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*Attorneys for Defendant Penson Financial Services, Inc.*

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IN THE THIRD DISTRICT COURT, 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.

**DECLARATION OF RICHARD D. FLINT  
IN SUPPORT OF DEFENDANT PENSON  
FINANCIAL SERVICES, INC.'S MOTION  
TO DISMISS THE COMPLAINT**

Case No. 100924572

Judge Constandinos Himonas

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RICHARD D. FLINT, a duly licensed attorney, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Holland & Hart LLP, counsel for Penson Financial Services, Inc. ("Penson") in the above-captioned action. As such, I am fully familiar with the facts as stated herein. I submit this declaration in support of defendant Penson's Motion to Dismiss the Complaint.

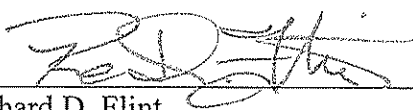
2. On December 10, 2010, plaintiff R. Wayne Klein, as court-appointed receiver for FFCF Investors, LLC, Ascendus Capital Management, LLC, and Smith Holdings, LLC, filed the Complaint in this matter. Attached hereto as **Exhibit A** is a true copy of the Complaint.

3. On September 12, 2011, the parties appeared before the Court for a hearing on Penson's Motion to Stay Action and Compel Arbitration. Attached hereto as **Exhibit B** is a true copy of the certified transcript of the September 12, 2011 hearing.

4. In support of its Motion to Dismiss the Complaint, Penson cites to an unpublished Order of Dismissal, dated February 27, 2002, issued by The Honorable Leslie A. Lewis in the action styled *Coroles v. Sabey*, Case No. 010903873 (Utah 3d Dist. Ct., Salt Lake Cnty.) ("Order"). Attached hereto as **Exhibit C** is a true copy of the Order.

5. I declare under penalty of perjury under the laws of the United States and the State of Utah that the foregoing is true and correct.

DATED this 21<sup>st</sup> day of October, 2011.

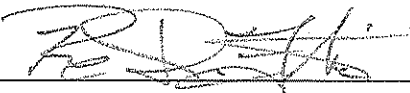
  
\_\_\_\_\_  
Richard D. Flint

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of October, 2011, the foregoing **DECLARATION OF RICHARD D. FLINT IN SUPPORT OF DEFENDANT PENSON FINANCIAL SERVICES, INC.'S MOTION TO DISMISS THE COMPLAINT** was served, via U.S. Mail, postage prepaid, as follows:

David C. Castleberry  
Aaron C. Garrett  
MANNING CURTIS BRADSHAW  
& BEDNAR LLC  
170 South Main, Suite 900  
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*Attorneys for Plaintiff*

  
\_\_\_\_\_

# EXHIBIT “A”

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FILED DISTRICT COURT  
Third Judicial District

DEC 10 2010

SALT LAKE COUNTY

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

Attorneys for Receiver for FFCF Investors, LLC,  
Ascendus Capital Management, LLC,  
and Smith Holdings, LLC

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,

vs.

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

Defendants.

COMPLAINT

Case No. 1009.24572

Judge Lindberg

Plaintiff R. Wayne Klein (the "Receiver"), as duly court-appointed Receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus"), and Smith Holdings, LLC ("Smith Holdings"), (collectively, the "Receivership Entities"), by and through his counsel, Manning Curtis Bradshaw & Bednar LLC, hereby files this action against

Defendants Penson Financial Services, Inc. ("Penson") and Consilium Trading Company, LLC ("Consilium"), and alleges as follows:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff was appointed Receiver for the Receivership Entities by the Honorable Denise P. Lindberg, Third Judicial District Court of Salt Lake County, State of Utah, pursuant to an Order dated March 18, 2009 (the "Order"), entered in the action *A. David Barnes, M.D., P.C. v. FFCF Investors, LLC et al.*, Case No. 080922273.
2. Under the terms of the Order, the Plaintiff is 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.
3. By an order dated October 22, 2010, Judge Lindberg authorized the Receiver to conduct further investigation into the conduct of Penson with respect to the Receivership Entities and to file suit if the Receiver believes claims should be asserted.
4. Jurisdiction and venue are properly vested with this Court pursuant to Utah Code § 78B-3-201 *et seq.* and Utah Code Ann. § 78B-3-307.
5. Upon information and belief, Penson is a North Carolina corporation with its principal place of business in Dallas, Texas. Upon information and belief, Penson has been registered as a broker-dealer with the State of Utah since 1995; however, even though Penson transacts business in the State of Utah as a broker-dealer, it has not registered to do business in the State of Utah as a foreign corporation pursuant to Utah Code Ann. § 16-10a-1501 *et seq.*
6. Upon information and belief, Consilium is an administratively dissolved Utah

limited liability company that had its principal place of business in Orem, Utah when it was operating.

### **BRIEF OVERVIEW**

7. Ascendus operated as a Ponzi scheme. Its manager, Roger E. Taylor ("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 investor accounts. This trading resulted in significant losses in the investor accounts. 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.

8. At the instruction of Taylor and Ascendus, Penson took money from investor accounts and sent it to Ascendus and other entities associated with the Ponzi scheme. Penson transferred securities from the accounts of certain customers into the accounts of others. Penson sent monies and transferred funds based on forged and altered letters of authorization. Penson altered the records it reported to customers, to create the illusion that the customer accounts had the amounts claimed by Taylor.

9. In early 2006, Penson withdrew more than \$7.4 million of funds directly from the brokerage accounts of customers and sent this money directly to bank accounts controlled by Taylor and his associates. The money from all of these customers was pooled and put into FFCHF, a new Ponzi scheme. In July 2008, this new scheme collapsed completely, eventually resulting in the appointment of the Receiver.

10. The Receiver is pursuing claims against Taylor and his associate, Richard T. Smith ("Smith"), for their wrongdoing in other actions previously filed in Utah state court. Both Taylor and Smith have also been charged criminally in connection with their roles in the Ascendus and FFCF schemes.

### **GENERAL ALLEGATIONS, BACKGROUND**

#### **The Ascendus Options Trading Program**

11. In January 2003, Taylor began working for a company called Teach Me To Trade, where he conducted seminars that claimed to teach others that options could be traded profitably. He formed Ascendus Capital Management, LLC, along with Smith. In April 2003, Ascendus received a license as an investment adviser. Taylor was the designated official of the investment adviser and referred to himself as the registered investment adviser.

12. Taylor solicited investors to engage Taylor and Ascendus to trade options, using the investors' funds. Investors were told that Taylor would utilize a proprietary trading strategy that was consistently profitable and that was designed to avoid losses. In some cases, Taylor solicited investors at 'Teach Me To Trade' seminars.

13. Investors were required to pay Ascendus a sliding-scale commission rate that increased as reported profits rose. If the investment returns were under 12% a year, Ascendus would earn 10% of the profits earned each month. Commissions of 20% were due if profits were between 12% and 24% a year. If the investment earned greater than 24% annual returns, investors owed Ascendus 30% of the profits earned for them by Ascendus.

14. In the majority of cases, investors were instructed to open brokerage accounts in



their own name at Penson.<sup>1</sup> Investors deposited their investment funds (and in some cases, stock) into their brokerage accounts at Penson. Investors signed forms granting Taylor authority to buy and sell securities, including options, using funds in their Penson brokerage accounts. These forms were labeled 'Limited Trading Authorizations' ("LTA"). In at least one case, Taylor had an investor sign an LTA which gave his father, Newton Taylor, authorization to conduct trades in the client's account.<sup>2</sup> On information and belief, these LTAs were the basis of Penson allowing Taylor and his traders to make trades in the customer accounts at Penson.

15. While a majority of investors opened separate brokerage accounts at Penson, some sent their money directly to Ascendus to be pooled and managed by Taylor. Investors were told that they needed to have at least \$100,000 in a Penson brokerage account to qualify for options trading by Taylor. Investors who had less than \$100,000 to invest could send their investment funds to Ascendus for management by Ascendus in the pooled "Ascendus Growth Fund."

16. The investor money pooled in the Ascendus Growth Fund allowed Ascendus to conduct its scheme by making illegitimate transfers to other investors or third parties from this fund. For example, Ascendus used other funds paid to it by investors in order to make distribution payments to other investors. This is a practice typically found in Ponzi schemes, where funds from new investors are used to make payments to earlier investors, in order to retain

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<sup>1</sup> These accounts were opened through an introducing broker-dealer named Great Eastern Securities. However, Great Eastern was not allowed to hold customer monies or securities. These were held at Penson and Penson executed all trades and prepared the confirmation statements and monthly customer account statements.

<sup>2</sup> Newton Taylor had previously been convicted of white collar fraud; a fact not disclosed to the investor when the trading authorization was granted.

the investors and attract even larger investments.

17. Each month, Ascendus prepared account statements for each investor, purporting to report how much profit had been earned from options trading in their accounts and how much commission was owed to Ascendus as a result. These commissions were paid to Ascendus by the investors, or, in some cases, the commissions were wired directly from Penson to Ascendus.

18. During the entire time that Ascendus operated, from early 2003 through January 2006, Ascendus reported profits every month to all investors. The amount of profit varied each month, but the monthly statements always reported a profit.

19. Investors who opened accounts at Penson also received monthly account statements directly from Penson. These account statements listed the trades conducted in their accounts during the prior month and disclosed the end-of-month value of the account. The Penson account statements were complex and difficult to understand, making it hard for investors to measure profits and losses.<sup>3</sup> The Ascendus statements, by contrast, simply reported the total amount of profits earned and commissions due to Ascendus.

20. The account statements from Penson showed lower amounts than the account values reported to investors by Ascendus. When some investors asked Ascendus about the discrepancies, Taylor gave a variety of explanations such as: Penson's accounting is not well suited for the type of trading Ascendus does, or that the difference was due to the value of options positions still open at the end of the month – positions that were really unrealized profits.

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<sup>3</sup> One factor that led to the lack of clarity was that most of the transactions in the accounts were options trades, which did not settle until the third Friday of the following month. As a result, many options positions were still open when the account statements were prepared.

Most investors accepted these explanations.

**The Ascendus Account Statements Reported False Profits**

21. In reality, Ascendus was not earning profits for investors every month. Many months saw significant declines in the value of the investors' accounts. In at least one case, the value of an investor's portfolio dropped 51% during a single month. Despite these losses, Ascendus continued to report profits to investors.

22. As Ascendus reported an unending stream of profits, at a time when account values were fluctuating and generally declining, the gap between the reality of account values and the perception – *i.e.*, the amount reported in the Ascendus account statements – grew.

23. Taylor realized that if Ascendus had admitted the truth to investors:

- a. There would be months in which Taylor would have earned no compensation;
- b. The compensation levels he did receive would have been lower in months where actual profits were lower than the reported profits;
- c. Investors likely would have been disillusioned with his trading results and would have withdrawn their investment funds; and
- d. Investors would have demanded repayment of commissions improperly paid and repayment of losses reported as profits.

24. On information and belief, Ascendus had its first month of losses in July 2003. When Taylor decided to report profits for that month, perhaps hoping to make up the losses in future months, he started Ascendus on a downward spiral from which it never recovered. The

losses were never made up and the monthly account statements issued by Ascendus became increasingly fraudulent.

25. By sending false account statements to investors, Taylor caused Ascendus to become insolvent. This insolvency occurred because the false account statements caused Ascendus to owe more to investors than its net worth. The aggregate account value that Ascendus reported to investors in the monthly account statements exceeded the combined value of the brokerage accounts of the investors and the assets of Ascendus. In other words, Ascendus lacked the net worth to pay investors the amount by which the "reported" account values exceeded the "actual" account values.

26. Further, Taylor and Smith accepted investors into Ascendus who did not meet the net worth standards required as part of Ascendus' investment advisory license. This made Ascendus liable to repay any investor who did not have \$750,000 under management by Ascendus or who did not have a net worth of over \$1.5 million. Ascendus lacked sufficient funds to make those payments.

#### **Closure of Ascendus, Formation of FFCF**

27. In late 2005, Taylor decided to close the Ascendus options trading program. Taylor paired with his brother-in-law, Jeff Roylance, to raise investment funds for a California investment adviser – LBS Advisors ("LBS"). Roylance and his company, Summit Capital Advisors ("Summit"), had secured exclusive rights to raise funds for LBS. Taylor became a sub-advisor for Summit. Taylor was to earn commissions from Summit for investment funds he was able to deliver to LBS.

28. Taylor and Smith formed FFCF Investors, LLC in January 2006, as a vehicle for pooling investor funds to send to LBS. Taylor was again the managing member. The FFCF name was itself an indication that investor monies were to be sent to "Franklin Forbes Composite Fund," a fund operated by LBS.

29. Because Taylor and Ascendus would no longer receive commissions from options trading for investors after Ascendus closed, Taylor would receive no further income from Ascendus. In order to continue receiving compensation – this time from LBS Advisors – Taylor needed to persuade investors to move their money to LBS. This, in turn, required continuation of the illusion that the options trading in customer accounts was as profitable as had been reported in the monthly Ascendus account statements.

30. In late 2005, Taylor and his business partners began talking and meeting with Ascendus investors, telling them the options trading environment was not conducive to the continued string of profits they had received in the past. Taylor told investors about FFCF and the investment programs offered by LBS, encouraging investors to move their investments to FFCF. Most investors were told that LBS required a minimum investment amount of \$10 million, so investor funds would have to be pooled.

31. The process of having investors withdraw their funds from their Penson accounts created a problem for Taylor, as liquidating the Penson accounts would have made investors realize that their Penson accounts had lost money and that the accounts did not have the value stated in the account statements from Ascendus. To solve this problem, Taylor and Penson utilized several fraudulent devices, including:

- a. Penson transferred funds and securities out of the accounts of some of its customers, based on forged and altered documents sent to Penson by Taylor;
- b. Penson transferred funds out of the accounts of its customers based on purported customer authorizations, when Penson did not require verification of the customer signatures and relied on purported signatures transmitted by facsimile machine;
- c. Penson wired money from the accounts of its customers directly to entities controlled by Taylor and his associates;
- d. Penson transferred securities from the accounts of its customer to the accounts of other customers who were unrelated to the first customer;
- e. Penson removed funds from customer accounts in a manner not authorized by the customers;
- f. Money was sent from Ascendus to Penson for deposit into investor accounts, to create the illusion the accounts had earned profits which had not been earned;
- g. Penson recorded fictitious deposits in customer account records to create the false impression that the accounts had values greater than their true value. Those fictitious deposits were reversed after the investors agreed to move their investments to the new FFCE investment program; and
- h. Penson reported false information in records sent, or made available, to its customers, including: i) having particular trades reported differently in online statements, paper statements, and end-of-year Form 1099s, ii) reporting to customers that distributions from their accounts were not sent to third parties, and iii) reporting false account balances for customers.

32. Because investor monies and securities were held in individual brokerage accounts at Penson, Taylor's fraudulent scheme could succeed only with the tacit or active assistance of Penson, including:

- a. The transfers and false reporting described in the prior paragraph;
- b. Penson granted trading authorizations to people such as Newton Taylor, a felon previously convicted of securities fraud;
- c. Penson permitted Taylor to trade securities in customer accounts where Ascendus would be paid performance-based fees, when these fees were not permitted by state or federal law; and
- d. Penson facilitated the payment of commissions to Ascendus – knowing: i) that Ascendus should have received compensation only if trading in the accounts was profitable, and ii) that the customer accounts were losing money, not earning profits.

33. Upon information and belief, agents at Great Eastern, the introducing broker, had access to Penson's password-protected trading platform, and conducted trades for the investors in Ascendus under the direction of Taylor. 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. Also, upon information and belief, Penson allowed agents at Great Eastern to be paid compensation from Ascendus based on a share of the purported profits of Ascendus at the same time that Penson was paying Great Eastern a share of trading commissions collected by Penson.

34. When Taylor met with investors to persuade them to move their money to FFCF, he showed the investors documents that significantly overstated the amount of their beginning

investment balance in FFCF. The amounts listed in the subscription agreements were consistent with the investment values that had been reported in the account statements sent out by Ascendus. For example:

a. Investor DA had a \$470,792.56 ending value in his investment account at Penson. This was wired from Penson to FFCF on February 15, 2006. During this time period, his Ascendus account statement said his investment balance was almost twice that amount – \$912,000.

b. Investor AB had a \$179,237.88 balance in his Penson account, but his subscription agreement with FFCF showed a \$500,000 beginning investment balance.

c. Investor RH had a \$239,713.84 balance in his Penson account, but his FFCF subscription agreement showed a beginning investment balance of \$329,830.28.

35. In total, investors who joined FFCF at its inception delivered actual funds to FFCF totaling \$7,585,727.61 (between December 2005 and February 2006). These investors were told by Taylor and FFCF that their investment balances were at least \$12,819,451.19. This \$5,233,723.58 difference represented fictitious investment deposits.

#### **Penson Transferred Funds and Securities Based on Forged Documents**

36. Several months after being appointed, the Receiver obtained the original copies of business records of Ascendus. These include many documents instructing Penson to withdraw or transfer funds from customer accounts.

37. One of the documents discovered by the Receiver is an instruction to Penson dated October 28, 2003 to have Penson transfer a 2,000 share short position in Netflix stocks



from the account of customer KR to the account of a different, and unrelated, Penson customer. The original of this document includes a signature of KR that has been cut out of another document and affixed to this document with transparent tape. The Receiver has located the actual document from which this signature was cut. It appears that this instruction was sent, or intended to be sent, by facsimile transmission to Penson. The Receiver does not know if this document was actually sent (presumably by fax) to Penson, and if so, what action Penson took on receipt of this document.<sup>4</sup> A copy of this document is attached as Exhibit 1.

38. The Receiver discovered several copies of a "Fed Wire Request Form" for customer DS. This form contains the Penson logo and apparently was used by customers to request that Penson send funds from the customer's account via wire transfer.<sup>5</sup>

a. The Receiver discovered a blank copy of the wire request form that had the signature of DS taped onto the signature line. This signature was cut from another document and affixed to the wire request form. A copy of the form is attached as Exhibit 2.

b. The Receiver also discovered several other wire request forms for the account of DS with the identical signature in the same location. These other wire request forms appear to have been sent to Penson and used as the basis for withdrawals from DS's Penson account. The other information on these forms is in different handwriting than the cut and pasted signature on the form.

