Knauer*, 348 F.3d at 236 (noting that the receiver in *Scholes* was "seeking to recover the diverted funds from the beneficiaries of the diversions" whereas the receiver in *Knauer* was seeking "tort damages from entities that derived no benefit from the embezzlements."). Here, unlike in *Scholes*, the Receiver fails to allege how the funds transferred from Ascendus and "deposit[ed] into customer accounts at Penson" benefited Penson whatsoever. (Compl. ¶ 57.) In fact, if anything, the Complaint suggests that Penson, in turn, transferred these funds to Taylor-controlled entities. (Compl. ¶¶ 9; 84(a)-(p)). Certainly the Receiver fails to allege that Penson retained these monies or derived any benefit whatsoever. Under the reasoning of *Knauer*, such claims should be barred under principles of *in pari delicto*.[6]

For these reasons, this court should reject the application of *Scholes* here.

---

[6] Penson also anticipates that the Receiver will rely upon *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). This case does nothing to save the Receiver's claims from dismissal. In *Donell*, the Ninth Circuit, without any analysis, merely followed *Scholes* and held that the receiver in that case had standing to bring a fraudulent conveyance claim against an investor who had profited from the Ponzi scheme. 533 F.3d at 777. But, as noted above, Penson does not challenge the Receiver's standing with respect to his fraudulent conveyance claims (Count II) and, thus, this case is inapposite. Moreover, the Ninth Circuit did not address the *in pari delicto* doctrine at all and, accordingly, it carries no precedential value on this point.

III. THE RECEIVER FAILS TO STATE A CLAIM AGAINST PENSON IN COUNTS I, V, AND VI.

Even assuming, *arguendo*, that the Receiver had standing (he does not) and that he was not barred by the *in pari delicto* doctrine (he is), the Receiver still fails to adequately plead Counts I, V, and VI.

A. The Aiding and Abetting a Breach of Fiduciary Duty Claim (Count V) Is Not Recognized Under Utah Law.

In Count V, the Receiver attempts to hold Penson liable under the theory that it aided and abetting Taylor's Ponzi scheme. (Compl. ¶¶ 113-122). This claim fails.

First, no such claim exists under Utah law. In *Coroles v. Sabey*, No. 010903873, Slip Op. (Utah 3d Dist. Ct., Salt Lake Cnty. Feb. 27, 2002), the Honorable Leslie A. Lewis of this Court dismissed the precise claim the Receiver attempts to assert here, holding that claims of aiding and abetting a breach of fiduciary duty "are not cognizable under Utah law." *Coroles*, Slip Op. at 2, attached as Ex. C to Flint Decl.

Second, as discussed above, the Receiver fails sufficiently to plead damages to the Receivership Entities. In affirming Judge Lewis's dismissal of the claim for aiding and abetting a breach of fiduciary duty, the Utah Court of Appeals held that, "*if* this cause of action is cognizable in Utah, it includes damages as an essential element[.]" *Coroles v. Sabey*, 2003 UT App 339, ¶ 34, 79 P.3d 974, 983 n.19 (emphasis added). In *Coroles*, the plaintiffs, a group of investors in a company called Ganter USA, alleged that the defendants, a group of individuals associated with Ganter USA, fleeced them of millions of dollars. The plaintiffs attempted to bring claims belonging to Ganter USA that the company had assigned to the plaintiffs, including

a claim for aiding and abetting a breach of fiduciary duty. In support of this claim, the plaintiffs alleged that the money they invested was used to "'buy out' other investors and to pay such things as 'unpaid attorneys fees and other unpaid creditors.'" *Coroles*, 2003 UT App 339 at ¶ 33, 79 P.3d at 983. Noting that "[a] court can decide something as a matter of law at the dismissal stage of the proceedings," *id.* at ¶ 33 n.18, the court held that "[p]laintiffs failed to plead damages," reasoning that "we fail to see how Ganter USA, the supposed victim of the assigned claims, was harmed[.]" *Id.* at ¶ 33.

Similarly, even if this cause of action existed, here, the Receiver fails to allege how the Receivership Entities were harmed by the alleged breaches of fiduciary duty. According to the Complaint, the only harm that resulted from Taylor's breaches of fiduciary duty came from the commissions that were fraudulently obtained from the Investors. (Compl. ¶ 115). But the Receiver failes to allege that these ill-gotten fees harmed the Receivership Entities. According to the Complaint, the only harm was to the Investors, who were fraudulently induced to part with these commissions---a fact the Receiver readily admits by alleging that Penson's purported assistance to Taylor and Smith "caused damage to the Investors." (Compl. ¶ 118). And, finally, even though the Receiver alleges that the Receivership Entities were "damaged [because of] the [Penson's] aiding and abetting," (Compl. ¶ 122), such conclusory allegations of harm are insufficient to preclude dismissal. *See Foster*, 2005 WL 1356799, at *1 ("Appellate courts have stressed, and continue to hold, that mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal[.]") (internal

quotation marks omitted). The claim for aiding and abetting a breach of fiduciary duty should be dismissed.

