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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.

**DEFENDANT PENSON FINANCIAL
SERVICES, INC.'S MOTION TO DISMISS
THE COMPLAINT**

Case No. 100924572

Judge Constandinos Himonas

Pursuant to Rules 8(a), 9(b) and 12(b)(1) and (6) of the Utah Rules of Civil Procedure,
Defendant Penson Financial Services, Inc. ("Penson"), by and through its counsel, respectfully

moves the Court for an order dismissing, with prejudice, the remaining claims in the Complaint filed by plaintiff R. Wayne Klein, as court appointed receiver (“Receiver”) for Ascendus Capital Management, LLC, FFCF Investors, LLC, and Smith Holdings, LLC (collectively, the “Receivership Entities”). This Motion is based on several independent grounds, including the following:

1. 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 individual investors (“Investors”) in the Receivership Entities—were injured by Penson’s alleged acts.

2. 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.


3. Even if he had standing and was not barred under the *in pari delicto* doctrine, the Receiver fails to plead essential elements of these claims.

4. The Receiver’s claims are time-barred.

This Motion is supported by the Memorandum in Support of Defendant Penson Financial Services, Inc’s Motion to Dismiss the Complaint and the Declaration of Richard D. Flint, which are filed and served concurrently herewith.

RESPECTFULLY SUBMITTED this 21st day of October, 2011.

HOLLAND & HART LLP

A handwritten signature in black ink, appearing to read "Richard D. Flint", written over a horizontal line.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2011, the foregoing **DEFENDANT**
PENSON FINANCIAL SERVICES, INC.'S MOTION TO DISMISS THE COMPLAINT

was served, via U.S. Mail, postage prepaid, as follows:

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