39. The Receiver discovered copies of 11 wire request forms with the purported

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<sup>4</sup> The Receiver sent a subpoena to Penson on October 8, 2010, asking for this and other information. Counsel for Penson has notified the Receiver it does not intend to supply the information requested by the Receiver.

<sup>5</sup> Again, the Receiver requested information from Penson (by subpoena) regarding this document, but Penson refused to supply any information. This is true for the other documents and transactions described below.

signature of customer GY. These are instructions to Penson to wire money out of GY's Penson account. All 11 have the identical signature in the exact same location on the form, but contain different dates and different withdrawal amounts.

a. The signatures all have a portion of the signature cut off and contain stray marks that appear to be from a photocopier. When copied onto transparencies and compared, the signatures all match perfectly, indicating the signatures were copied onto the forms before each of them was completed.

b. The handwritten instructions on the form listing the customer name, the date of the document, the amount to be withdrawn, and the destination of the transfer are in different handwriting than the signature. Notably, many of these forms have the customer's name misspelled.<sup>6</sup>

c. The funds withdrawn from the account of GY were sent to a bank account controlled by Ascendus.

#### **Penson Transferred Funds and Securities Based on Altered Documents**

40. In February 2006, when Taylor was persuading investors to withdraw their funds from Penson and invest in FFCF, many investors signed wire request forms asking Penson to withdraw the entire balance of their investment accounts.

41. In many, and perhaps all, cases, these wire request forms were sent by the investors to Ascendus. It is unknown whether the wire request forms were sent by Ascendus directly to Penson or whether they were sent to Great Eastern. In any event, these wire request

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<sup>6</sup> This is another factor suggesting that the customer did not sign the form after the form was filled out.

forms resulted in the withdrawal of \$5.7 million of funds from customer accounts and the delivery of those funds to Ascendus and affiliated entities.

42. The Receiver has obtained a copy of the original wire request form dated February 7, 2006 that was signed by customer SW and sent by facsimile transmission to Ascendus.<sup>7</sup> "White out" tape was applied to the facsimile copy received by Ascendus on the portion of the form asking for the "Customer's Bank Account Number." The "white out" tape covered up the writing placed on the form by the customer. On the new "white out" tape, the bank account number of the Ascendus affiliated entity is listed. Based on this alteration, Penson wired more than \$700,000.00 of SW's money to the bank account of the Ascendus affiliate.

43. To date, the Receiver has located copies of wire request forms for five other investors where the copies indicate the similar white out tape was applied to the customer form. It is believed the white out tape was used to insert a bank account number that was not on the form at the time the form was signed by the customer. In the case of each of these five, monies were sent by Penson to entities controlled by Ascendus.

44. The Receiver believes there are more instances where these alterations were made, but the business records he recovered are incomplete. The Receiver expects that records of Penson will show the extent to which these alterations were made in the accounts of other customers whose funds were sent to entities controlled by Ascendus.

#### **Penson Paid Customer Funds Directly to Ascendus and Affiliated Entities**

45. Taylor told investors that if they opened an account at Penson, their money could

<sup>7</sup> There are actually two different signed forms with the same date. It is not known which one ultimately was sent to Penson (or whether both were sent).

not be withdrawn by Taylor or Ascendus. Taylor said he could conduct trades in the accounts, but could not withdraw any funds from the accounts.

a. The LTA signed by many customers reinforces this protection. One LTA form (on Ascendus letterhead) states: "You are not authorized to transfer funds or to conduct any Account activities except as stated in this document."

b. Ascendus' investment advisory licensing form (Part II of Form ADV) states: "Neither the advisor, not (sic) Mr. Taylor will take custody of any of the funds of Clients."

46. The Receiver believes these LTA forms were on file with Penson, meaning Penson knew that Taylor and Ascendus lacked authority to have customer funds sent directly to Ascendus.

47. Penson's own policy appears to prohibit the use of faxed, non-notarized wire request forms to effectuate the payment of customer funds to the trader (or any third party).

a. One of the LTA forms signed by investors, which is on Penson letterhead, says the LTA "does not afford the authorized Agent authority to transfer securities and/or disburse funds from the undersigned's account."

b. A July 11, 2001 enforcement order by the Nevada Division of Securities, imposing disciplinary sanctions on Penson, recites: "the policies and procedures of [Penson] required that all third-party wire transfer requests be signed by the customer and a representative of the branch office from where the transfer request originated and that it be notarized." A copy of this order is attached as Exhibit 3.

48. Despite the apparent prohibition against taking money from customer accounts

and sending it to Ascendus, there were frequent, substantial transfers of funds from customer accounts to Ascendus. The chart below lists the transactions believed by the Receiver to represent payments directly from Penson to Ascendus.<sup>8</sup>

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<sup>8</sup> The Receiver identified an additional 32 transactions for investor AD that appeared to be direct payments from Penson to Ascendus, but investor AD indicated she believes these were sent by Penson to her account. These total \$159,867.53.

PAYMENTS FROM CUSTOMER ACCOUNTS AT PENSON TO ASCENDUS ENTITIES				
Investor	# of Pymts	From	To	Amount
DA	1	2/15/06	2/15/2006	470,792.44
AB	1	2/22/06	2/22/2006	179,327.88
NB	1	2/15/06	2/15/2006	39,559.67
KC	1	2/22/06	2/22/2006	160,833.24
AD	1	2/15/06	2/15/2006	332,037.10
VF	3	12/30/03	2/25/2004	8,147.26
MH	3	11/22/04	3/30/2005	1,255.38
RH	1	2/10/06	2/10/2006	239,713.84
SH	1	2/20/07	2/20/2007	34,760.53
BJ	1	5/17/06	5/17/2006	98,000.00
RM	1	2/22/06	2/22/2006	48,155.71
WM	1	2/22/06	2/22/2006	800,031.98
RN	12	5/28/04	11/22/2005	140,118.82
DO	15	9/26/03	11/1/2006	180,439.39
EP	11	4/22/04	4/28/2005	52,677.87
RP	1	2/15/06	2/15/2006	63,685.52
SR	1	2/25/04	2/25/2004	30,672.00
KR	1	12/12/05	12/12/2005	150,000.00
DS	14	6/28/04	10/31/2005	93,140.00
SW	1	2/10/06	2/10/2006	710,995.85
AW	29	12/29/03	5/11/2006	2,220,193.89
RW	1	2/10/06	2/10/2006	720,336.94
GY	13	1/14/04	2/25/2005	109,110.86
DY	1	2/22/06	2/22/2006	101,685.31
RY	1	2/6/06	2/6/2006	1,719,065.42
<b>Total</b>	<b>117</b>			<b>8,704,736.90</b>

49. These 117 transfers of funds, totaling \$8,704,736.90, were sent from customer accounts at Penson directly to Ascendus and affiliated entities. The Receiver has seen no indication Penson possessed original customer signatures on these wire request forms or that the signatures were notarized.

50. The number and size of transfers directly to Ascendus in February 2006 were significant. During that one month alone, more than \$7.4 million was withdrawn from customer accounts and sent directly to Ascendus.

**Penson Transferred Securities from Customer Accounts to Other Customers, Based on Instructions from Ascendus**

51. During 2003, Taylor purchased a short position of 1,000 shares of Netflix in the account of AD. The monthly account statement Penson sent to AD for her account reported that this position was transferred to account #\*\*\*\*8455 on November 5, 2003. AD has no relation with the owner of account #\*\*\*\*8455.

a. At the time, this position was valued at approximately \$59,000.00. When the stock position was transferred, AD's account was charged \$119,200.00 – twice the value of the securities transferred out of her account.<sup>9</sup>

b. This stock position was credited to account #8455, along with the \$119,200.00 taken from AD's account.

52. In October 2003, a 2,000 share short position in Netflix was purchased in the account of KC. On November 4, 2003, this short position was transferred from the account of KC to account #8455. KC has no relation with the owner of account #8455. The account

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<sup>9</sup> Charging the incorrect amount to the account of AD, along with other false recordkeeping entries, is discussed below. It appears the excess amount withdrawn from AD's account was returned the following year, more than three and a half months later.

When questioned about this transaction in April 2010, Penson reported to the Receiver that it could not explain the reasons for the transfer of this position or why the amount debited to AD's account was twice the value of the stock position.

statement for #8455 shows this share position was received in this account.<sup>10</sup>

53. Customer CS held approximately \$71,000.00 worth of mutual funds in his tax-advantaged IRA account at Penson (#0030) in November 2003. These mutual funds were liquidated some time in early 2004. On April 4, 2004, the \$71,000.00 in proceeds from the mutual funds was transferred to account #0924.

a. CS's account statement said this was a "transfer to . . . 0924 Smith." The Receiver has identified account #0924 as belonging to Ascendus Growth Fund, an account controlled by Ascendus and Taylor. The account was not in the name of "Smith," nor was anyone named Smith a signer on this account.

b. The money transferred from the account of CS to the Ascendus Growth Fund account resulted in the money moving from a tax-advantaged account to a non-retirement account, triggering unintended (and undisclosed) tax liabilities for CS.

**Penson Withdrew Funds from Customer Accounts Without Their Knowledge or Consent**

54. On February 25, 2004, \$30,672.00 was taken from SR's brokerage account at Penson. The funds were wired directly to Ascendus. Until the Receiver questioned SR about this transaction in 2009, SR was unaware that the money had been taken from his account.

55. On November 1, 2006, \$147,329.93 was taken from the account of DO at Penson. The money was wired to the bank account of FFCF. DO told the Receiver he did not authorize this transfer and was unaware of it at the time it occurred.<sup>11</sup>

<sup>10</sup> Note these transfers were one week after the forged authorization letter from the account of KR, discussed above.

<sup>11</sup> The Receiver has located a copy of a notice from Penson to DO, indicating the transfer was made, but that it did not go to a third party.



**Penson Accepted Deposits from Ascendus to Boost the Value of Customer Accounts**

56. Great Eastern told customers that Penson would only accept funds for deposit into customer accounts from an account having the same name as the Penson brokerage account and that third-party checks would not be accepted. The Receiver believes that this is, in fact, the policy of Penson.<sup>12</sup>

57. The Receiver has found 15 instances in which Ascendus or an affiliated entity sent funds to Penson for deposit into customer accounts at Penson. Ascendus purchased 15 cashier's checks from Far West Bank in Orem, Utah. The checks were made payable to Penson. The memo line of each check lists the name of the customer and the customer's account number.

58. Each of the checks listed in the chart below was accepted by Penson and deposited into the accounts of the customers listed on each check. These checks and the funds reflected by these checks did not come from the customers.

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<sup>12</sup> Because Penson has so far refused to provide the Receiver with a copy of its policies and procedures and compliance manuals, the Receiver has been unable to verify this belief.

PAYMENTS FROM ASCENDUS DEPOSITED INTO CUSTOMER ACCOUNTS AT PENSON			
Date	Customer	Amount	Source
7/12/2005	JW	5,951.55	Smith Holdings
6/24/2004	RY	4,656.14	Ascendus
8/4/2004	RY	7,218.00	Ascendus
12/29/2004	RY	5,826.66	Ascendus
1/24/2005	RY	2,605.24	Ascendus
1/26/2005	TP	8,841.90	Ascendus
3/9/2005	VF	10,000.00	Ascendus
3/23/2005	BJ	6,599.09	Ascendus
7/6/2005	KC	4,125.12	Ascendus
8/23/2005	RH	12,662.35	Ascendus
11/8/2005	KC	41,434.08	Ascendus
11/21/2005	KC	13,213.96	Ascendus
11/28/2005	BJ	37,742.90	Ascendus
12/14/2005	RH	25,531.62	Ascendus
5/2/2006	TP	20,153.36	Ascendus
<b>Total</b>	<b>15</b>	<b>206,561.97</b>	

59. These deposits had the effect of increasing the reported value of the customer accounts.

#### Penson Recorded Fictitious Deposits in a Customer Account

60. A cashier's check dated November 8, 2005 in the amount of \$41,434.08 was deposited in the Penson account of KC (see chart above). These funds came from Ascendus. Penson's records show this money was credited to the account of KC on November 11, 2005.<sup>13</sup>

61. This check was deposited a second time into the account on December 6, 2005, resulting in a net deposit of \$82,868.16 into the account. This brought the value of KC's Penson account to \$208,265.20 on December 31, 2005. The value of the account was listed as

<sup>13</sup> For reasons not clear in the documents, this check was returned, then redeposited on November 22, 2005.

\$201,934.58 on the January 31, 2006 account statement.

62. This made KC's account balance consistent with a K-1 tax form sent to KC by Ascendus showing a December 31, 2005 investment account balance of \$200,000.00.

63. On February 1, 2006, KC signed a subscription agreement, agreeing to move his investment balance from Penson to FFCF. The subscription agreement shows an initial investment amount of \$200,000.00.

64. On February 16, 2006, Penson deducted \$41,434.08 from the account of KC – the amount of the cashier's check that had been deposited twice. This money sat in the account of KC for more than two months, during which time Ascendus reported a \$200,000.00 investment value for tax purposes and persuaded KC to move his investments to FFCF.

65. On February 22, 2006, KC requested the "outstanding balance" of his account at Penson, which he believed to be \$200,000 but was actually only \$160,883.24, be transferred for investment with FFCF. Until the Receiver was appointed, however, KC had believed his investment amount transferred to FFCF was \$200,000.00.

66. KC told the Receiver that he would not have moved his investment from Penson to Ascendus unless his account value at Penson had been greater than \$200,000.00 in February 2006. The only way KC's account showed a value in excess of \$200,000.00 in February 2006 was due to the \$41,434.08 cashier's check that was credited to his account twice – and the extra funds remained in the account for two months.

#### **Penson Reported False information to Investors**

67. Upon information and belief, it was Penson's practice to mail a notice to

customers when funds were withdrawn from their brokerage accounts. These "Cash and Security Disbursement" notices indicated the dates and amounts of transfers. There was also a spot for a notation indicating whether the transfer was to a Third Party. In every Cash and Security Disbursements notice found by the Receiver where funds were wired directly from customer accounts at Penson to Ascendus (and affiliated entities), the notice indicated "No" on the "third-party" notation – despite these payments going to third parties.

68. The transfer of Netflix shares from the account of AD in November 2003 resulted in twice the value of the shares being deducted from her account (described above). The account statements sent to AD reported a false value of this transaction in her account. The account information made available to AD online also was incorrect.

69. Penson sent account and transaction information to AD, and perhaps others, that contained incorrect information on the transactions actually executed, including the use of false stock symbols and false expiration dates.

70. The account statement of the recipient of the Netflix transfer (account #8455) reported the deposit of \$119,200.00 into his account, when the true value of the deposited shares was only \$59,600.00.

71. The fictitious deposits in the account of KC in December 2005 (described above) resulted in Penson sending false account statements to KC in December 2005 and January 2006, as well as the account information made available online.

72. When the cash was transferred from the retirement account of CS to Ascendus (discussed above), the April 30, 2004 account statement sent to CS falsely reported that the

transfer was to an account controlled by "Smith."

**Penson Engaged in Other Actions to Assist the Fraud Being Perpetrated by Ascendus**

73. The fraud being perpetrated by Taylor and Ascendus would have been discovered earlier or would not have been possible but for Penson's role in the transactions described in preceding paragraphs.

74. At least one LTA signed by a customer (KR) granted trading authorization to Newton Taylor, a felon with two prior convictions for white collar fraud – including securities fraud. This LTA is on a Penson trading authorization form. The Receiver has not yet been able to determine: i) what other customers granted discretionary trading authority to Newton Taylor, ii) what transactions Newton Taylor conducted in customer accounts, or iii) what transfers of funds or securities, if any, were sent from the accounts of customers to Newton Taylor.

75. Penson permitted Taylor to conduct securities trades in customer accounts. This permission should have been granted to Taylor only through written LTAs. Most, if not all, the LTA forms submitted to Penson for Taylor also listed the compensation Taylor would earn from trading he would conduct in the accounts of Penson customers.

76. This compensation was performance-based. If the trading earned 12% or less return, Ascendus would earn 10% of the profits. If trading earned between 12% and 24%, Ascendus would be paid 20% of the profits. For profits greater than 24%, Ascendus would be paid 30% of the profits.

77. Penson knew that compensation to Ascendus and Taylor derived from performance-based fees.

78. Performance-based fees are prohibited by the Investment Advisers Act of 1940, except in certain limited conditions. These conditions include a requirement that performance-based fees can be collected only on contracts relating "to the investment of assets in excess of \$1 million."<sup>14</sup>

79. The Utah Securities Act also limits the imposition of performance-based fees, requiring:

- a. The client must have "at least \$750,000 under the management of the investment adviser;"<sup>15</sup>
- b. The compensation formula must include realized capital losses and unrealized losses, and be based on gains less the losses;<sup>16</sup>
- c. The compensation formula must be based on trading of "not less than one year."<sup>17</sup>

80. Penson permitted Taylor to trade securities in customer accounts where Taylor and Ascendus would be granted performance-based fees, when these fees were not permitted by state or federal laws.

81. Penson authorized payments of performance-based compensation to Taylor and Ascendus from the accounts of its customers when:

- a. The clients, with a few exceptions, did not have sufficient amounts under

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<sup>14</sup> Investment Advisers Act of 1940, Section 205(b)(2)(B).

<sup>15</sup> R164-2-1(D)(1)(a) of the Rules under the Utah Securities Act. Alternatively, \$1.5 million in assets is acceptable, even if less than \$750,000 is under management.

<sup>16</sup> R164-2-1(E)(1)(a), R164-2-1(E)(1)(c).

<sup>17</sup> R164-2-1(E)(1)(c).

management to allow payment of performance-based compensation;

b. The fees taken from client accounts and paid to Ascendus did not account for realized and unrealized capital losses and were not based on gains less the losses; and

c. Performance-based compensation was based on periods of less than one year.

82. Penson authorized payments of performance-based compensation to Ascendus knowing that the customer accounts for which the compensation was being paid were losing money and that no performance-based compensation was owed to Ascendus.

**The Receiver Has Been Assigned Claims Against Penson**

83. Sixteen investors (the "Investors") who had brokerage accounts at Penson have assigned to the Receiver their claims against Penson (the "Assigned Claims").<sup>18</sup>

84. Information about each of the Investors is set forth below:

a. DA resides in Arizona. DA opened an account at Penson in or about August 2003, and, upon information and belief, signed an LTA. DA deposited approximately \$1,100,000.00 into his Penson account. DA paid \$69,196.99 in commissions to Ascendus. In or about February 2006, Penson withdrew \$470,792.44 from DA's Penson account and transferred it to Consilium, a company controlled at the time of the transfer by Smith, Taylor, and Taylor's father, Newton Taylor, a convicted felon. The wire transfer form used to effectuate this transfer appears to have been fraudulently altered.