B. The Claim for Aiding and Abetting a Securities Fraud (Count I) Fails Because the Receiver Does Not Sufficiently Allege That Penson Materially Aided Taylor's Fraudulent Sale Or Purchase of Securities.

In Count I, the Receiver purports to assert a claim for aiding and abetting a securities fraud under the Utah Uniform Securities Act.[7] (Compl. ¶¶ 85-93). This claim is premised on the allegation that Penson "materially aided in the sale or purchase of securities" by "act[ing] as a clearing broker for investors of Ascendus" and materially aided Taylor's Ponzi scheme by "allow[ing] the improper transfer of funds from the investors to third parties . . . at the request [of] third parties." (Compl. ¶ 87). This claim fails because, as a matter of law, the Receiver cannot sufficiently allege the essential element of "material aid."

The Utah Uniform Securities Act provides that "every broker-dealer . . . who materially aids in the sale or purchase [of a security is] liable jointly and severally with and to the same extent as the seller or purchaser[.]" Utah Code § 61-1-22(4)(a). The Receiver's allegation that Penson provided material aid by "acting as a clearing broker for investors of Ascendus," (Compl. ¶ 87), is legally insufficient because "[t]he performance by a clearing broker of the clearing broker's contractual functions—even though necessary to the processing of a transaction—

[7] This claim is subject to the heightened pleading standard set forth in Rule 9(b) of the Utah Rules of Civil Procedure. *See Milliner v. Elmer Fox & Co.*, 529 P.2d 806, 809 (Utah 1974).

without more would not constitute material aid or result in liability under this subsection." Official Comments to the Uniform Securities Act § 509(g)(4) (2002).[8]

Courts have interpreted the "material aid" element to be synonymous with "substantial assistance," *see Foley v. Allard*, 427 N.W.2d 647, 650-51 (Minn. 1988), and there is a long line of cases standing for the proposition that clearing firms do not provide "substantial assistance" as a matter of law when they are alleged simply to be providing clearing services. *See, e.g., Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 29 (2d. Cir. 2000) ("[T]he simple providing of normal clearing services to a primary broker who is acting in violation of the law does not make out a case of aiding and abetting against the clearing broker."); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) ("A clearing broker does not provide 'substantial assistance' to or 'participate' in a fraud when it merely clears trades.").[9]

And, interpreting the "materially aided" language in Utah's Uniform Securities Act to encompass a "substantial assistance" inquiry would be in keeping with the Utah Legislature's pronouncement that "[t]he Utah Act must be construed so 'as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate interpretation and

---

[8] The Utah Securities Act is Utah's adopted version of the Uniform Securities Act, and, thus, its Official Comments are relevant to construing Utah's statute.

[9] In *Foley*, the Minnesota Supreme Court adopted the "substantial assistance" test to determine whether a party may be deemed to have "materially aided" a primary actor's securities violation under that state's blue sky laws. *See Foley v. Allard*, 427 N.W.2d 647, 650-51 (Minn. 1988). In reaching this conclusion, the court was construing Minnesota Securities Act's aiding and abetting provision, which provides that "every broker-dealer or agent who *materially aids* in the act or transaction constituting the violation, [is] also liable jointly and severally with and to the same extent as [the primary violator]." Minn. Stat. § 80A.23(3) (emphasis added). This language is strikingly similar to the language found in Utah's statute.

administration of this chapter with the related federal regulation.'" *Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1291 (D. Utah 1999) (quoting Utah Code § 61-1-27).[10]

For these reasons, the claim for aiding and abetting a securities fraud should be dismissed with prejudice.

C. The Claim for Aiding and Abetting a Fraud (Count VI) Is Not Recognized Under Utah Law.

In Count VI, the Receiver purports to assert a claim for aiding and abetting a fraud against Penson.[11] (Compl. ¶¶ 123-131). But this claim fails for the simple reason that it is "not cognizable under Utah law." *See Coroles*, Slip Op. at 2. Accordingly, this claim should be dismissed with prejudice.

IV. THE FRAUDULENT TRANSFER CLAIMS ARE TIME-BARRED.[12]

---

[10] For instance, before the U.S. Supreme Court eliminated a private cause of action for aiding and abetting federal securities fraud in *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), the Tenth Circuit required a showing of "substantial assistance" to prove such a claim. *See Farlow v. Peat, Marwick, Mitchell & Co.* 956 F.2d 982, 986 (10th Cir. 1992) ("In order to establish secondary liability under Section 10(b), the facts must show fraud in the sale of securities by the primary violator, knowledge of that fraud by an aider and abettor, and 'substantial assistance' by the aider and abettor.") (emphasis omitted).