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<sup>18</sup> Because the Complaint is a public document, the Plaintiff has identified each of the Investors with the Investor's initials in the Complaint. The Plaintiff can provide full names and account numbers of the Investors to the Defendants upon request.

b. NB resides in Orem, Utah. NB opened an account at Penson in or about June 2004, and signed an LTA. NB deposited approximately \$130,000.00 into his Penson account. NB paid \$6,624.41 in commissions to Ascendus. In or about February 2006, Penson withdrew \$39,559.67 from NB's Penson account and transferred it to Consilium. The wire transfer form used to effectuate this transfer appears to have been fraudulently altered.

c. KC resides in Mapleton, Utah. KC opened an account at Penson in or about September 2003, and signed an LTA. KC deposited approximately \$175,000 into his Penson account. KC paid \$20,732.10 in commissions to Ascendus. Also, Penson accepted three checks into KC's Penson account directly from Ascendus in the amounts of \$4,434.08, \$13,213.96, and \$41,334.08. The check in the amount of \$41,334.08 was deposited twice into KC's account, then the extra deposit was later removed. In or about February 2006, Penson withdrew \$160,833.24 from KC's Penson account and transferred it to FFCF. The wire transfer form used to effectuate this transfer appears to have been fraudulently altered, and the Penson disbursement notice provides that the payment was not to a third party.

d. AD resided in San Diego, California when the facts giving rise to this action occurred. AD opened an account at Penson in or about May 2003, and signed an LTA. AD deposited \$100,000 in cash and stock valued at approximately \$683,436.69 into her Penson account. AD paid \$159,867.99 in commissions to Ascendus. Also, as explained above, AD's account was debited for an amount twice the value of the position transferred relating to a short position in Netflix. AD also was damaged when \$59,600 was taken out of her account improperly for a period of three months. In or about February 2006, Penson withdrew



\$332,037.10 from AD's Penson account and transferred it to Consilium.

e. RH resides in Mapleton, Utah. RH opened an account at Penson in or about October 2003, and signed an LTA. Upon information and belief, RH deposited approximately \$300,000 into his Penson account. RH paid \$25,269.28 in commissions to Ascendus. Also, Penson accepted payments directly from Ascendus into his Penson account in the amounts of \$12,662.35 and \$25,531.62. In or about February 2006, Penson withdrew \$239,713.84 from RH's Penson account and transferred it to Consilium.

f. SH resides in San Antonio, Texas. SH opened an account at Penson in or about September 2004, and signed an LTA. SH deposited \$50,000 into his Penson account. SH paid \$1,310.74 in commissions to Ascendus. In or about February 2006, Penson withdrew \$34,760.53 from RH's Penson account and transferred it to Consilium.

g. RM resides in Moab, Utah. RM opened an account at Penson in or about March 2004, and signed an LTA. RM paid \$9,060.47 in commissions to Ascendus. In or about February 2006, Penson withdrew \$48,155.71 from RM's Penson account and transferred it to FFCE.

h. WM resides in Mapleton, Utah. WM opened an account at Penson in or about September 2003, and signed an LTA. WM deposited \$900,000 into his Penson account. WM paid \$103,983.11 in commissions to Ascendus. In or about February 2006, Penson withdrew \$800,031.98 from WM's Penson account and transferred it to FFCE.

i. RN resides in Baton Rouge, Louisiana. RN opened an account at Penson in or about January 2004, and signed an LTA. RN paid \$140,118.82 in commissions to

Ascendus. These payments were wired directly from Penson to an account controlled by Ascendus.

j. RP resides in Mapleton, Utah. RP opened an account at Penson in or about January 22, 2004, and signed an LTA. RP deposited \$100,000 into his Penson account. RP paid \$13,459.73 in commissions to Ascendus. In or about February 2006, Penson withdrew \$63,685.52 from RP's Penson account and transferred it to Consilium. The wire transfer form used to effectuate this transfer appears to have been fraudulently altered, and the Penson disbursement notice provides that the payment was not to a third party.

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

l. KR resides in North Salt Lake, Utah. KR opened an account at Penson in or about August 2003, and signed an LTA. KR deposited \$47,869 in stocks and \$310,450.10 in cash into her Penson account. RK paid \$11,893.14 in commissions to Ascendus. In or about December 2005, Penson withdrew \$150,000 from KR's account and transferred it to Ascendus.

m. SW resides in Tucson, Arizona. SW opened an account at Penson in or about May 2005, and signed an LTA. In or about February 2006, Penson withdrew \$710,995.85 from SW's account and transferred it to Consilium. The wire transfer form used to effectuate this transfer appears to have been fraudulently altered, and the Penson disbursement notice provides that the payment was not to a third party.

n. AW resides in Chicago, Illinois. AW opened an individual account at Penson in or about September 2003 and an IRA account at Penson in or about October 2003. AW signed an LTA. AW deposited \$3,073,422.25 in stocks and \$451,605.95 in cash into his personal account, and AW deposited \$439,800.32 into his IRA account. AW paid \$382,086.20 in commissions to Ascendus. In or about February 2006, Penson withdrew \$1,382,545.85 from AW's accounts and transferred this money to Consilium. In or about February 2006, Penson withdrew \$465,700.65 from AW's accounts and transferred this money to FFCF. In or about March 2006, Penson withdrew \$1,350.21 from AW's accounts and transferred it to FFCF. The wire transfer forms used to effectuate these transfers appear to have been fraudulently altered.

o. DY resides in Sandy, Utah. DY opened an account at Penson in or about March 2003, and signed an LTA. DY deposited \$150,000 into his Penson account. DY paid \$12,831.29 in commissions to Ascendus. In or about February 2006, Penson withdrew \$101,685.31 from DY's account and transferred it to FFCF.

p. RY resides in Mapleton, Utah. RY opened an account at Penson in or about January 2004, and signed an LTA. RY deposited \$2,507,700.80 into his Penson account. RY paid \$68,349.73 in commissions to Ascendus. Also, Penson accepted three checks into RY's Penson account directly from Ascendus in the amounts of \$7,218 in or about August 2004, \$5,826.66 in or about December 2004, and \$2,605.25 in or about January 2005. In or about February 2006, Penson withdrew \$1,719,065.42 and transferred it to Consilium.

### **FIRST CLAIM FOR RELIEF**

**(Aiding and Abetting Violation of the Utah Uniform Securities Act  
Pursuant to Utah Code Ann. § 61-1-22 against all Defendants)**

85. The preceding paragraphs are realleged and incorporated by references as if set forth fully herein.

86. As more fully described above, Taylor and Smith violated the Utah Uniform Securities Act by, *inter alia*, making untrue statements of a 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 their scheme.

87. Penson is a broker-dealer that materially aided in the sale or purchase of securities as it acted as the clearing broker for investors of Ascendus, and materially aided Taylor and Smith as they conducted their fraudulent scheme when, *inter alia*, it allowed the improper transfer of funds from the investors to third parties and at the request from third parties.

88. 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.

89. Penson's actions caused damages to the Investors and the Receivership Entities.

90. By accepting deposits of investor money directly from Penson based on fraudulently altered wire transfer forms, Consilium knew, or was reckless in its failure to know, that its actions were an important and integral part of the scheme conducted by Taylor and Smith to defraud investors.

91. Consilium knowingly or recklessly provided assistance to Taylor and Smith in the

commission of the breach of fiduciary duty by Taylor and Smith inasmuch as Taylor and Smith controlled this company.

92. Consilium's actions caused damage to the Investors.

93. As a result, the Receiver was damaged for the Defendants' aiding and abetting of violations of the Utah Uniform Securities Act by Taylor and Smith.

### **SECOND CLAIM FOR RELIEF**

#### **(Fraudulent Transfer against Penson)**

94. The preceding paragraphs are realleged and incorporated by references as if set forth fully herein.

95. As described above in paragraphs 56 through 59, the Receivership Entities transferred money into the accounts of investors to create the false impression that these investors had gained more from the trading of Ascendus than had actually occurred.

96. These transfers to Penson from Ascendus were inherently fraudulent because they were made as part of a Ponzi scheme, and were made with the intent to hinder, delay, or defraud the creditors and/or investors of the Receivership Entities.

97. None of the Receivership Entities received a reasonably equivalent value from Penson for goods or services in exchange for these transfers to Penson.

98. Accordingly, these transfers from the Receivership Entities to Penson are fraudulent transfers under the Utah Uniform Fraudulent Transfer Act.

99. The Receivership Entities were insolvent at the time the transfers were made to Penson.

100. Pursuant to Utah Code § 25-6-1 *et seq.*, the Receiver is entitled to avoid and recover the transfer of money from the Receivership Entities to Penson as an actual or constructive fraudulent conveyance.

### **THIRD CLAIM FOR RELIEF**

#### **(Breach of Contract against Penson)**

101. The preceding paragraphs are realleged and incorporated by reference as if set forth fully herein.

102. Before the Investors in Ascendus were allowed to deposit their funds with Penson, Penson required that they complete various authorizations, forms, and agreements that provided protection to the investors and to the money they deposited with Penson.

103. For example, the Investors completed and agreed to the terms of an LTA, which was drafted on Penson letterhead and provides that the LTA "does not afford the authorized Agent authority to transfer securities and/or disburse funds from the undersigned's account."

104. Each of the Investors performed all conditions, covenants, and promises required to be performed in accordance with the terms and conditions of the Agreements.

105. As described above in Paragraphs 36 through 82, 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 customer funds directly to Ascendus and other affiliated entities; by transferring securities from customer accounts to accounts of other Customers based on instructions from Ascendus; by withdrawing funds from the accounts of customers without their knowledge or

consent; by accepting deposits from Ascendus to boost improperly the value of customer accounts; by recording fictitious deposits in a customer account; by reporting false information to investors; and by engaging in other actions to assist the fraud being perpetrated by Taylor and Smith.

106. Penson's breach of the Agreements damaged the Investors.

107. As a result of the breach of the Agreements by Penson, the Receiver is entitled to damages.

#### **FOURTH CLAIM FOR RELIEF**

##### **(Breach of the Implied Covenant of Good Faith and Fair Dealing against Penson)**

108. The preceding paragraphs are realleged and incorporated by reference as if set forth fully herein.

109. 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.

110. Penson breached the covenant of good faith and fair dealing by, *inter alia*, transferring funds and securities based on forged documents; by transferring funds and securities based on altered documents; by transferring customer funds directly to Ascendus and other affiliated entities; by transferring securities from customer accounts to accounts of other Customers based on instructions from Ascendus; by withdrawing funds from the accounts of customers without their knowledge or consent; by accepting deposits from Ascendus to boost improperly the value of customer accounts; by recording fictitious deposits in a customer account; by reporting false information to investors; and by engaging in other actions to assist

the fraud being perpetrated by Taylor and Smith.

111. Penson's breaches of the implied covenant of good faith and fair dealing damaged the Investors and the Receivership Entities.

112. As a result of the breach of the implied covenant of good faith and fair dealing by Penson, the Receiver is entitled to damages.

#### **FIFTH CLAIM FOR RELIEF**

##### **(Aiding and Abetting Breach of Fiduciary Duty against All Defendants)**

113. The preceding paragraphs are realleged and incorporated by references as if set forth fully herein.

114. Taylor and Smith owed fiduciary obligations to Ascendus and to the Investors.

115. When Taylor and Smith provided statements to investors in Ascendus and FFCF that were materially false and misleading and that omitted material information, they breached their fiduciary duties to the Investors and to Ascendus, especially when these false and misleading statements allowed Taylor and Smith to receive commissions to which they were not entitled.

116. Penson knew, or was reckless in its failure to know, that its activity described in Paragraphs 36 through 82 above, was an important and integral part of the scheme conducted by Taylor and Smith to defraud investors.

117. Penson knowingly or recklessly provided assistance to Taylor and Smith in the commission of the breach of fiduciary duty by Taylor and Smith.

118. Penson's actions caused damage to the Investors.



119. By accepting deposits of investor money directly from Penson based on fraudulently altered wire transfer forms, Consilium knew, or was reckless in its failure to know, that its actions were an important and integral part of the scheme conducted by Taylor and Smith to defraud investors.

120. Consilium knowingly or recklessly provided assistance to Taylor and Smith in the commission of the breach of fiduciary duty by Taylor and Smith inasmuch as Taylor, Smith, and Taylor's father, Newton Taylor, controlled this company.

121. Consilium's actions caused damage to the Investors.

122. As a result, the Receiver was damaged for the Defendants' aiding and abetting of breach of fiduciary duty.

#### **SIXTH CLAIM FOR RELIEF**

##### **(Aiding and Abetting Fraud against all Defendants)**

123. The preceding paragraphs are realleged and incorporated by references as if set forth fully herein.

124. As more fully described above, Taylor and Smith provided statements to investors with Ascendus and FFCF that were materially false and misleading and that omitted material information.

125. Penson knew, or was reckless in its failure to know, that its activity described in Paragraphs 36 through 82 above, was an important and integral part of the scheme conducted by Taylor and Smith to defraud investors.

126. Penson knowingly or recklessly provided assistance to Taylor and Smith in the

commission of fraud by Taylor and Smith.

127. Penson's actions caused damages to the Investors and to the Receivership Entities.

128. By accepting deposits of investor money directly from Penson based on fraudulently altered wire transfer forms, Consilium knew, or was reckless in its failure to know, that its actions were an important and integral part of the scheme conducted by Taylor and Smith to defraud investors.

129. Consilium knowingly or recklessly provided assistance to Taylor and Smith in the commission of the fraud by Taylor and Smith inasmuch as Taylor, Smith, and Taylor's father, Newton Taylor, controlled this company.

130. Consilium's actions caused damage to the Investors.

131. As a result, the Receiver was damaged for the Defendants' aiding and abetting of fraud.

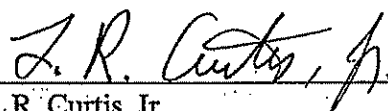
#### **PRAYER FOR RELIEF**

WHEREFORE, the Receiver prays for judgment against the Defendants as follows:

1. For a judgment awarding the Plaintiff damages from the Defendants in an amount to be established at trial, believed to be in excess of \$7,500,000.00;
2. For pre-judgment and post-judgment interest to the fullest extent permitted;
3. For costs and attorneys' fees expended in this action; and
4. For such other and further relief as the Court may deem just and proper.

DATED this 18<sup>th</sup> day of December, 2010.

**MANNING CURTIS BRADSHAW  
& BEDNAR LLC**

  
\_\_\_\_\_  
L.R. Curtis, Jr.  
David C. Castleberry  
Attorneys for Receiver for FFCF Investors, LLC,  
Ascendus Capital Management, LLC and Smith  
Holdings, LLC

**Plaintiff:**

Wayne Klein

Court-Appointed Receiver for FFCF Investors, LLC, Ascendus Capital Management, LLC,  
and Smith Holdings, LLC

299 South Main, Suite 1300

Salt Lake City, UT 84111

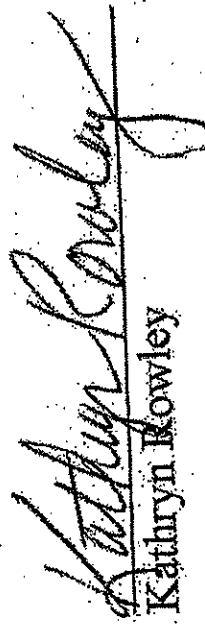
# EXHIBIT 1

000172

Whom It May Concern:  
Penson Financial Services/TouchTrade

Please DTC the securities listed below from my Penson Financial Services Account  
#15635303 to this account # **15638455** at Penson Financial Services.  
DTC# 0234

NFLX 2000 shares (short position)

  
Kathryn Rowley

10/28/03

# EXHIBIT 2

002742



**Penson Financial Services, Inc**

**FED WIRE REQUEST FORM**

Date: \_\_\_\_\_

Person Financial Account Number: \_\_\_\_\_

Person Financial Account Name: \_\_\_\_\_

Amount of Transfer: \_\_\_\_\_

**Recipient Bank Information:**

Bank ABA Number: \_\_\_\_\_

Bank Name: \_\_\_\_\_

Bank City and State: \_\_\_\_\_

SWIFT Number (Foreign Wires Only): \_\_\_\_\_

Country (Foreign Wires Only): \_\_\_\_\_

**Beneficiary Information:**

Customer's Name: \_\_\_\_\_

Customer's Bank Account Number: \_\_\_\_\_

Customer's Address (Optional): \_\_\_\_\_

**For Further Credit To:**

Name: \_\_\_\_\_

Account Number: \_\_\_\_\_

Customer Signature: \_\_\_\_\_

Customer Signature (Joint Account): \_\_\_\_\_

Office Approval: \_\_\_\_\_

NOTARY

# EXHIBIT 3





2 of 2 DOCUMENTS

In the Matter of: PENSON FINANCIAL SERVICES, INC., Respondent

File No. I01-062

STATE OF NEVADA  
SECRETARY OF STATE  
SECURITIES DIVISION

2001 Nev. Sec. LEXIS-3

July 11, 2001

[\*1] Charles E. Moore, Securities Administrator

**Opinion:**

**CONSENT AGREEMENT**

**THIS CONSENT AGREEMENT** (the "Agreement") is hereby voluntarily entered into by and between PENSON FINANCIAL SERVICES, INC. ("Penson") (hereinafter referred to as "Respondent"), and the ADMINISTRATOR OF THE NEVADA SECRETARY OF STATE, SECURITIES DIVISION (the "Administrator"), effective as of the date set forth below.

**WHEREAS**, Respondent, is a broker-dealer and has been licensed with the state of Nevada as such since on or about March 4, 1996; and

**WHEREAS**, Finance 500, Inc. ("Finance 500") is a broker-dealer and has been licensed with the state of Nevada as a broker-dealer since on or about May 5, 1995; and

**WHEREAS**, Respondent, is and has been acting as the clearing firm for Finance 500, Inc. during all times relevant to the matters contained herein; and

**WHEREAS**, Mr. Tony Dean Davis ("Davis") was a sales representative for Finance 500 and was licensed with the state of Nevada as such from on or about September 3, 1997 to on or about January 26, 2001; and

**WHEREAS**, between February, 2000 and January 2001, Mr. Davis caused to be made through, Respondent, twenty-eight (28) unauthorized third-party [\*2] wire transfers:

**WHEREAS**, during the eleven month period in which the twenty-eight (28) unauthorized third-party wire transfers were effected, twenty-four (24) were made to one bank account of Dale Brown; and

**WHEREAS**, the unauthorized third-party wire transfers were made to the bank account of Dale Brown from nine (9) unrelated customer accounts held at Respondent, for and on behalf of customers of Finance 500; and

**WHEREAS**, Respondent, performed the twenty-eight (28) unauthorized third-party wire transfers, for and on behalf of customers of Finance 500, based on faxed copies of the "Fed Wire Request Form" transmitted by Tony Davis from the Las Vegas, Nevada office of Finance 500, inasmuch as while Respondent's policies and procedures manual did require the signature of a branch office representative of Finance 500, it did not require the original request form to be sent for examination prior to effecting the transfers, and did not require the authorization of a principal of Finance 500; and

**WHEREAS**, the above listed twenty-eight (28) third party wire transfers represent an aggregate of \$ 3,050,000 being wired from the accounts of customers of Finance 500 to third parties [\*3] without the knowledge or consent of the owners of the accounts; and

**WHEREAS**, the actual loss to customers of Finance 500 as a result of the twenty-eight (28) wire transfers was \$ 2,040,000; and

**WHEREAS**, the policies and procedures of Respondent, required that all third-party wire transfer requests be signed by the customer and a representative of the branch office from where the transfer request originated and that it be notarized, and Davis had, in fact, apparently forged the signatures of the customers of Finance 500 and placed unlawful notarizations on the Fed Wire Request Forms; and

**WHEREAS**, based on the above-referenced unauthorized third party wire transfers, the Administrator Issued an Order suspending the sales representative license of Mr. Davis on January 31, 2001.

**WHEREAS**, Respondent, on or about January 29, 2001, following its discovery of the unauthorized wire transfers, voluntarily amended its policies and procedures manual to require delivery of an original transfer request form to Respondent before transfers may be effected in a customer account and, additionally, to provide that letters confirming the customer's knowledge of wire transfer and check [\*4] requests be transmitted by Respondent to the customer; and

**WHEREAS**, Respondent, has cooperated fully with the Administrator and other governmental regulatory authorities in addressing the acts of Davis in effecting the unauthorized wire transfers and amended its policies and procedures manual on a voluntary basis.

**NOW THEREFORE**, in order to resolve the issues raised herein and solely for purposes of settlement of those issues, the undersigned parties, without resort to legal adjudication of any issue of fact or law raised herein, agree as follows:

**1. Voluntary Execution of Agreement and Waiver of Certain Rights.** Respondent acknowledges that this agreement is being entered into voluntarily and that it understands that it is waiving certain rights as set forth in the Waiver of Hearing attached hereto as Exhibit A.

**2. Cooperation with the Division.** Respondent agrees to cooperate fully with the Division in the investigation, prosecution or any other legal action that may be initiated or pursued against any other person relating directly or indirectly to the subject matter of this Agreement. Full cooperation by Respondents pursuant to this Agreement shall not require Respondents [\*5] to waive any legally recognized privilege or constitutional right. Respondent, will supply the Division with the records requested, or state, in writing that such records are not available and why such required records were not properly maintained.

**3. Compliance with the Nevada Securities Act.** Respondent, agrees to abide by all statutes and regulations of the Nevada Securities Act, *NRS 90.211 et. seq.* and NAC Chapter 90.

**4. SUPERVISION.** Respondent, agrees to maintain and reasonably follow written policies and procedures, including providing names of designated supervisors at Penson and related authority and responsibility.

**5. Reimbursement of Investigative Costs and Rescission.** Respondent submits herewith a check made payable to the Secretary of State in the amount of fifty thousand dollars (\$ 50,000) as reimbursement for the Division's costs of investigation, and as a civil penalty. The entire sum is to be credited to the Division's revolving account.

**6. Restitution to Customers.** Respondent, agrees to offer restitution to all customers of Finance 500 who had money wired from their accounts to third parties without their knowledge and/or consent. The offer [\*6] shall include repayment of any and all monies transferred, wire transfer fees, margin interest arising because of the wire transfers, and interest at the legal rate. Respondent agrees to make these offers of restitution, if it has not already done so, within sixty (60) days after this Consent Agreement is signed and accepted by the parties hereto. With respect to customers of Finance 500 who accept the offers of restitution in the manner prescribed in this paragraph 6, Respondent shall, within thirty (30) days after a customer's acceptance of such offer:

a. In cases where the customer's account can be adjusted, do so to provide restitution,

b. In cases where the account is closed, or it is otherwise impractical to accomplish restitution by adjusting the customer's account, mail a check to the customer for the amount of the restitution.

Respondent may enter into appropriate settlement agreements with all customers who accept the offers of restitution as outlined herein.

**7. Customer Involvement in Scheme.** Should Respondent find that any customer who lost money through the third party wire transfers was involved in the scheme or benefited in an unknown manner from the scheme, [\*7] Respondent, upon proper showing to the Division may request that said customer not receive restitution. The Division, upon receipt of credible evidence that a customer was involved in or received an unknown benefit from the third party wire transfers, may allow Respondent to remove the customer from the restitution requirement or reduce the amount of the restitution by the amount of the benefit. Respondent, recognizes that this determination is at the discretion of the Division, and that there must be credible evidence of culpability and/or benefit.

**8. Subrogation.** Respondent, may require clients receiving restitution of funds to subrogate their claims against Finance 500 and/or Davis or others as a condition of restitution.

**9. Access to Records.** Respondent shall provide the Division reasonable access to all records relating to the business of Respondent and or Finance 500.

**10. Consideration.** In consideration of the above, the Division agrees that no action other than as set forth in this Agreement shall be taken by the Division against Respondent or respondent's employees in connection with the subject matter of this Agreement; provided however, should the Respondent [\*8] fail to comply with the terms of this Consent Agreement in any material respect, this Consent Agreement shall become null and void.

**11. Binding Effect.** This Consent Agreement shall be binding upon and inure to the benefit of each party hereto, Respondent and its respective successors and permitted assigns. Except as provided herein, nothing in this Consent Agreement, express or implied, is intended or shall be construed to give any person other than the parties hereto any right, remedy or claim under or by reason of this Consent Agreement.

**12. Entire Agreement; Amendment.** This writing constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any and all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification or amendment to this agreement shall be binding unless executed in writing by each of the parties hereto.

**13. Headings.** The paragraph headings contained in this Consent Agreement are for reference purposes only and shall not effect, in any way, the meaning or interpretation of this Agreement.

**14. Limitation of Agreement.** Irrespective of the above, it is understood [\*9] that in the event any other agency or authority commences any action in connection with any information obtained by the Division against Respondent, the Division may assist in such actions as authorized by law. It is further understood that this Agreement applies only to the activities of Respondent, and to no others.

**15. Effective Date.** This Consent Agreement shall be effective as of the date on which it is accepted by the Administrator as set forth below his signature hereto.

Signature

Print Name

For and on behalf of Penson Financial Services, Inc.

Attachment:

EXHIBIT A

**WAIVER OF HEARING**

I, Daniel P. Sm, acting in my capacity as [ILLEGIBLE WORD] of Penson Financial Services, Inc., and being of sound mind and body, hereby knowingly and willfully execute this Waiver of Hearing as attached to the CONSENT AGREEMENT ("Agreement") between Penson Financial Services, Inc. and the Nevada Secretary of State, Securities Division (the "Division"). I recognize that it is within the rights of Penson Financial Services, Inc. to request and be granted a hearing on the matters consented to in this Agreement. I further recognize that should Penson Financial Services, Inc. request a hearing [\*10] it could be represented by counsel, call witnesses, present evidence in its defense, and cross-examine those who would testify against it.

2001 Nev. Sec. LEXIS 3, \*

By signing this Waiver of Hearing, I, Daniel P. Sm, for and on behalf of Penson Financial Services, Inc. knowingly waive all rights to a hearing which would be allowed by the Nevada Uniform Securities Act, *NRS 90.211 et. seq.* ("Act"). Further, I, on behalf of Penson Financial Services, Inc. waive all rights to appeal the waiver of these rights.

I hereby swear that I have signed the attached Agreement of my own free will for and on behalf of Penson Financial Services, Inc. and that it has been advised of all its legal rights, including the rights to counsel and a hearing on the merits of the referenced matter. I attest that I have had an opportunity to read the attached Agreement, and that I understand all portions thereof. I swear that I was in no way coerced or forced to sign the Agreement of this Waiver of Hearing for and on behalf of Penson Financial Services, Inc. by either the Division or any third party.

Signature

Please print

For and on behalf of Penson Financial Services, Inc.

# **EXHIBIT “B”**

ORIGINAL

---

R. WAYNE KLEIN,

Plaintiff,

-against-

PENSON FINANCIAL SERVICES,

Respondent.

---

Transcription Agency: Laraine M. Zizza

ADL Transcription Services

3132 Union Boulevard

East Islip, NY 11730

(631) 277-7900 Fax (631) 277-7907

1 Please note that all names were spelled phonetically.

2 THE COURT: Okay. Let's go  
3 forward in the Matter of R. Wane Klein as  
4 receiver versus Penson Financial Services  
5 and others 100924572. Will those who  
6 (inaudible) appearances please do so for  
7 the record.

8 MR. CASTLEBERRY: Good  
9 afternoon, Your Honor. David Castleberry  
10 for court appointed receiver R. Wane  
11 Klein.

12 MR. HANCHET: Your Honor, my  
13 name is Mark Hanchet with the law firm  
14 Mayer Brown for Penson Financial  
15 Services.

16 MALE SPEAKER: (Inaudible) with  
17 Holland and Hart also for Penson

18 THE COURT: All right,  
19 counselor, you may proceed.

20 MR. CASTLEBERRY: Your Honor,  
21 would you like me to go to the podium?  
22 Your Honor, this is --

23 THE COURT: Would you mind if I  
24 ask questions during this proceeding?

25 MR. CASTLEBERRY: I would

1 welcome that, Your Honor. This is  
2 Penson's motion to stay the proceedings  
3 and to compel arbitration. I don't want  
4 to repeat what's set forth in our papers.

5 THE COURT: I've been through  
6 everything on more than one occasion  
7 (inaudible) the pleadings (inaudible)  
8 (inaudible) and I think it comes down  
9 really to this kind of reversed  
10 derivative action, right?

11 MR. CASTLEBERRY: Well, I'm not  
12 sure what you mean by that, Your Honor,  
13 but there is a couple of interesting  
14 issues to highlight here which I'm happy  
15 to do.

16 THE COURT: (Inaudible) that  
17 interest me the most is the notion that  
18 there are nine positive actions, six of  
19 which are asserted against your client,  
20 three of which are asserted against the  
21 other company, Of the fours -- of the  
22 four of those six, four are asserted in  
23 the name of the receiver and each of  
24 those have a paragraph in the complaint,  
25 and I've marked them that says Penson's



1 actions caused damages to the investors  
2 and the receivership entities.

3 MR. CASTLEBERRY: That is what  
4 the complaint says, Your Honor. I  
5 certainly agree with that. I would  
6 disagree with the notion that the six can  
7 be biforcated -- well, or split four and  
8 two the way that you've outlined but  
9 certainly that's the receiver's position.  
10 Are you -- do you want me to agree two  
11 and then four, that's what I was going to  
12 do. You just want to talk about the  
13 four? Okay.

14 THE COURT: Right now I just  
15 want to talk about the four and when I  
16 talk about this reversed derivative  
17 action, it seems to me that what you're  
18 saying is any claims that the company has  
19 are derivative of claims of the investors  
20 have versus a typical derivative action  
21 where the claims actually belong to the  
22 corporate entity and it's the individual  
23 that's seeking to prosecute them.

24 MR. CASTLEBERRY: Well, I hadn't  
25 or I didn't intend or I hadn't thought of

1           it that way, Your Honor, but I guess  
2           that's absolutely right. The way I look  
3           at it is if you parse the complaint and  
4           look at what's really going on here, what  
5           the receiver is trying to do is recover  
6           seven point four million dollars that  
7           were allegedly transferred improperly;  
8           fraudulently transferred, you know, or  
9           whatever -- whatever the theories are --  
10          transferred out of the investors accounts  
11          over to this F. F. C. F. entity.

12                       THE COURT: But the receiver's  
13          alleging damages. Here's my issue. The  
14          receiver's alleging independent damages.

15                      MR. CASTLEBERRY: I understand  
16          that, Your Honor, and what I want to  
17          point out to you and maybe you're already  
18          there, is that doesn't make any sense  
19          because the seven point four million  
20          dollars that are asserted here, in the  
21          complaint as the relief requested is the  
22          return of the funds that went to F. F. C.  
23          F. back to the investors. Well, if it's  
24          going back to the investors, I am at a  
25          loss to understand how it is that the

1 receiver has any standing whatsoever to  
2 pursue these claims except for through  
3 the assignment which --

4 THE COURT: I think I'd actually  
5 like (inaudible) Mr. Castleberry.

6 MR. CASTLEBERRY: I understand,  
7 Your Honor.

8 THE COURT: That's my primary  
9 concern. I hope you don't mind me asking  
10 questions either. I've always  
11 appreciated the questions rather than the  
12 sitting here like a bump on a log.

13 MR. CASTLEBERRY: It's nice to  
14 have a back and forth discussion rather  
15 than guess what --

16 THE COURT: So my concern is  
17 this notion that while you have pleaded  
18 those four, six causes of action that  
19 there's distinct damage to the investors  
20 and to the entities that are in  
21 receivership, how is that so?

22 MR. CASTLEBERRY: (Inaudible.)

23 THE COURT: I'll put you in the  
24 hot box.

25 MR. CASTLEBERRY: All right.

1 THE COURT: My wife would call  
2 it the penalty box.

3 MR. CASTLEBERRY: Hopefully it's  
4 not the penalty box right now.

5 Well, I mean where we're at,  
6 Your Honor, there are three entities, the  
7 receivership entities, those investors  
8 that have assigned claims and also those  
9 investors that are allowable claims  
10 meaning when the receivership --

11 THE COURT: Talk about maybe  
12 first the assigned claims.

13 MR. CASTLEBERRY: Okay.

14 THE COURT: All right. How in  
15 the world do you not arbitrate those?

16 MR. CASTLEBERRY: As far as the  
17 assigned claims go, in typical fashion,  
18 those would need to be arbitrated. But  
19 this is a special case, this is equity  
20 receivership. Courts are broad  
21 discretion when dealing with equity  
22 receiverships.

23 THE COURT: Have you found a  
24 single case where in the (inaudible)  
25 where a court (inaudible) dealing with an

1 equitable receivership was allowed to set  
2 aside an arbitration clause that was  
3 (inaudible) by the F. A. A.

4 MR. CASTLEBERRY: We have  
5 looked --

6 THE COURT: That case doesn't  
7 exist does it in.

8 MR. CASTLEBERRY: No, the court  
9 also recognize that it's sparse -- the  
10 case law is sparse. The S.C.C. V.  
11 Harding (sic) recognizes we're not gonna  
12 come up with an (inaudible) situation  
13 equity receivership case because they're  
14 fact intensive, they're complex, they're  
15 convoluted as far as finding analysis  
16 cases, we're not gonna find any. But  
17 there is a --

18 THE COURT: There's a plethora  
19 of cases that talk about the  
20 extraordinary equitable powers that the  
21 Court enjoys in this situation.

22 MR. CASTLEBERRY: That's right.

23 THE COURT: But candidly, have  
24 you seen one where a court has been able  
25 to disregard a claim and I take it you

1 don't argue the F. A. A. is not a likable  
2 to those claims. You, you, you would  
3 invoke equity.

4 MR. CASTLEBERRY: We invoke  
5 equity. The law and equity collide,  
6 equity needs --

7 THE COURT: You don't tell me  
8 they're not in commerce. You don't make  
9 any of the other arguments you just  
10 you're -- I'm candidly struggling with  
11 that on as much as I would just you know  
12 look you usurp as much authority as  
13 possible, I mean, I think that I would be  
14 reversed in ten seconds if I were to go  
15 that far.

16 MR. CASTLEBERRY: Well, I mean,  
17 the case law would give you support, Your  
18 Honor, for setting aside contract  
19 based defenses, contract based claims.  
20 There's the recent case that the Bodman  
21 case that we cited to in our paper where  
22 the Court said look statute of  
23 limitations contract based defenses don't  
24 apply here. We really need to look at  
25 the equities. We need to look at what

1 makes sense and here as it as in S. C. C.  
2 v. Harding, there's not a lot of case  
3 law. The Court has broad discretion and  
4 really the underlying principle in these  
5 cases is that we need efficiency, we need  
6 the receivership to be --

7 THE COURT: I'm concerned with  
8 the F. A. A. I agree with you entirely  
9 otherwise entirely but it dictates from  
10 the F. A. A. the limitation on the state  
11 powers that's really --

12 MR. CASTLEBERRY: Well, it's not  
13 a surprise today coming here, Your Honor,  
14 that's where you're struggling with and I  
15 mean, in the (inaudible) papers we  
16 address those that the Court has the  
17 authority, has the discretion to exercise  
18 it's equitable powers to make sense in  
19 the situation rather than bifurcate two  
20 track litigations. Let's just decide --

21 THE COURT: Look it makes sense.  
22 I'm not gonna tell you it doesn't make  
23 sense.

24 MR. CASTLEBERRY: Okay, okay.

25 THE COURT: If I felt like I

1           could do it, I would do it. But I  
2           actually think I'm constrained in this  
3           particular case by the F. A. A. with  
4           respect to those I think that these two  
5           exactly what the courts are trying to  
6           avoid. Right? Mr. Castleberry I wish  
7           -- if there's a case out there where some  
8           court has in this context been able to in  
9           a state court setting set aside an  
10          arbitration clause, I'd really be  
11          interested in that case.

12                       MR. CASTLEBERRY: Well,--

13                       THE COURT: I'm sure you looked.

14                       MR. CASTLEBERRY: We have  
15          looked, we've gone through the hay stacks  
16          we've looked for those needles and we  
17          haven't come up with anything but I mean  
18          the point is this situation doesn't come  
19          up all the time this is the opportunity  
20          for the court to do what makes sense. I  
21          mean you're saying the argument makes  
22          sense you're following of the law and so  
23          with as far as the two track litigation  
24          this is --

25                       THE COURT: Then there's that



1 (inaudible) language from the F. A. A.  
2 right? Master (inaudible) the F. A. A.  
3 not only declared a national policy  
4 favoring arbitration but withdrew the  
5 power of the states to require a judicial  
6 court from the resolution of claims which  
7 the contracting party agreed to resolve  
8 by arbitration. I think I'm bound.