[11] If this claim were recognized under Utah law, it would be subject to the heightened pleading standard set forth in Rule 9(b) of the Utah Rules of Civil Procedure. Utah R. Civ. P. 9(b) ("In *all* averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") (emphasis added).

[12] The Receiver's aiding and abetting claims (Counts I, V, and VI) are also time-barred. The claim for aiding and abetting a violation of the Utah Securities Act (Count I) is subject to a five-year statute of limitations. *See* Utah Code § 61-1-22(7)(a). The Receiver alleges that Penson's liability arises from "act[ing] as the clearing broker for [I]nvestors of Ascendus" and "materially aid[ing] Taylor" in his scheme. (Compl. ¶ 87). According to the Complaint, Penson's alleged conduct in this regard occurred, at least in part, before October 2005 (*i.e.*, prior to five years before the Complaint was filed). (*See, e.g.*, Compl. ¶ 33 ("In or about March 2005, Taylor then fired the agents trading for him at Great Eastern and began to conduct trades directly on Penson's trading platform."). As explained above, claims for aiding and abetting a breach of fiduciary duty (Count V) and aiding and abetting a fraud (Count VI) are not cognizable under Utah law and, therefore, no statute of limitations applies to these purported claims. Even if these claims were recognized under Utah law, the Receiver's claims would still be time-barred. For purposes of this motion only, Penson assumes that the statute of limitations applicable to fraud and breach of fiduciary duty would apply to the Receiver's derivative aiding and abetting claims. *See United Park City Mines Co.*

In Count II, the Receiver attempts to plead claims for actual and constructive fraudulent transfer under the Utah Uniform Fraudulent Transfer Act. (Compl. ¶ 100); *see also* Utah Code § 25-6-5(1)(a), (b). The Receiver alleges that, on various dates between August 4, 2004 and May 2, 2006, Ascendus or an affiliated entity sent fifteen checks to "Penson for deposit into customer accounts[.]" (Compl. ¶ 57). The Receiver seeks to avoid and recover the total sum of these checks (alleged to be $206,561.97), based on the allegation that "the funds reflected by these checks did not come from the customers." (Compl. ¶ 58). These claims must be dismissed because they are time-barred.[13]

The Receiver's claims are subject to the four-year statute of limitations set forth in the Utah Uniform Fraudulent Transfer Act § 25-6-10 ("Section 25-6-10"), which provides that:

---

v. Greater Park City Co., 870 P.2d 880, 890 (Utah 1993). Under Utah law, a claim for breach of fiduciary duty is "subject to a four-year statute of limitations." *Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, ¶ 11, 78 P.3d 616, 620; *see* Utah Code § 78B-2-307. The Receiver premises his claim for aiding and abetting a breach of fiduciary duty on the allegation that Taylor "provided statements to [I]nvestors in Ascendus and FFCF that were materially false," improperly receiving commissions as a result, and that Penson somehow facilitated Taylor's actions. (Compl. ¶¶ 114-117). The Complaint indicates that Penson's alleged conduct in this regard occurred, at least in part, before October 2006 (*i.e.*, prior to four years before the Complaint was filed). (*See* Compl. ¶ 84(a) (alleging that Investor "DA" open a Penson account "in or about August 2003" and paid "commissions to Ascendus"); *see also* Compl. ¶¶ 84(b)-(p)). Utah law "requires that a cause of action for fraud must be brought within three years." *Allred ex rel. Jensen v. Allred*, 2008 UT 22, ¶ 34, 182 P.3d 337, 345; *see* Utah Code § 78B-2-305(3). The Receiver bases his claim for aiding and abetting fraud (Count VI) on allegations virtually identical to those underlying his claim for aiding and abetting a breach of fiduciary duty (Count V). (*Compare* Compl. ¶¶ 115-117 *with* Compl. ¶¶ 124-126). Given this and the fact that Count VI would be subject to a shorter statute of limitations (three years) than Count V (four years), Count VI is similarly time-barred. Penson recognizes, however, that, unlike the allegations in Count II, the factual allegations underlying Counts I, V, and VI may not be set forth in the Complaint with the requisite clarity to be a proper basis for dismissal on a motion to dismiss. Penson reserves its right to challenge Counts I, V, and VI as time-barred.

[13] As with Penson's *in pari delicto* defense, the Court may properly consider a statute of limitations affirmative defense on a motion to dismiss where "the existence of the affirmative defense . . . appear[s] within the complaint itself." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 53 P.3d 947, 950 (Utah 2002) (recognizing a statute of limitations argument as an affirmative defense). As detailed below, Penson's statute of limitations defense is based on allegations appearing on the face of the Complaint.