9 MR. CASTLEBERRY: Okay. Well,  
10 we --

11 THE COURT: I think I'm bound on  
12 this. As much as I'd like not to be  
13 because I do believe that it's gonna be  
14 all kinds of inefficiencies, it leads to  
15 potential for inconsistent rulings, all  
16 the mischief that we like to avoid, the  
17 equities cut seems to be in favor of  
18 (inaudible). I don't believe I have the  
19 ability to (inaudible).

20 MR. CASTLEBERRY: Well, we I  
21 mean, we respectfully abide by your  
22 court's decision we disagree with the  
23 analysis. We think you do are the power,  
24 the equitable power to grant the relief  
25 that we're requesting but we still have

1           those other four claims. So --

2                   THE COURT: You got the claims  
3           against Consillium by the way you moved  
4           for a default against Consillium but I  
5           don't think you provided a default  
6           certificate.

7                   MR. CASTLEBERRY: We need a  
8           fault to get a default certificate. I  
9           think we're already with that.

10                  THE COURT: Okay. On the other  
11           hand, which preliminarily, I think is  
12           also equally certain that the signator to  
13           (inaudible) to an arbitration agreement,  
14           you don't arbitrate, you're not bound by  
15           it. I think you're absolutely right  
16           about That. They counter that argument  
17           by what I are characterized as the  
18           reverse derivative claim.

19                  MR. CASTLEBERRY: Correct,  
20           correct, Your Honor.

21                  THE COURT: That's why I called  
22           you up here and then took you off some  
23           place else. My apologies.

24                  MR. CASTLEBERRY: It's all  
25           right.

1 THE COURT: And if you have, if  
2 you think you have another argument, I  
3 don't want to cut you off and this is  
4 preliminary so if you think you have  
5 another argument or a better argument you  
6 want to make on the F. A. A. and those  
7 two claims let's hear it.

8 MR. CASTLEBERRY: Okay. Okay:

9 THE COURT: If you think there's  
10 something I haven't considered.

11 MR. CASTLEBERRY: I mean,  
12 essentially, Your Honor, you have  
13 considered our arguments. I mean, as far  
14 as the case law directly on point there's  
15 nothing that we're about to find. The F.  
16 A. A. is statute just like the statute of  
17 limitations it's able to be set aside  
18 when the equities --

19 THE COURT: It's that darn  
20 supremacy clause isn't it?

21 MR. CASTLEBERRY: The supremacy  
22 clause is definitely something to --

23 THE COURT: If this were a  
24 state -- we're not talking about the  
25 Utah act are we?

1 MR. CASTLEBERRY: That's right.

2 THE COURT: We're not sitting  
3 here berating you about the Utah act.

4 MR. CASTLEBERRY: That's right.

5 Well --

6 THE COURT: I also those, I want  
7 to give you a full and fair opportunity.  
8 Look, I think the best thing -- I like  
9 what California does frankly and I've got  
10 a (inaudible) here where forty eight  
11 hours before the hearing you get  
12 preliminary ruling, this is I've  
13 considered it, I've gone through  
14 everything this is what I'm thinking you  
15 guys come on down you know what I'm  
16 thinking that's kind of what we're doing  
17 right now. I been through everything I  
18 keep an open mind I mean you won't be the  
19 first person to change my mind as I speak  
20 right in so if you think I'm missing  
21 something are rocks in my head you tell  
22 me.

23 MR. CASTLEBERRY: And I  
24 appreciate that, Your Honor, I think it's  
25 more efficient when you tell me here's

1           what I'm thinking, you tell the counsel  
2           here's what I'm thinking convince me  
3           where I'm wrong. I mean there's two  
4           tracks --

5                   THE COURT: If I missed  
6           something, if I haven't considered  
7           something, if there's an argument that  
8           you haven't made in your briefs and you  
9           want me to consider it, I'm all ears. It  
10          really comes down to the briefing  
11          question. General cases that are here  
12          abroad local authority the court  
13          receivership versus the character that  
14          the F. A. A. is really ripped this from  
15          state court hands. I think I'm siding  
16          with the defendant on that one.

17                   MR. CASTLEBERRY: Okay.

18                   THE COURT: Unless, again, you  
19          have anything else you want to offer.

20                   MR. CASTLEBERRY: At this time,  
21          no, Your Honor. I mean, I'd like a chance  
22          to confer with the receiver. Of course.

23                   THE COURT: Confer away.

24                   RECEIVER: Let it go.

25                   MR. CASTLEBERRY: All right.

1 All Right.

2 (Inaudible) to this situation I  
3 mean what Penson so going back to the  
4 four claims, what Penson is trying to do  
5 is take sledge hammer approach and pound  
6 the receivership entities into the  
7 (inaudible) into those investors who have  
8 allowed the claims.

9 THE COURT: (Inaudible.)

10 MR. CASTLEBERRY: Right. The  
11 sledge hammer is inappropriate. This is  
12 really to take it a little further to  
13 take it a little further a scalpel is  
14 needed to cut through the claims this is  
15 allowed by --

16 THE COURT: Do you have damages?  
17 Here's my question. You've plead -- is  
18 it pleaded or plead by the way? I've  
19 never decided what the correct English is  
20 here.

21 MR. CASTLEBERRY: I've looked  
22 that up and had arguments that --

23 THE COURT: I had a senior  
24 partner that insists it's pleaded.

25 MR. CASTLEBERRY: I would say

1           pleaded, Your Honor.

2                   THE COURT: All right pleaded.

3           I'm going with pleaded. You have pleaded  
4           in each of those four causes of actions  
5           distinct damages to the investors and to  
6           the receivership entities. What are the  
7           damages to the receivership entities that  
8           are distinct from the damages to the  
9           investors?

10                   MR. CASTLEBERRY: Well --

11                   THE COURT: How about we take  
12           that one by one, each cause of action in.

13                   MR. CASTLEBERRY: What we could  
14           do, Your Honor, I've actually prepared in  
15           conjunction with the client, we've looked  
16           at all of the claims and rather than  
17           focus on paragraph 84 or the actual  
18           claims for relief, if you want to go  
19           through the body of the complaint --

20                   THE COURT: I have been through  
21           the body of the complaint a couple of  
22           times so I'm looking at paragraphs if you  
23           want me to direct you to paragraphs 89.

24                   MR. CASTLEBERRY: Okay.

25                   THE COURT: 111, 127, and I'm

1 missing one I think -- and 97. Do I have  
2 the right four claims and the right --

3 MR. CASTLEBERRY: Yes, yes, you  
4 do, Your Honor. There's the aiding and  
5 abetting claims and the fraudulent  
6 transfer claims.

7 THE COURT: So let's take the  
8 first claim for relief Aiding abetting  
9 paragraph 89 Penson's actions caused  
10 damages to the investors the receivership  
11 entities. Are there damages caused by  
12 Penson as alleged that are distant to the  
13 receivership entities in that derivative  
14 of any damages to the investors?

15 MR. CASTLEBERRY: Yes, Your  
16 Honor, and the Denow versus (inaudible)  
17 cases is very helpful to understand how  
18 the receivership has the receivership  
19 entities have standing absent of any  
20 claims against the or any damages  
21 suffered by individual investors. One  
22 thing that's important to understand is  
23 when --

24 THE COURT: I'm not talking  
25 about absent though I'm talking about the



1 opposite. Not absent damages caused by  
2 (inaudible) investors but damage -- let's  
3 I think counsel's argument is that every  
4 damage you've asserted belongs to  
5 individual investors that's why I've  
6 characterized it as reversed derivative  
7 claim.

8 MR. CASTLEBERRY: So in this  
9 case a receiver (inaudible) as an F. F.  
10 C. F. both were ponzie schemes. The  
11 principles of the Ascendus and the  
12 principles of the F. F. C. F. committed  
13 waste fraud that actually harmed the  
14 companies. The companies as the case law  
15 says it scolds which is layman rape  
16 language the companies while they're  
17 controlled by the principles are zombies  
18 bees they're complicit in the fraud, the  
19 fraudulent transfers and everything else.  
20 When a receiver is appointed, the zombies  
21 are kicked out, the bad actors are kicked  
22 out, then the companies have the right to  
23 sue the bad actors, to sue the  
24 individuals who aided and assisted those  
25 bad actors because what happened was when

1           you are a upon see scheme underpaid  
2           investors are torte creditors and they  
3           are claims against the receivership  
4           companies. There are also overpaid  
5           those investors do not necessarily have  
6           claims, if fact they would be the subject  
7           of claims brought by the receiver on  
8           behalf of the receivership estate. So  
9           there's a receivership estate, there are  
10          torte creditors of that estate the  
11          receiver needs to go about filing  
12          lawsuits, making demands, gathering  
13          assets in the best way he can to make  
14          whole as much as possible these torte  
15          creditors. So there -- you can't say  
16          that an investor is giving these claims  
17          to the receivership entity because there  
18          are overpaid and underpaid investors. In  
19          fact, of the assignments some of these  
20          (inaudible) are not allowable claimants  
21          meaning that they were not underpaid  
22          investors so when there is a recovery  
23          from this case, those proceeds would go  
24          to the under paid investors as distinct  
25          separate from the over paid investors.

1 And so the case that I mentioned earlier  
2 it's a ninth circuit case just recently  
3 decided not too long ago Denow versus  
4 (inaudible) 533 F third 762 and really  
5 the issue there was standing. One of the  
6 investors what was being sued said  
7 there's no standing here because any  
8 recovery you get you're just gonna give  
9 to other Investors. The Court cited to  
10 Skoals cited that wonderful and  
11 descriptive evil zombie language they  
12 held the receiver has standing to bring  
13 the suit because although the losing  
14 investors will ultimately benefit from  
15 the asset recovery, the receiver is in  
16 fact suing to address injuries that  
17 Wellmanbrock, that was the company that  
18 was running the ponzie scheme that  
19 Wellmanbrock suffered when it's managers  
20 caused Wellmanbrock to commit waste  
21 fraud. So here I mean we're not really  
22 debating whether they were ponzie schemes  
23 that's pleaded with -- in great detail in  
24 the complaint. There were ponzie  
25 schemes.

1 THE COURT: Okay, but there's  
2 -- so that describe though injury to the  
3 corporate entity there. Waste and fraud  
4 right what is it here, the same?

5 MR. CASTLEBERRY: Waste and  
6 fraud. Also, Yeah, and as set forth in  
7 Aiding and abetting.

8 THE COURT: Waste fraud.

9 MR. CASTLEBERRY: Yeah. So in  
10 this case the damages are the moneys that  
11 the receiver need to obtain and to  
12 recover in order to pay out to the torte  
13 creditors, the investors. In this case  
14 if, Your Honor, would if I may have  
15 permission to approach.

16 THE COURT: You may, just share  
17 with opposing counsel first though.

18 MR. CASTLEBERRY: Copy of the  
19 complaint along with a spreadsheet.

20 THE COURT: The Denow case what  
21 was the specific case law that you cited  
22 that you were referring too?

23 MR. CASTLEBERRY: 776 and 777.  
24 The argument was advanced that the  
25 receiver really did not have standing

1           because he's really suing on behalf of  
2           the losing investors as opposed to the  
3           corporation. The Court said that's not  
4           the case. The receiver is suing on  
5           before of the corporate entities it's  
6           suing the bad actors, those who received  
7           fraudulent transfers those who committed  
8           waste fraud in order to bring assets into  
9           the receivership estate. An important  
10          point to consider, Your Honor, it's  
11          Penson's actions that caused an increase  
12          and exacerbated even created the  
13          opportunity to commit this fraud to  
14          create these poor creditors so to speak.

15                 THE COURT: All right. Well,  
16          tell me what you've given me.

17                 MR. CASTLEBERRY: What we've  
18          done, Your Honor, is gone through the  
19          body of the complaint and to look at the  
20          claim the specific actions by Penson and  
21          whether's there's an (inaudible)  
22          involved, whether there's an allowable  
23          claimant involved. Also the individuals  
24          who are subjects of the claim. So if  
25          Your Honor, could first turn to for

1 example 36, page 36, of the complaint  
2 you'll see that one of the problems one  
3 of the reasons that we're here today is  
4 because Penson transferred funds  
5 securities based on forged documents. One  
6 of the basic claims we have here is that  
7 if Penson would have followed it's  
8 compliance procedures manuals, if it  
9 would have followed it's federal  
10 regulation requirements, there would be  
11 been no opportunity to commit the waste  
12 fraud involved in this case. Also the  
13 fraudulent transfer. So for example in  
14 paragraph 36 it outlines allegations  
15 that Penson on transfers Funds securities  
16 based on forged documents. The forgeries  
17 were obvious. There were signatures that  
18 were cut and then sent into Penson that  
19 should have caused Penson to know that  
20 these forms are not legitimate if it  
21 would have followed it's own Requirements  
22 procedures there were transfers based to  
23 others on altered documents. There are  
24 some forms that were sent it becomes  
25 obvious as we get into the specific facts

1 documentation that they were altered  
2 there was -- I think there is one case  
3 where there was a signature sent to  
4 Pension where the signature is the same  
5 time after time after time. It's not  
6 properly verified. There's a missing G  
7 on each of the signatures. Pension also,  
8 basically what happened, Your Honor, at  
9 the beginning just to step back a little  
10 bit the perpetrators of the ponzie scheme  
11 (inaudible) said we will trade your  
12 Securities and accounts in Pension that  
13 are safe, that we cannot touch we'll get  
14 a commission based on the profits that  
15 we've earned in the trading. What  
16 happened was they traded and rather than  
17 realize profits they realized significant  
18 losses but they continued to report  
19 profits so they could get their  
20 commissions and so you are the account  
21 value in the Pension accounts steadily  
22 declining in value while the investors  
23 are receiving account statements from  
24 Ascendus that's increasing in value so  
25 the gap between reality what's reported

1 is growing into becoming more and more of  
2 a problem. The principles of Ascendus  
3 then say well, let's look for another  
4 scheme. Let's transfer this money into  
5 another investment opportunity but that  
6 would have been under the requirement of  
7 Pension investors need to send in money  
8 themselves they need to receive money  
9 themselves they would have received the  
10 money directly to themselves it would  
11 have been readily apparent that there's a  
12 fraud being perpetrated and so the  
13 principles of Ascendus who are also the  
14 principles of F. F. C. F., have the money  
15 sent to companies either controlled by  
16 them or by Ascendus and then onto this  
17 next -- there was really a ponzie scheme  
18 that would eventually collapse did not --  
19 then in the wake of the litigation a  
20 receiver was appointed to try to get  
21 moneys on behalf of those who invested  
22 more than they Received so in this case  
23 if you go through the analysis of the  
24 (inaudible) claims against Pension you'll  
25 see that Pension received moneys to



1           inflate investors accounts they would see  
2           that they had Money then the money would  
3           be taken out so these are fraudulent  
4           transfers sent from the company to Penson  
5           no reasonable (inaudible) value was given  
6           to the company. This is it's against the  
7           policies and procedures allowed by  
8           Penson. And so because of this Penson is  
9           complicit with as far as the securities  
10          violations that occurred, they were false  
11          statements made by the principles of the  
12          company when they sold traded securities  
13          on behalf of the investors. Penson knew  
14          or should have known that it aided and  
15          abetted in those security violations. In  
16          fact, it will have the burden of proof  
17          that it could not have known when this is  
18          ultimately tried. So this is a claim  
19          going back to, I mean, why we're here  
20          today, this is a claim when these  
21          fraudulent transfers were going out, this  
22          is harm caused to receivership companies  
23          they are the right to sue Penson to get  
24          this money back. Whether it's going to  
25          someone that's assigned a claim or not,

1           it's really doesn't matter because the  
2           receiver independent of any assigned  
3           claims, has the authority, has the  
4           ability has the standing to assert claims  
5           on behalf of the receivership because  
6           they were damaged.

7                     THE COURT: Was it paragraph  
8           two, paragraph two says the receiver is  
9           authorized to institute legal proceedings  
10          for the benefit of the receivership  
11          entities their investors and creditors.  
12          These are -- these claims only brought on  
13          behalf of the receivership entities not  
14          on behalf of the investors creditors; is  
15          that right?

16                    MR. CASTLEBERRY: I mean, that's  
17          right any recovery goes to the  
18          receivership estate. There's a claims  
19          process that has been set up the moneys  
20          will be distributed according to the  
21          claims process that's been set up by this  
22          court. But as far as the claims it's  
23          independent of any investors, independent  
24          of any --

25                    THE COURT: Do any individual

1 investors have claims against the  
2 receivership entities?

3 MR. CASTLEBERRY: The torte  
4 creditors, yeah, absolutely.

5 THE COURT: For their loss?

6 MR. CASTLEBERRY: For their  
7 loss.

8 THE COURT: The receivership  
9 (inaudible) try to gather as much money  
10 on behalf of those entities as possible?

11 MR. CASTLEBERRY: Correct.

12 THE COURT: Then will distribute  
13 those moneys as appropriate.

14 MR. CASTLEBERRY: There's a  
15 claims process that's been set up money  
16 has been distributed it's based on a pro  
17 rata approach and so as we receive  
18 recover more money, the money is again  
19 distributed to again those who have made  
20 claims that have been allowed by the  
21 receiver by the Court. So in this case,  
22 Your Honor, the damages are evident. They  
23 are real and the damages suffered by  
24 (inaudible) F. F. C. F. would not have  
25 happened but for Penson's role in the

1           entire scheme.