> [a] claim for relief or cause of action regarding a fraudulent transfer or obligation . . . is extinguished unless action is brought:
>
> (1) . . . within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant [with respect to an actual fraudulent transfer claim];
>
> (2) . . . within four years after the transfer was made or the obligation was incurred [with respect to a constructive fraudulent transfer claim.]

Utah Code § 25-6-10(1)-(2). The Utah Supreme Court recognizes that statutes of limitation, like Section 25-6-10, serve an important function; namely, "to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh." *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989).

Here, the Receiver filed this Complaint on December 10, 2010, more than four years *after* the last purported fraudulent transfer on May 2, 2006. (Compl. ¶ 58). Because the Receiver did not file this Complaint within four years of the last alleged fraudulent transfer, it is clear from the face of the Complaint that the Receiver's actual and constructive fraudulent transfer claims with respect to all fifteen transfers are time-barred. *See Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 20, 20 P.3d 868, 873-74 (finding that "plaintiff's claim regarding fraudulent transfer or conveyance was not timely filed" under Section 25-6-10).

Even assuming, *arguendo*, that the Receiver enjoys the benefit of the discovery rule, his claims would still be time-barred. Section 25-6-10 provides that, if an actual fraudulent transfer

claim is not asserted within the four-year limitations period, it must be brought "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Utah Code § 25-6-10(1).[14] Here, the Receiver was appointed by the Court on March 18, 2009. (Compl. ¶ 1). As of that date, the Receiver was "authorized to investigate the affairs of the Receivership Entities, to marshal and safeguard their assets, and to institute legal proceedings for the benefit of the Receivership Entities and their investors and creditors." (Compl. ¶ 2). Despite being appointed on March 18, 2009 and having the authority to investigate the affairs of Ascendus, the Receiver did not assert his actual and constructive fraudulent transfer claims against Penson until December 10, 2010— more than one year after his appointment. Accordingly, these claims are time-barred and must be dismissed with prejudice.

V. ASSUMING, *ARGUENDO*, THAT THE FRAUDULENT TRANSFER CLAIMS ARE NOT BARRED BY THE *IN PARI DELICTO* DOCTRINE OR THE STATUTE OF LIMITATIONS, THE RECEIVER MUST REPLEAD THEM.

As stated above, the Receiver seeks damages "in excess of $7,500,000," (Compl. at 38), a figure that represents the funds allegedly transferred from the Investors' Penson accounts. Despite that, the Receiver claims that he is pursuing damages suffered not by the Investors, but by the Receivership Entities. The Complaint fails to explain what those damages are. The Receiver's failure to put Penson on notice as to the specifics of its damages is a failure of pleading. *See Peak Alarm Co., Inc. v. Salt Lake City Corp.*, 2010 UT 22, ¶ 69, 243 P.3d 1221,

[14] For purposes of this analysis only, Penson assumes that a common law discovery rule applies to the Receiver's constructive fraudulent transfer claim. As the above-quoted text from Section 25-6-10 makes clear, the Utah Legislature did not provide for a statutory discovery rule with respect to constructive fraudulent transfer claims. *See* Utah Code § 25-6-10(2). Penson reserves the right to challenge any assertion by the Receiver that the common law discovery rule applies to his constructive fraudulent transfer claim.

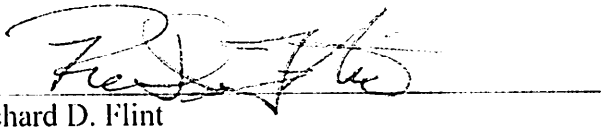
1244-45 ("The plaintiff must provide the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."); *see also* Utah R. Civ. P. 8(a)(2) (requiring a pleader to set forth "a demand for judgment for the relief.") We submit that this is a sufficient basis for dismissal; at a minimum, the Receiver should be required to replead, so as to clearly articulate his theory of damages as against Penson. *See Peak Alarm*, 2010 UT at ¶¶ 71-73, 243 P.3d at 1245 (affirming dismissal of claim where plaintiff failed to provide defendant "fair notice of a claim").

CONCLUSION

For the foregoing reasons, Penson respectfully requests that this Court grant Penson's motion and dismiss Counts I, II, V, VI with prejudice.

RESPECTFULLY SUBMITTED this 21 day of October, 2011.

HOLLAND & HART LLP



Richard D. Flint
Attorneys for Defendant Penson Financial Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of October, 2011, the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT** was served, via U.S. Mail, postage prepaid, as follows:

L.R. Curtis, Jr.
David C. Castleberry
MANNING CURTIS BRADSHAW &
BEDNAR LLC
170 South Main, Suite 900
Salt Lake City, UT 84101-1655

Attorneys for Plaintiff