2                   THE COURT: Right. Let me hear  
3           from opposing counsel.

4                   MR. HANCHET: Your Honor, it  
5           (inaudible) and I do mean that genuinely,  
6           you asked counsel to explain how the  
7           receivership entities were injured by  
8           Penson's misconduct and I don't think  
9           that an answer was given. Certainly  
10          there was no pointing to any portion of  
11          the complaint that states that moneys as  
12          Mr. Castleberry just said, I wrote it  
13          down, were sent from the company to  
14          Penson. If that allegation is in the  
15          complaint I'd like to see it because  
16          that's not what the complaint is about,  
17          Your Honor. The complaint in my view can  
18          be distilled in paragraphs 8 and 9. The  
19          brief overview of what the receiver  
20          alleges is at the instruction of Taylor  
21          Ascendus in paragraph 8, Your Honor,  
22          Penson took money from investor accounts  
23          that's already important. Penson took  
24          money from investor accounts and sent it  
25          to Ascendus and other entities associated

1 with a ponzie scheme. So Penson took  
2 moneys from these investors, it didn't  
3 take money from the receivership  
4 entities. It took money from the  
5 investors. Paragraph 9 in early 2006  
6 Penson withdrew more than seven point  
7 four million of funds directly from the  
8 brokerage accounts of customers sent this  
9 money directly to bank accounts  
10 controlled by Taylor and his associates.  
11 Again, it's very clear what's going on  
12 here. Withdrew more than seven point  
13 four million from the brokerage accounts  
14 of customers, not from the receivership  
15 entities if I can ask Your Honor to flip  
16 forward to the (inaudible) for relief on  
17 page 38 when are they looking for? For a  
18 judgment awarding the plaintiff damages  
19 in the amount believed to be in excess of  
20 seven point five million. The exact same  
21 amount here. There's no damage to the  
22 receivership entities. The moneys are  
23 sitting in people's accounts. These  
24 fraudsters say send the money over here,  
25 they do, the allegations are that Penson

1 was complicit in those phoney  
2 (inaudible) --

3 THE COURT: Isn't the answer  
4 then that the receiver doesn't have  
5 standing to prosecute these those claims?

6 MR. HANCHET: Yes, Your Honor.  
7 And --

8 THE COURT: That's a different  
9 -- that's a different issue.

10 MR. HANCHET: Yes, Your Honor

11 THE COURT: That's a different  
12 issue.

13 MR. HANCHET: But I'm trying to  
14 cut through it, Your Honor, because I  
15 mean I get that and that would be a two  
16 step process if can I hypothesize for a  
17 moment against my own interest?

18 THE COURT: Go ahead.

19 MR. HANCHET: Against my own  
20 interest if, Your Honor, were to decide  
21 that with respect to two claims there are  
22 they are to be arbitrated there are four  
23 more over here we would file a motion  
24 before Your Honor seeking to dismiss for  
25 lack of Standing.

1 THE COURT: That's exactly what  
2 I would expect.

3 MR. HANCHET: Okay.

4 THE COURT: Or the other thing  
5 that I'm thinking is going to happen is  
6 they pled damages on behalf of the  
7 investors the receivership entities is  
8 I'm worried about do we ends up where we  
9 split the claims those four claims to the  
10 extent that you, you pled them against  
11 for damages against the investors would  
12 are to be arbitrated and damages for the  
13 receivers for against the receivership  
14 entities would proceed but you pled both  
15 in each of those four paragraphs, you've  
16 asked for damages for both.

17 MR. CASTLEBERRY: We would not  
18 be splitting the cause of action, I mean,  
19 the cause of action is clear that has  
20 been assigned is a breach of contract  
21 claim it's a contract more as these are  
22 (inaudible) claims, fraudulent transfers  
23 (inaudible) just to respond, I mean, if I  
24 may as far as that there's no allegations  
25 that Penson Septembers deposits from

1 Ascendus directly to boost the value of  
2 customer accounts, those allegations are  
3 clear in paragraph 56, 57, 58, there is a  
4 chart on page 22 of the complaint that  
5 out lines this and these were then also  
6 in paragraph 60 and 61 there were  
7 fictitious deposits in customer accounts  
8 so Ascendus to boost the value of the  
9 account holders value of the amount of  
10 money in the account holders fund at  
11 Penson was rather than putting money in  
12 itself was receiving money directly from  
13 Penson which -- was the Penson account  
14 holder were told that Penson would only  
15 accept funds for deposit into customer  
16 accounts from an account having the same  
17 name as a Penson brokerage account and  
18 the third party checks would not be  
19 accepted in this case that's exactly what  
20 happened. Third party accounts --  
21 checks -- were accepted and that means  
22 to paint a broad brush these fraudulent  
23 transfers need to be returned and they  
24 need to be --

25 THE COURT: Are the damages



1           caused when you look at paragraph 89  
2           Penon's actions caused damages to the  
3           investors the receivership entities, are  
4           they coextensive? Are they one in the  
5           same? (Inaudible).

6                     MR. CASTLEBERRY: No, they're  
7           not -- no.

8                     THE COURT: What is the damage  
9           to the investor under the first claim to  
10          relief -- for relief that is distinct  
11          from the damage to the receivership  
12          entity?

13                    MR. CASTLEBERRY: Well, I mean,  
14          it depends on the investor that we're  
15          talking about and it depends -- so the  
16          investors are all of the individuals that  
17          are invested with these companies.

18                    THE COURT: Okay.

19                    MR. CASTLEBERRY: Some are over  
20          paid, some are under paid. Not all of  
21          them have damages resulting from the  
22          fraud which was committed by Taylor and  
23          Smith the principles of Ascendus and F.  
24          F. C. F. Where as the receivership  
25          entities they also have a claim they have

1           been damaged by the actions of Penson in  
2           connection with Taylor and --

3                   THE COURT: I'm not asking a  
4           very good question. Is the nature of the  
5           damages different when we're talking  
6           about the investors in paragraph 9ne then  
7           the measure of damages that we're talking  
8           about the receivership entities?

9                   MR. CASTLEBERRY: In paragraph  
10          9, Your Honor?

11                  THE COURT: Sorry. 89.

12                  MR. CASTLEBERRY: The analysis  
13          would be the same, Your Honor.

14                  THE COURT: So the exact same  
15          -- Penson's actions caused damage to the  
16          investors you would say the exact same  
17          damages caused to the investors is the  
18          exact same damages caused to the  
19          receivership entities.

20                  MR. CASTLEBERRY: Well, the  
21          amount of damages would be different, the  
22          analysis would be similar. Each investor  
23          is damaged on his own behalf to --

24                  THE COURT: We're talking about  
25          in total not -- I mean, I can understand

1           how one individual investor may have  
2           gained money and is on a pro rata basis  
3           asked to make a contribution (inaudible)  
4           they loss. I understand that. But at  
5           the end of the day, okay. I understand  
6           what you're saying, okay.

7                     MR. HANCHET: Well, Your Honor,  
8           I can only deal with the complaint.  
9           Obviously, we're constrained by what's in  
10          the complaint. If you read the  
11          complaints paragraphs 8 and 9 couple that  
12          with what's in 84 notwithstanding what  
13          Mr. Castleberry just said there's  
14          absolute coextensiveness (sic) if that's  
15          a word, between the damages allegedly  
16          suffered by the investors -- I frankly  
17          don't see how the receivership --

18                    THE COURT: If it's not a word  
19          let's declare it one now since I don't  
20          have power under the F. A. A. to make  
21          this (inaudible) power today.

22                    MR. HANCHET: Your Honor, you  
23          know I was taught early in law school  
24          just to sit down on your head. I -- I'm  
25          gonna do that. We can talk about the F.

1           A. A. but I disagree with some of your  
2           remarks that's all I'll say.

3                   THE COURT: Well, tell me what  
4           you don't agree with.

5                   MR. HANCHET: Well, only that  
6           this is gonna result in an inequitable  
7           place or this is going to put us in an  
8           inequitable place, I disagree. The  
9           parties agree by contract. That's what's  
10          underlying the F. A. A. the legislature,  
11          you know, it's really important in this  
12          country to have arbitration. It's  
13          important for parties to take the burden  
14          off of courts. If --

15                   THE COURT: If I said  
16          inequitable I misspoke. I'm talking  
17          about inefficient.

18                   MR. HANCHET: I also disagree  
19          with that Your Honor, because -- I  
20          understand where you're coming from if  
21          this were a different case, of course, I  
22          would agree wholeheartedly but in this  
23          case the point I was getting around to  
24          making a few minutes ago was these other  
25          four claims that were hanging up there

1 are no different from the first two. I  
2 think that's (inaudible) clear from the  
3 allegations in paragraphs 8 and 9 and 84.  
4 Now, it, it when I said before we can  
5 avoid the charades, well it not a charade  
6 we can avoid the motion before Your Honor  
7 to dismiss by simply here now saying well  
8 Mr. Castleberry with all do respect not  
9 to tell you what to do but these other  
10 four claims are really no different. You  
11 haven't asserted independent damages to  
12 receivership entities. The only way the  
13 receivership entities can collect a dime  
14 under this is through these assignments.

15 THE COURT: The thing is they  
16 have asserted under the complaint  
17 independent damages to the receivership  
18 entities. Now whether it's a different  
19 story whether they can prove them or not  
20 but if you're saying have they pleaded  
21 them, they are pleaded them. That's why  
22 I marked those paragraphs.

23 MR. HANCHET: Well, I understand  
24 Your Honor, with all do Respect, and I  
25 know it was not binding in this court

25 circuit I mean, so the seventh circuit --

1 the ninth circuit relying on the seventh  
2 circuit.

3 MR. HANCHET: Right but even the  
4 seventh circuit is split in various ways  
5 it's a fascinating issue quite frankly  
6 and I practice mostly in the second  
7 circuit mostly it's going the other way.  
8 The Supreme Court, I'm sorry, the New  
9 York Court of Appeals just ruled and said  
10 a couple of weeks ago what they call the  
11 Wagner rule in New York is Alive Well  
12 hasn't been changed by anything. But I  
13 submit that all of that discussion as  
14 intellectually enjoyable as that would be  
15 is unnecessary here, Your Honor.

16 THE COURT: I think we  
17 (inaudible).

18 MR. HANCHET: Okay. Well in my  
19 view, in my view, I respectfully submit  
20 that our motion should be granted in its  
21 entirety not just with respect to the two  
22 claims but also with respect to the four  
23 because they haven't pled how it is or  
24 explained how the receivership entities  
25 collect in their own right.

1 THE COURT: Nor do I think and,  
2 as I said you hit the nail on the head,  
3 we're not there at that point yet in this  
4 state. I'm gonna deny the motion with  
5 respect to those four claims knowing full  
6 well it's coming.

7 MR. HANCHET: Okay.

8 THE COURT: I mean I think that  
9 that's -- maybe frankly it's -- the  
10 standing issue is the first issue but  
11 then of course if we get into the  
12 standing issue you run the risk of  
13 whether there's a waiver issue by not  
14 having first raised the motion to compel  
15 arbitration so I'm not sure that  
16 (inaudible). We may be back you may be  
17 arbitrating one way or the other, I don't  
18 know. But I expect we'll be testing  
19 exactly as you articulated the standing  
20 issues.

21 MR. CASTLEBERRY: So, Your  
22 Honor, we'll await some kind of written  
23 -- you said at the beginning that you  
24 haven't made up your mind and things are  
25



1 THE COURT: No, no, no. I'm  
2 ruling from the bench.

3 MR. CASTLEBERRY: I see.

4 THE COURT: I'm ruling from the  
5 bench. I'm not waiting for -- so  
6 Mr. Castleberry you can graft an order  
7 that grants in parts and denies in part  
8 the motion to stay to compel arbitration.  
9 The motion to stay is denied. The motion  
10 to compel arbitration is granted with  
11 respect to the assign -- sixteen  
12 assignments is denied with respect to the  
13 individuals to the claims the torte  
14 claims the (inaudible) claims in which  
15 the receiver has alleged independent  
16 damage.

17 MR. CASTLEBERRY: Thank you.

18 MR. HANCHET: Thank you, Your  
19 Honor.

20 THE COURT: Do you want to just  
21 go ahead and set up a briefing and  
22 hearing schedule right now.

23 MR. CASTLEBERRY: I don't know  
24 if we need the court's involvement we've  
25 been very cooperative historically.

1 THE COURT: I just mean I can  
2 get you a date.

3 MR. CASTLEBERRY: Oh, that'd  
4 (sic) be wonderful. I don't (inaudible)  
5 work backwards we'll get you on the  
6 schedule right now if you know what's  
7 coming.

8 MR. CASTLEBERRY: It might be,  
9 could we submit something a short letter  
10 to Your Honor in a day or two after we  
11 confer and try put something out there --

12  
13 THE COURT: Either that or just  
14 collectively get me on the phone one from  
15 each side and I can and that way we can  
16 work through each other's schedules.

17 MR. CASTLEBERRY: Thank you,  
18 Your Honor.

19 THE COURT: Thank you very much.

20 MR. HANCHET: Your Honor, just  
21 so we can all be clear is (inaudible)  
22 schedule we're talking about the motion  
23 to dismiss based on lack of standing is  
24 that what we're --

25 THE COURT: Well, (inaudible)

1 exactly going to happen.

2 MR. CASTLEBERRY: Correct. I  
3 just wanted to make sure that we're all  
4 on the same page so this is the motion

5  
6 THE COURT: That's fine. I, I  
7 never mind. He's not limiting himself to  
8 that.

9 MR. CASTLEBERRY: Sure.

10 THE COURT: Okay. Thank you very  
11 much.

12 MR. CASTLEBERRY: Thank you,  
13 Your Honor.

14 MR. HANCHET: Thank you, Your  
15 Honor.

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CERTIFICATION

I, Laraine M. Zizza, certify that the foregoing transcript of proceedings, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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<p><b>A</b></p> <p>abetted 28:15  abetting 19:5,8 23:7  abide 12:21  ability 12:19 29:4  able 8:24 11:8 14:17  abroad 16:12  absent 19:19,25 20:1  absolute 38:14  absolutely 5:2 13:15  30:4  accept 35:15  accepted 35:19,21  account 26:20,23 35:9  35:10,13,16,17  accounts 5:10 26:12  26:21 28:1 31:22,24  32:8,9,13,23 35:2,7  35:16,20  accurate 47:5  act 14:25 15:3  action 3:10 4:17,20  6:18 18:12 34:18,19  actions 3:18 4:1 18:4  19:9 24:11,20 36:2  37:1,15 41:2  actors 20:21,23,25  24:6  actual 18:17  address 10:16 22:16  ADL 1:22 47:12  advanced 23:24  afternoon 2:9  Agency 1:21  ago 22:3 39:24 42:10  agree 4:5,10 10:8 39:4  39:9,22  agreed 12:7  agreement 13:13  ahead 33:18 44:21  aided 20:24 28:14  aiding 19:4,8 23:7  Alive 42:11  allegation 31:14 41:2  41:7</p>	<p>allegations 25:14  32:25 34:24 35:2  40:3  alleged 19:12 44:15  allegedly 38:15  allegely 5:7  alleges 31:20  alleging 5:13,14  allowable 7:9 21:20  24:22  allowed 8:1 17:8,15  28:7 30:20  altered 25:23 26:1  amount 32:19,21 35:9  37:21  analysis 8:15 12:23  27:23 37:12,22  answer 31:9 33:3  apologies 13:23  apparent 27:11  Appeals 42:9  appearances 2:6  applies 41:16  apply 9:24  appointed 2:10 20:20  27:20  appreciate 15:24  appreciated 6:11  approach 17:5 23:15  30:17  appropriate 30:13  arbitrate 7:15 13:14  arbitrated 7:18 33:22  34:12  arbitrating 43:17  arbitration 3:3 8:2  11:10 12:4,8 13:13  39:12 43:15 44:8,10  argue 9:1  argument 11:21 13:16  14:2,5,5 16:7 20:3  23:24  arguments 9:9 14:13  17:22  articulated 43:19</p>	<p>Ascendus 20:11 26:24  27:2,13,16 31:21,25  35:1,8 36:23  aside 8:2 9:18 11:9  14:17  asked 31:6 34:16 38:3  asking 6:9 37:3  assert 29:4  asserted 3:19,20,22  5:20 20:4 40:11,16  asset 22:15  assets 21:13 24:8  assign 44:11  assigned 7:8,12,17  28:25 29:2 34:20  assignment 6:3  assignments 21:19  40:14 44:12  assisted 20:24  associated 31:25  associates 32:10  authority 9:12 10:17  16:12 29:3  authorized 29:9  avoid 11:6 12:16 40:5  40:6  await 43:22  awarding 32:18</p> <p><b>B</b></p> <p>back 5:23,24 6:14 17:3  26:9 28:19,24 41:5  43:16  backwards 45:5  bad 20:21,23,25 24:6  bank 32:9  based 9:19,19,23 25:5  25:16,22 26:14 30:16  45:23  basic 25:6  basically 26:8  basis 38:2  becoming 27:1  bees 20:18  beginning 26:9 43:23</p>	<p>behalf 21:8 24:1 27:21  28:13 29:5,13,14  30:10 34:6 37:23  believe 12:13,18  believed 32:19  belong 4:21  belongs 20:4  bench 44:2,5  benefit 22:14 29:10  berating 15:3  best 15:8 21:13  better 14:5  biforcated 4:7  bifurcate 10:19  binding 40:25  bit 26:10  Bodman 9:20  body 18:19,21 24:19  boost 35:1,8  Boulevard 1:23 47:13  bound 12:8,11 13:14  box 6:24 7:2,4  breech 34:20  brief 31:19 41:19  briefing 16:10 44:21  briefs 16:8  bring 22:12 24:8  broad 7:20 10:3 35:22  brokerage 32:8,13  35:17  brought 21:7 29:12  Brown 2:14  brush 35:22  bump 6:12  burden 28:16 39:13</p> <p><b>C</b></p> <p>C 5:11,22 10:1,1 20:10  20:12 27:14 30:24  36:24  California 15:9  call 7:1 42:10  called 13:21  candidly 8:23 9:10  carried 41:4</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

case 7:19,24 8:6,10,13 9:17,20,21 10:2 11:3 11:7,11 14:14 20:9 20:14 21:23 22:1,2 23:10,13,20,21 24:4 25:12 26:2 27:22 30:21 35:19 39:21,23	charade 40:5 charades 40:5 chart 35:4 checks 35:18,21 circuit 22:2 41:14,17 41:25,25 42:1,2,4,7 claim 8:25 13:18 19:8 20:7 24:20,24 28:18 28:20,25 34:21 36:9 36:25	committed 20:12 24:7 36:22 companies 20:14,14 20:16,22 21:4 27:15 28:22 36:17 company 3:21 4:18 22:17 28:4,6,12 31:13 compel 3:3 43:14 44:8 44:10 complaint 3:24 4:4 5:3 5:21 18:19,21 22:24 23:19 24:19 25:1 31:11,15,16,17 35:4 38:8,10 40:16 41:6 complaints 38:11 complex 8:14 compliance 25:8 complicit 20:18 28:9 33:1 concern 6:9,16 concerned 10:7 conclusory 41:1,7 confer 16:22,23 45:11 conjunction 18:15 connection 37:2 consider 16:9 24:10 considered 14:10,13 15:13 16:6 Consillium 13:3,4 constrained 11:2 38:9 context 11:8 continued 26:18 contract 9:18,19,23 34:20,21 39:9 contracting 12:7 contribution 38:3 controlled 20:17 27:15 32:10 convince 16:2 Convolutd 8:15 cooperative 44:25 Copy 23:18 corporate 4:22 23:3 24:5	corporation 24:3 correct 13:19,20 17:19 30:11 46:2 counsel 16:1 23:17 31:3,6 counselor 2:19 counsel's 20:3 counter 13:16 country 39:12 41:15 couple 3:13 18:21 38:11 42:10 course 16:22 39:21 43:11 court 2:2,10,18,23 3:5 3:16 4:14 5:12 6:4,8 6:16,23 7:1,11,14,23 7:25 8:6,8,18,21,23 8:24 9:7,22 10:3,7,16 10:21,25 11:8,9,13 11:20,25 12:6,11 13:2,10,21 14:1,9,19 14:23 15:2,6 16:5,12 16:15,18,23 17:9,16 17:23 18:2,11,20,25 19:7,24 22:9 23:1,8 23:16,20 24:3,15 29:7,22,25 30:5,8,12 30:21 31:2 33:3,8,11 33:18 34:1,4 35:25 36:8,18 37:3,11,14 37:24 38:18 39:3,15 40:15,25 41:8,10,21 41:24 42:8,9,16 43:1 43:8 44:1,4,20 45:1 45:13,19,25 46:6,10 courts 7:20 11:5 39:14 court's 12:22 44:24 create 24:14 created 24:12 creditors 21:2,10,15 23:13 24:14 29:11,14 30:4 customer 35:2,7,15 customers 32:8,14 cut 12:17 14:3 17:14
cases 8:16,19 10:5 16:11 19:17 Castleberry 2:8,9,20 2:25 3:11 4:3,24 5:15 6:5,6,13,22,25 7:3,13,16 8:4,8,22 9:4,16 10:12,24 11:6 11:12,14 12:9,20 13:7,19,24 14:8,11 14:21 15:1,4,23 16:17,20,25 17:10,21 17:25 18:10,13,24 19:3,15 20:8 23:5,9 23:18,23 24:17 29:16 30:3,6,11,14 31:12 34:17 36:6,13,19 37:9,12,20 38:13 40:8 43:21 44:3,6,17 44:23 45:3,8,17 46:2 46:9,12 cause 18:12 34:18,19 caused 4:1 19:9,11 20:1 22:20 24:11 25:19 28:22 36:1,2 37:15,17,18 causes 6:18 18:4 causing 41:2 certain 13:12 certainly 4:5,9 31:9 certificate 13:6,8 CERTIFICATION 47:1 certify 47:3 chance 16:21 change 15:19 character 16:13 characterized 13:17 20:6	claimant 24:23 claimants 21:20 claims 4:18,19,21 6:2 7:8,9,12,17 9:2,19 12:6 13:1,2 14:7 17:4,8,14 18:16,18 19:2,5,6,20 21:3,6,7 21:16 25:6 27:24 29:3,4,12,18,21,22 30:1,15,20 33:5,21 34:9,9,22 39:25 40:10 42:22 43:5 44:13,14,14 clanged 42:12 clause 8:2 11:10 14:20 14:22 clear 32:11 34:19 35:3 40:2 45:21 client 3:19 18:15 coextensive 36:4 coextentiveness 38:14 collapse 27:18 collect 40:13 42:25 collectively 45:14 collide 9:5 come 8:12 11:17,18 15:15 comes 3:8 16:10 coming 10:13 39:20 43:6 45:7 commerce 9:8 commission 26:14 commissions 26:20 commit 22:20 24:13 25:11		

25:18 33:14	<b>describe</b> 23:2	<b>enjoys</b> 8:21	<b>F</b> 5:11,11,11,22,22,23
<b>D</b>	<b>descriptive</b> 22:11	<b>entire</b> 31:1	8:3 9:1 10:8,10 11:3
<b>damage</b> 6:19 20:2,4	<b>detail</b> 22:23	<b>entirely</b> 10:8,9	12:1,2 14:6,15 16:14
32:21 36:8,11 37:15	<b>dictates</b> 10:9	<b>entirety</b> 42:21	20:9,9,10,12,12,12
44:16	<b>different</b> 33:8,9,11	<b>entities</b> 4:2 6:20 7:6,7	22:4 27:14,14,14
<b>damaged</b> 29:6 37:1,23	37:5,21 39:21 40:1	17:6 18:6,7 19:11,13	30:24,24,24 36:23,24
<b>damages</b> 4:1 5:13,14	40:10,18	19:19 24:5 29:11,13	36:24 38:20,25 39:10
17:16 18:5,7,8 19:10	<b>dime</b> 40:13	30:2,10 31:7,25 32:4	<b>fact</b> 8:14 21:6,19
19:11,14,20 20:1	<b>direct</b> 18:23	32:15,22 34:7,14	22:16 28:16
23:10 30:22,23 32:18	<b>directly</b> 14:14 27:10	36:3,25 37:8,19	<b>facts</b> 25:25
34:6,11,12,16 35:25	32:7,9 35:1,12	40:12,13,18 41:5	<b>fair</b> 15:7
36:2,21 37:5,7,17,18	<b>disagree</b> 4:6 12:22	42:24	<b>false</b> 28:10
37:21 38:15 40:11,17	39:1,8,18	<b>entity</b> 4:22 5:11 21:17	<b>far</b> 7:16 8:15 9:15
41:3	<b>discretion</b> 7:21 10:3	23:3 36:12	11:23 14:13 28:9
<b>darn</b> 14:19	10:17	<b>equally</b> 13:12	29:22 34:24 41:17
<b>date</b> 45:2	<b>discussion</b> 6:14 42:13	<b>equipment</b> 47:5	<b>fascinating</b> 42:5
<b>David</b> 2:9	<b>dismiss</b> 33:24 40:7	<b>equitable</b> 8:1,20 10:18	<b>fashion</b> 7:17
<b>day</b> 38:5 45:10	45:23	12:24	<b>fault</b> 13:8
<b>deal</b> 38:8	<b>disregard</b> 8:25	<b>equities</b> 9:25 12:17	<b>favor</b> 12:17
<b>dealing</b> 7:21,25	<b>distant</b> 19:12	14:18	<b>favoring</b> 12:4
<b>debate</b> 41:20	<b>distilled</b> 31:18	<b>equity</b> 7:19,21 8:13	<b>Fax</b> 1:25 47:15
<b>debating</b> 22:22	<b>distinct</b> 6:19 18:5,8	9:3,5,5,6	<b>federal</b> 25:9
<b>decide</b> 10:20 33:20	21:24 36:10	<b>essentially</b> 14:12	<b>felt</b> 10:25
<b>decided</b> 17:19 22:3	<b>distribute</b> 30:12	<b>estate</b> 21:8,9,10 24:9	<b>fictitious</b> 35:7
<b>decision</b> 12:22 41:14	<b>distributed</b> 29:20	29:18	<b>file</b> 33:23
<b>declare</b> 38:19	30:16,19	<b>eventually</b> 27:18	<b>filing</b> 21:11
<b>declared</b> 12:3	<b>documentation</b> 26:1	<b>evident</b> 30:22	<b>Financial</b> 1:7 2:4,14
<b>declining</b> 26:22	<b>documents</b> 25:5,16,23	<b>evil</b> 22:11	<b>find</b> 8:16 14:15
<b>default</b> 13:4,5,8	<b>doing</b> 15:16	<b>exacerbated</b> 24:12	<b>finding</b> 8:15
<b>defendant</b> 16:16	<b>dollars</b> 5:6,20	<b>exact</b> 32:20 37:14,16	<b>fine</b> 46:6
<b>defenses</b> 9:19,23	<b>E</b>	37:18	<b>firm</b> 2:13
<b>definitely</b> 14:22	<b>earlier</b> 22:1	<b>exactly</b> 11:5 34:1	<b>first</b> 7:12 15:19 19:8
<b>demands</b> 21:12	<b>early</b> 32:5 38:23	35:19 41:9 43:19	23:17 24:25 36:9
<b>denied</b> 44:9,12	<b>earned</b> 26:15	46:1	40:1 43:10,14
<b>denies</b> 44:7	<b>ears</b> 16:9	<b>example</b> 25:1,13	<b>five</b> 32:20
<b>Denow</b> 19:16 22:3	<b>East</b> 1:24 47:14	<b>excess</b> 32:19	<b>flip</b> 32:15
23:20	<b>efficiency</b> 10:5	<b>exercise</b> 10:17	<b>focus</b> 18:17
<b>deny</b> 43:4	<b>efficient</b> 15:25	<b>exist</b> 8:7	<b>followed</b> 25:7,9,21
<b>depends</b> 36:14,15	<b>eight</b> 15:10	<b>expect</b> 34:2 43:18	<b>following</b> 11:22
<b>deposit</b> 35:15	<b>either</b> 6:10 27:15	<b>explain</b> 31:6	<b>foregoing</b> 47:3
<b>deposits</b> 34:25 35:7	45:13	<b>explained</b> 42:24	<b>forged</b> 25:5,16
<b>derivative</b> 3:10 4:16	<b>ends</b> 34:8	<b>extent</b> 34:10 41:12	<b>forgeries</b> 25:16
4:19,20 13:18 19:13	<b>English</b> 17:19	<b>extraordinary</b> 8:20	<b>forms</b> 25:20,24
20:6	<b>enjoyable</b> 42:14	<b>F</b>	<b>forth</b> 3:4 6:14 23:6
			<b>forty</b> 15:10

forward 2:3 32:16  
 found 7:23  
 four 3:22,22 4:7,11,13  
 4:15 5:6,19 6:18  
 13:1 17:4 18:4 19:2  
 32:7,13 33:22 34:9  
 34:15 39:25 40:10  
 42:22 43:5  
 fours 3:21  
 frankly 15:9 38:16  
 42:5 43:9  
 fraud 20:13,18 22:21  
 23:3,6,8 24:8,13  
 25:12 27:12 36:22  
 fraudsters 32:24  
 fraudulent 19:5 20:19  
 24:7 25:13 28:3,21  
 34:22 35:22  
 fraudulently 5:8  
 full 15:7 43:5  
 fund 35:10  
 funds 5:22 25:4,15  
 32:7 35:15  
 further 17:12,13  
 future 41:20

**G**

G 26:6  
 gained 38:2  
 gap 26:25  
 gather 30:9  
 gathering 21:12  
 General 16:11  
 genuinely 31:5  
 getting 39:23  
 give 9:17 15:7 22:8  
 given 24:16 28:5 31:9  
 giving 21:16  
 go 2:2,21 7:17 9:14  
 16:24 18:18 21:11,23  
 27:23 33:18 41:5  
 44:21  
 goes 29:17  
 going 4:11 5:4,24 17:3  
 18:3 28:19,21,24

32:11 34:5 39:7 42:7  
 46:1  
 gonna 8:11,16 10:22  
 12:13 22:8 38:25  
 39:6 43:4  
 good 2:8 37:4  
 graft 44:6  
 grant 12:24  
 granted 42:20 44:10  
 grants 44:7  
 great 22:23  
 growing 27:1  
 guess 5:1 6:15  
 guys 15:15

**H**

hammer 17:5,11  
 Hanchet 2:12,13 31:4  
 33:6,10,13,19 34:3  
 38:7,22 39:5,18  
 40:23 41:9,11,23  
 42:3,18 43:7 44:18  
 45:20 46:14  
 hand 13:11  
 hands 16:15  
 hanging 39:25  
 happen 34:5 46:1  
 happened 20:25 26:8  
 26:16 30:25 35:20  
 happy 3:14  
 Harding 8:11 10:2  
 harm 28:22  
 harmed 20:13  
 Hart 2:17  
 hay 11:15  
 head 15:21 38:24 43:2  
 hear 14:7 31:2  
 hearing 15:11 44:22  
 held 22:12  
 helpful 19:17  
 highlight 3:14  
 historically 44:25  
 hit 43:2  
 holder 35:14  
 holders 35:9,10

Holland 2:17  
 Honor 2:9,12,20,22  
 3:1,12 4:4 5:1,16 6:7  
 7:6 9:18 10:13 13:20  
 14:12 15:24 16:21  
 18:1,14 19:4,16  
 23:14 24:10,18,25  
 26:8 30:22 31:4,17  
 31:21 32:15 33:6,10  
 33:14,20,24 37:10,13  
 38:7,22 39:19 40:6  
 40:24 41:13,19 42:15  
 43:22 44:19 45:10,18  
 45:20 46:13,15  
 hope 6:9  
 Hopefully 7:3  
 hot 6:24  
 hours 15:11  
 hypothesize 33:16

**I**

important 19:22 24:9  
 31:23 39:11,13  
 improperly 5:7  
 inappropriate 17:11  
 inaudible 2:6,16 3:7,7  
 3:8,16 6:5,22 7:24,25  
 8:3,12 10:15 12:1,2  
 12:18,19 13:13 15:10  
 17:2,7,9 19:16 20:2,9  
 21:20 22:4 24:21  
 26:11 27:24 28:5  
 30:9,24 31:5 32:16  
 33:2 34:22,23 36:5  
 38:3,21 40:2 41:8,16  
 41:24 42:17 43:16  
 44:14 45:4,21,25  
 inconsistent 12:15  
 increase 24:11  
 increasing 26:24  
 independent 5:14 29:2  
 29:23,23 40:11,17  
 44:15  
 individual 4:22 19:21  
 20:5 29:25 38:1

individuals 20:24  
 24:23 36:16 44:13  
 inefficiencies 12:14  
 inefficient 39:17  
 inequitable 39:6,8,16  
 inflate 28:1  
 injured 31:7  
 injuries 22:16  
 injury 23:2  
 insists 17:24  
 institute 29:9  
 instruction 31:20  
 intellectually 42:14  
 intend 4:25  
 intensive 8:14  
 interest 3:17 33:17,20  
 interested 11:11  
 interesting 3:13  
 invested 27:21 36:17  
 investment 27:5  
 investor 21:16 31:22  
 31:24 36:9,14 37:22  
 38:1  
 investors 4:1,19 5:10  
 5:23,24 6:19 7:7,9  
 17:7 18:5,9 19:10,14  
 19:21 20:2,5 21:2,5  
 21:18,22,24,25 22:6  
 22:9,14 23:13 24:2  
 26:22 27:7 28:1,13  
 29:11,14,23 30:1  
 32:2,5 34:7,11 36:3  
 36:16 37:6,16,17  
 38:16 41:3  
 invoke 9:3,4  
 involved 24:22,23  
 25:12  
 involvement 44:24  
 Islip 1:24 47:14  
 issue 5:13 22:5 33:9,12  
 41:20 42:5 43:10,10  
 43:12,13  
 issues 3:14 43:20

**J**



judgment 32:18  
judicial 12:5

**K**

keep 15:18  
kicked 20:21,21  
kind 3:9 15:16 43:22  
kinds 12:14  
Klein 1:4 2:3,11  
knew 28:13  
know 5:8 9:11 15:15  
25:19 38:23 39:11  
40:25 41:12,17 43:18  
44:23 45:6  
knowing 43:5  
known 28:14,17  
knows 41:14

**L**

lack 33:25 45:23  
language 12:1 20:16  
22:11  
Laraine 1:21 47:3,11  
law 2:13 8:10 9:5,17  
10:3 11:22 14:14  
20:14 23:21 38:23  
lawsuits 21:12  
layman 20:15  
leads 12:14  
legal 29:9  
legislature 39:10  
legitimate 25:20  
letter 45:9  
let's 2:2 10:20 14:7  
19:7 20:2 27:3,4  
38:19  
likable 9:1  
limitation 10:10  
limitations 9:23 14:17  
limiting 46:7  
lines 25:14 35:5  
litigation 11:23 27:19  
litigations 10:20  
little 17:12,13 26:9  
local 16:12  
log 6:12

long 22:3  
look 5:2,4 9:12,22,24  
9:25 10:21 15:8  
24:19 27:3 36:1  
looked 8:5 11:13,15,16  
17:21 18:15  
looking 18:22 32:17  
losing 22:13 24:2  
loss 5:25 30:5,7 38:4  
losses 26:18  
lot 10:2

**M**

M 1:21 47:3,11  
making 21:12 39:24  
MALE 2:16  
managers 22:19  
manuals 25:8  
Mark 2:13  
marked 3:25 40:22  
Master 12:2  
matter 2:3 29:1  
Mayer 2:14  
mean 3:12 7:5 9:13,16  
10:15 11:17,21 12:21  
14:11,13 15:18 16:3  
16:21 17:3 22:21  
28:19 29:16 31:5  
33:15 34:18,23 36:13  
37:25 41:25 43:8  
45:1  
meaning 7:10 21:21  
means 35:21  
measure 37:7  
mentioned 22:1  
million 5:6,19 32:7,13  
32:20  
mind 2:23 6:9 15:18  
15:19 43:24 46:7  
minutes 39:24  
mischief 12:16  
misconduct 31:8  
missed 16:5  
missing 15:20 19:1  
26:6

misspoke 39:16  
moment 33:17  
money 27:4,7,8,10,14  
28:2,2,24 30:9,15,18  
30:18 31:22,24 32:3  
32:4,9,24 35:10,11  
35:12 38:2  
moneys 23:10 27:21  
27:25 29:19 30:13  
31:11 32:2,22  
motion 3:2 33:23 40:6  
42:20 43:4,14 44:8,9  
44:9 45:22 46:4  
moved 13:3

**N**

nail 43:2  
name 2:13 3:23 35:17  
names 2:1  
national 12:3  
nature 37:4  
necessarily 21:5  
need 7:18 9:24,25 10:5  
10:5 13:7 23:11 27:7  
27:8 35:23,24 44:24  
needed 17:14  
needles 11:16  
needs 9:6 21:11  
never 17:19 46:7  
New 42:8,11 47:14  
nice 6:13  
nine 3:18  
ninth 22:2 41:24 42:1  
note 2:1  
notion 3:17 4:6 6:17  
notwithstanding  
38:12  
NY 1:24

**O**

obtain 23:11  
obvious 25:17,25  
Obviously 38:9  
occasion 3:6  
occurred 28:10  
October 47:17

offer 16:19  
Oh 45:3  
okay 2:2 4:13 7:13  
10:24,24 12:9 13:10  
14:8,8 16:17 18:24  
23:1 34:3 36:18 38:5  
38:6 42:18 43:7  
46:10  
open 15:18  
opportunity 11:19  
15:7 24:13 25:11  
27:5 41:19  
opposed 24:2  
opposing 23:17 31:3  
opposite 20:1  
order 23:12 24:8 44:6  
other's 45:16  
outlined 4:8  
overpaid 21:4,18  
overview 31:19

**P**

page 25:1 32:17 35:4  
46:4  
paid 21:24,25 36:20  
36:20  
paint 35:22  
paper 9:21  
papers 3:4 10:15  
paragraph 3:24 18:17  
19:9 25:14 29:7,8  
31:21 32:5 35:3,6  
36:1 37:6,9  
paragraphs 18:22,23  
31:18 34:15 38:11  
40:3,22  
parse 5:3  
part 44:7  
particular 11:3  
parties 39:9,13  
partner 17:24  
parts 44:7  
party 12:7 35:18,20  
pay 23:12  
penalty 7:2,4

<p><b>Penson</b> 1:7 2:4,14,17 17:3,4 19:12 24:20 25:4,7,15,18,19 26:4 26:7,12,21 27:7,24 27:25 28:4,8,13,23 31:14,22,23 32:1,6 32:25 34:25 35:11,13 35:13,14,17 37:1 <b>Penson's</b> 3:2,25 19:9 24:11 30:25 31:8 36:2 37:15 41:2 <b>people's</b> 32:23 <b>permission</b> 23:15 <b>perpetrated</b> 27:12 <b>perpetrators</b> 26:10 <b>person</b> 15:19 <b>phone</b> 45:14 <b>phonetically</b> 2:1 <b>phony</b> 33:1 <b>place</b> 13:23 39:7,8 <b>plaintiff</b> 1:5 32:18 <b>plead</b> 17:17,18 <b>pleaded</b> 6:17 17:18,24 18:1,2,3,3 22:23 40:20,21 <b>pleadings</b> 3:7 <b>please</b> 2:1,6 <b>pled</b> 34:6,10,14 42:23 <b>plethora</b> 8:18 <b>podium</b> 2:21 <b>point</b> 5:6,17,19 11:18 14:14 24:10 32:6,12 32:20 39:23 41:6 43:3 <b>pointing</b> 31:10 <b>policies</b> 28:7 <b>policy</b> 12:3 <b>ponzie</b> 20:10 22:18,22 22:24 26:10 27:17 32:1 <b>poor</b> 24:14 <b>portion</b> 31:10 <b>position</b> 4:9 <b>positive</b> 3:18 <b>possible</b> 9:13 21:14</p>	<p>30:10 <b>potential</b> 12:15 <b>pound</b> 17:5 <b>power</b> 12:5,23,24 38:20,21 <b>powers</b> 8:20 10:11,18 <b>practice</b> 42:6 <b>preliminarily</b> 13:11 <b>preliminary</b> 14:4 15:12 <b>prepared</b> 18:14 47:4 <b>primary</b> 6:8 <b>principle</b> 10:4 41:16 <b>principles</b> 20:11,12,17 27:2,13,14 28:11 36:23 <b>pro</b> 30:16 38:2 <b>problem</b> 27:2 <b>problems</b> 25:2 <b>procedures</b> 25:8,22 28:7 <b>proceed</b> 2:19 34:14 <b>proceeding</b> 2:24 <b>proceedings</b> 3:2 29:9 47:4,6 <b>proceeds</b> 21:23 <b>process</b> 29:19,21 30:15 33:16 <b>profits</b> 26:14,17,19 <b>proof</b> 28:16 <b>properly</b> 26:6 <b>prosecute</b> 4:23 33:5 <b>prove</b> 40:19 <b>provided</b> 13:5 <b>pursue</b> 6:2 <b>put</b> 6:23 39:7 45:11 <b>putting</b> 35:11</p> <p style="text-align: center;"><b>Q</b></p> <p><b>question</b> 16:11 17:17 37:4 <b>questions</b> 2:24 6:10,11 <b>quite</b> 42:5</p> <p style="text-align: center;"><b>R</b></p> <p><b>R</b> 1:4 2:3,10</p>	<p><b>raised</b> 43:14 <b>rape</b> 20:15 <b>rata</b> 30:17 38:2 <b>read</b> 38:10 <b>readily</b> 27:11 <b>real</b> 30:23 <b>reality</b> 26:25 <b>realize</b> 26:17 <b>realized</b> 26:17 <b>really</b> 3:9 5:4 9:24 10:4,11 11:10 16:10 16:14 17:12 22:4,21 23:25 24:1 27:17 29:1 39:11 40:10 <b>reasonable</b> 28:5 <b>reasons</b> 25:3 <b>receive</b> 27:8 30:17 <b>received</b> 24:6 27:9,22 27:25 <b>receiver</b> 2:4,10 3:23 5:5 6:1 16:22,24 20:9,20 21:7,11 22:12,15 23:11,25 24:4 27:20 29:2,8 30:21 31:19 33:4 41:12 44:15 <b>receivers</b> 34:13 <b>receivership</b> 4:2 6:21 7:7,10,20 8:1,13 10:6 16:13 17:6 18:6,7 19:10,13,18,18 21:3 21:8,9,17 24:9 28:22 29:5,10,13,18 30:2,8 31:7 32:3,14,22 34:7 34:13 36:3,11,24 37:8,19 38:17 40:12 40:13,17 41:4 42:24 <b>receiverships</b> 7:22 <b>receiver's</b> 4:9 5:12,14 <b>receiving</b> 26:23 35:12 <b>recognize</b> 8:9 <b>recognizes</b> 8:11 <b>record</b> 2:7 47:5 <b>recover</b> 5:5 23:12 30:18</p>	<p><b>recovery</b> 21:22 22:8 22:15 29:17 <b>referring</b> 23:22 <b>regulation</b> 25:10 <b>relief</b> 5:21 12:24 18:18 19:8 32:16 36:10,10 <b>relying</b> 41:13 42:1 <b>remarks</b> 39:2 <b>repeat</b> 3:4 <b>report</b> 26:18 <b>reported</b> 26:25 <b>requested</b> 5:21 <b>requesting</b> 12:25 <b>require</b> 12:5 <b>required</b> 47:4 <b>requirement</b> 27:6 <b>requirements</b> 25:10 25:21 <b>resolution</b> 12:6 <b>resolve</b> 12:7 <b>respect</b> 11:4 33:21 40:8,24 42:21,22 43:5 44:11,12 <b>respectfully</b> 12:21 42:19 <b>respond</b> 34:23 <b>Respondent</b> 1:8 <b>result</b> 39:6 <b>resulting</b> 36:21 <b>return</b> 5:22 <b>returned</b> 35:23 <b>reverse</b> 13:18 <b>reversed</b> 3:9 4:16 9:14 20:6 <b>right</b> 2:18 3:10 4:14 5:2 6:25 7:4,14 8:22 11:6 12:2 13:15,25 15:1,4,17,20 16:25 17:1,10 18:2 19:2,2 20:22 23:4 24:15 28:23 29:15,17 31:2 42:3,25 44:22 45:6 <b>ripped</b> 16:14 <b>risk</b> 43:12 <b>rocks</b> 15:21</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

role 30:25  
rule 42:11  
ruled 42:9  
ruling 15:12 44:2,4  
rulings 12:15  
run 43:12  
running 22:18

**S**

S 10:1  
safe 26:13  
saying 4:18 11:21 38:6  
40:7,20  
says 3:25 4:4 20:15  
29:8  
scalpel 17:13  
schedule 44:22 45:6  
45:22  
schedules 45:16  
scheme 21:1 22:18  
26:10 27:4,17 31:1  
32:1  
schemes 20:10 22:22  
22:25  
school 38:23  
scolds 20:15  
second 42:6  
seconds 9:14  
securities 25:5,15  
26:12 28:9,12  
security 28:15  
see 21:1 25:2 27:25  
28:1 31:15 38:17  
44:3  
seeking 4:23 33:24  
seen 8:24  
send 27:7 32:24  
senior 17:23  
sense 5:18 10:1,18,21  
10:23 11:20,22  
sent 25:18,24 26:3  
27:15 28:4 31:13,24  
32:8  
separate 21:25  
Septembers 34:25

Services 1:7,22 2:4,15  
47:12  
set 3:4 8:1 11:9 14:17  
23:6 29:19,21 30:15  
44:21  
setting 9:18 11:9  
seven 5:6,19 32:6,12  
32:20  
seventh 41:14,25 42:1  
42:4  
share 23:16  
short 45:9  
sic 8:11 38:14 45:4  
side 45:15  
siding 16:15  
signator 13:12  
signature 26:3,4  
signatures 25:17 26:7  
significant 26:17  
silent 41:17  
similar 37:22  
simply 40:7  
single 7:24  
sit 38:24  
sited 9:21 22:9,10  
23:21  
sitting 6:12 15:2 32:23  
situation 8:12,21  
10:19 11:18 17:2  
six 3:18,22 4:6 6:18  
sixteen 44:11  
Skoals 22:10 41:13  
sledge 17:5,11  
Smith 36:23  
sold 28:12  
sorry 37:11 42:8  
sparse 8:9,10  
speak 15:19 24:14  
SPEAKER 2:16  
special 7:19  
specific 23:21 24:20  
25:25  
spelled 2:1  
split 4:7 34:9 41:15  
42:4

splitting 34:18  
spreadsheet 23:19  
stacks 11:15  
standing 6:1 19:19  
22:5,7,12 23:25 29:4  
33:5,25 43:10,12,19  
45:23  
state 10:10 11:9 14:24  
16:15 43:4  
statements 26:23  
28:11  
states 12:5 31:11  
statute 9:22 14:16,16  
stay 3:2 44:8,9  
steadily 26:21  
step 26:9 33:16  
story 40:19  
struggling 9:10 10:14  
subject 21:6  
subjects 24:24  
submit 42:13,19 45:9  
sue 20:23,23 28:23  
sued 22:6  
suffered 19:21 22:19  
30:23 38:16  
suing 22:16 24:1,4,6  
suit 22:13  
support 9:17  
supremacy 14:20,21  
Supreme 42:8  
sure 3:12 11:13 43:15  
46:3,9  
surprise 10:13  
S.C.C 8:10

**T**

take 8:25 17:5,12,13  
18:11 19:7 32:3  
39:13  
taken 28:3  
talk 4:12,15,16 7:11  
8:19 38:25  
talking 14:24 19:24,25  
36:15 37:5,7,24  
39:16 41:6 45:22

taught 38:23  
Taylor 31:20 32:10  
36:22 37:2  
tell 9:7 10:22 15:21,25  
16:1 24:16 39:3 40:9  
ten 9:14  
testing 43:18  
Thank 44:17,18 45:17  
45:19 46:10,12,14  
that'd 45:3  
theories 5:9  
thing 15:8 19:22 34:4  
40:15 41:1  
things 43:24  
think 3:8 6:4 9:13 11:2  
11:4 12:8,11,23 13:5  
13:9,11,15 14:2,4,9  
15:8,20,24 16:15  
19:1 20:3 26:2 31:8  
40:2 42:16 43:1,8  
thinking 15:14,16  
16:1,2 34:5  
third 22:4 35:18,20  
thought 4:25  
three 3:20 7:6  
time 11:19 16:20 26:5  
26:5,5  
times 18:22  
today 10:13 25:3  
28:20 38:21  
told 35:14  
torte 21:2,10,14 23:12  
30:3 44:13  
total 37:25  
touch 26:13  
track 10:20 11:23  
tracks 16:4  
trade 26:11  
traded 26:16 28:12  
trading 26:15  
transcript 47:3  
transcription 1:21,22  
47:4,12  
transfer 19:6 25:13  
27:4

transferred 5:7,8,10  
25:4

transfers 20:19 24:7  
25:15,22 28:4,21  
34:22 35:23

tried 28:18

true 47:5

try 27:20 30:9 45:11

trying 5:5 11:5 17:4  
33:13

turn 24:25

two 4:8,10 10:19 11:4  
11:23 14:7 16:3 29:8  
29:8 33:15,21 40:1  
42:21 45:10

typical 4:20 7:17

## U

ultimately 22:14 28:18

underlying 10:4 39:10

underpaid 21:1,18,21

understand 5:15,25  
6:6 19:17,22 37:25  
38:4,5 39:20 40:23

Union 1:23 47:13

unnecessary 42:15

usurp 9:12

Utah 14:25 15:3

## V

v 8:10 10:2

value 26:21,22,24 28:5  
35:1,8,9

various 42:4

verified 26:6

versus 2:4 4:20 16:13  
19:16 22:3

view 31:17 42:19,19

violations 28:10,15

## W

Wagner 42:11

waiting 44:5

waiver 43:13

wake 27:19

Wane 2:3,10

want 3:3 4:10,12,15

5:16 14:3,6 15:6

16:9,19 18:18,23

44:20

wanted 46:3

waste 20:13 22:20

23:3,5,8 24:8 25:11

way 4:8 5:1,2 13:3

17:18 21:13 40:12

42:7 43:17 45:15

WAYNE 1:4

ways 41:15 42:4

weeks 42:10

welcome 3:1 41:18

Wellmanbrock 22:17

22:19,20

Well,I 40:23

went 5:22

we'll 26:13 43:18,22  
45:5

we're 7:5 8:11,16

12:25 13:9 14:15,24

15:2,16 22:21 25:3

28:19 36:14 37:5,7

37:24 38:9 41:6 43:3

45:22,24 46:3

we've 11:15,16 18:15

24:17 26:15 44:24

whatsoever 6:1

whether's 24:21

wholeheartedly 39:22

wife 7:1

wish 11:6

withdrew 12:4 32:6,12

wonderful 22:10 45:4

word 38:15,18

work 45:5,16

world 7:15

worried 34:8

written 43:22

wrong 16:3

wrote 31:12

## X

x 1:3,9

## Y

yeah 23:6,9 30:4

York 42:9,11 47:14

## Z

Zizza 1:21 47:3,11

zombie 22:11

zombies 20:17,20

## 1

100924572 2:5

111 18:25

11730 1:24 47:14

12 47:17

127 18:25

## 2

2006 32:5

2011 47:17

22 35:4

277-7900 1:25 47:15

277-7907 1:25

## 3

3132 1:23 47:13

36 25:1,1,14

38 32:17

## 5

533 22:4

56 35:3

57 35:3

58 35:3

## 6

60 35:6

61 35:6

631 1:25,25 47:15

631)277-7907 47:15

## 7

762 22:4

776 23:23

777 23:23

## 8

831:18,21 38:11 40:3

84 18:17 38:12 40:3

89 18:23 19:9 36:1

37:11

## 9

931:18 32:5 37:10

38:11 40:3

9ne 37:6

97 19:1

# EXHIBIT “C”

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FEB 28 2002

By SALT LAKE COUNTY  
[Signature]  
Deputy Clerk

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

**Honorable Leslie A. Lewis**

619

and Fabian and Clendenin, and J. Michael Hansen appeared on behalf of Frank Sutter and Sutter Axland.

At the hearing, the Court dismissed Count Two and Count Four of the Complaint, for aiding and abetting breach of fiduciary duty and aiding and abetting fraud, respectively, because these claims are not cognizable under Utah law. The Court further dismissed Count Ten of the Complaint based on plaintiffs' failure to state a claim for unjust enrichment. The Court also dismissed all claims alleged in the Complaint against Constance Ganter. The Court took the remainder of the arguments raised in the Motion to Dismiss under advisement and, on February 12, 2002, issued its Memorandum Decision on the remaining issues.

Based on the Memorandum Decision, and having considered the memoranda in support of and in opposition to the Motions to Dismiss, the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED as follows:

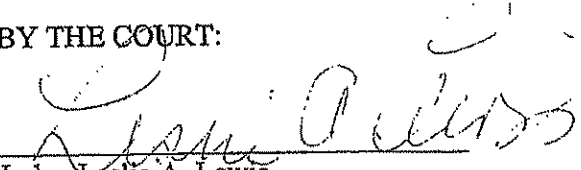
1. Based on plaintiffs' failure to plead fraud with particularity, the Ganter Defendants' Motion to Dismiss is hereby granted in its entirety;
2. Based on the granting of the Ganter Defendants' Motion to Dismiss, the Third, Fifth, Sixth, and Ninth Counts of the Complaint are hereby dismissed with respect to the Ganter Defendants;
3. Based on plaintiffs' failure to state a claim for breach of fiduciary duty, Count One of the Complaint is hereby dismissed with respect to the Ganter Defendants;

4. Because the remaining claims of the Complaint are predicated on plaintiffs' claims for fraud and breach of fiduciary duty, the remaining counts of the Complaint against the Ganter Defendants are hereby dismissed;

5. Based on the foregoing, the Complaint, and all claims alleged therein against the Ganter Defendants, are hereby dismissed; and

6. Because there is nothing to indicate that an amendment could resolve the deficiencies, plaintiffs' request for leave to amend the Complaint is hereby denied.

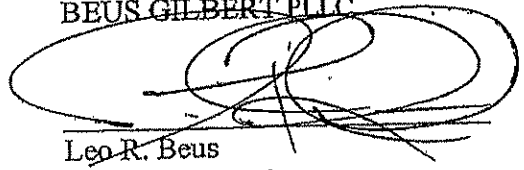
BY THE COURT:

  
Judge Leslie A. Lewis  
Third Judicial District Court

2-27-02

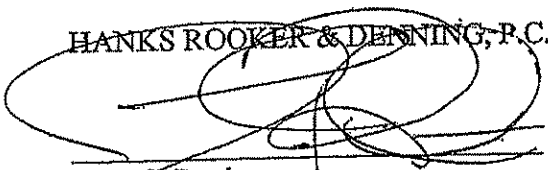
APPROVED AS TO FORM:

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Attorneys for Plaintiffs



HANKS ROOKER & DENNING, P.C.

  
John C. Rooker  
Attorneys for Plaintiffs



**CERTIFICATE OF SERVICE**

I hereby certify that, on this 22<sup>nd</sup> day of February 2002, I caused to be mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing proposed **ORDER OF DISMISSAL** to the following:

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