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

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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 (collectively, the "Receivership Entities"), by and through undersigned counsel of record, respectfully submits this Memorandum in Opposition to Defendant Penson Financial Services, Inc.'s ("Penson") Motion to Dismiss.

INTRODUCTION

Pending before the Court are the following claims for relief brought by the Receiver against Penson: (1) aiding and abetting securities violations, (2) aiding and abetting fraud, (3) aiding and abetting breach of fiduciary duty, and (4) fraudulent transfer. Penson has attempted to have these claims decided in other forums on two separate occasions. First, Penson improperly removed this case to Federal court on diversity of citizenship grounds. After the Federal court remanded this action, Penson filed a Motion to Compel Arbitration of all of the claims alleged in the Complaint. The Court denied Penson's Motion to Compel Arbitration with respect to the claims the Receiver asserted on his own behalf. Now Penson brings this Motion to Dismiss (the "Motion"), seeking dismissal of the claims brought by the Receiver in this action.

In the Motion, Penson argues that the Complaint should be dismissed because the Receiver has no standing to sue Penson, because of the equitable affirmative defense of *in pari delicto*, because the Receiver has failed to state claims for relief against Penson for aiding and abetting securities violations, fraud, and breach of fiduciary duty, and because the fraudulent transfer claims are time-barred. To decide the Motion, the Court must answer the four following questions:

1. Does the Receiver have standing to assert claims on behalf of Ascendus and FFCF against Penson when the Complaint alleges that (a) the principals of Ascendus and FFCF could not have operated Ponzi schemes without the assistance of Penson, and the operation of the Ponzi schemes (i) caused Ascendus and FFCF to become liable to its underpaid investors and (ii) allowed the principals of Ascendus and FFCF to commit waste and fraud on the companies; and (b) Penson received fraudulent transfers from Ascendus?

2. Does the affirmative defense of *in pari delicto* bar the Receiver's claims against Penson when application of this doctrine would only benefit the alleged wrongdoer to the detriment of the innocent investors?

3. Does Utah recognize a claim for aiding and abetting fraud and breach of fiduciary duty, and has the Receiver adequately alleged that Penson aided and abetting securities violations under the Utah standard found in Utah Code § 61-1-22?

4. Are the Receiver's claims for fraudulent transfer (or any other cause of action) barred by the statute of limitations when, under the doctrine of adverse domination, the limitations period was tolled until the Receiver was appointed?

The Receiver recognizes that the answers to these questions involve question of law that have not been established by Utah courts in every instance. The Receiver also recognizes that courts from other jurisdictions have dealt with similar facts and similar motions in different ways. The weight of authority and the better-reasoned decisions, however, support the Receiver's position that he has standing, his claims neither barred by the statute of limitations nor the doctrine of *in pari delicto*, and he has alleged claims that are recognized under Utah law.

Thus, the Court should deny the Motion and allow the parties to begin to conduct discovery on the Receiver's claims against Penson.

BACKGROUND

The following Background is taken from the well-pleaded allegations of fact contained in the Complaint, which allegations the Court must accept as true for the purposes of assessing this Motion.

Taylor's Role with FFCF and Ascendus

Roger E. Taylor ("Taylor") and Richard T. Smith ("Smith") jointly formed Ascendus in 2003. Complaint ¶ 11. Taylor was the manager of Ascendus, and in April 2003, Ascendus obtained a license as an investment advisor, and Taylor was the designated official of the investments adviser and referred to himself as the registered investment advisor. Complaint ¶¶ 7, 11. When Taylor closed down Ascendus in early 2006, he and Smith formed FFCF, which functioned as a vehicle for pooling investors' funds which would be sent to another investment advisor, LBS Advisors ("LBS"). Complaint ¶¶ 27-28. Taylor was the managing member of FFCF, and he was to earn commissions for the funds he delivered to LBS. Complaint ¶¶ 27-28.

Taylor and Smith Operated the Receivership Entities as a Ponzi Scheme

Through Ascendus, Taylor claimed the ability to trade options in an extremely profitable way with minimal risk. From 2003-2006, Taylor persuaded investors to open brokerage accounts at Penson and to give him authority to conduct trades in their accounts. Complaint ¶ 7. In fact, the trading resulted in substantial losses to the investors. Notwithstanding these losses, Ascendus sent account statements to investors reporting substantial gains, and Ascendus

collected significant amounts from the investors as commissions. Complaint ¶ 7. Ascendus also pooled investor money into a fund that allowed it to make illegitimate transfers to other investors or third parties from the fund to retain investors and attract larger investments. Complaint ¶ 16. Thus, Ascendus operated as a Ponzi scheme. Complaint ¶ 7.

When Taylor closed Ascendus in early 2006 and opened FFCF, Penson withdrew approximately $7.4 million from the investors' accounts and sent the money directly to bank accounts controlled by Taylor and his associates. Complaint ¶ 9. Taylor convinced the investors to transfer their money from Ascendus to FFCF by presenting subscription agreements greatly overstating the value of the investors' accounts. Complaint ¶ 34. FFCF was therefore insolvent from the beginning because it did not have the funds to cover the difference between the account values represented to the investors and the actual amounts in their accounts. Complaint ¶¶ 34, 99. FFCF also operated as a Ponzi scheme, which eventually collapsed in July 2008. Complaint ¶ 9.

Taylor falsified the monthly account statements that Ascendus would send to the investors, and the investors paid commissions to Taylor based on these inflated monthly account statements. Complaint ¶¶ 16-18, 23. By sending these false account statements to Ascendus' investors, Taylor caused Ascendus to become insolvent because the false account statements caused Ascendus to owe more to investors than its net worth. Complaint ¶ 25. When Taylor and Smith sent these account statements that were materially false and misleading, and omitted material information, they breached their fiduciary duties to Ascendus, especially when these

false or misleading statements allowed Taylor and Smith to receive commissions to which they were not entitled. Complaint ¶ 115.

These fraudulent account statements violated the Utah Securities Act as they constituted untrue statements of material fact and/or omissions of material fact to the investors in a scheme that operated as a fraud and deceit upon the investors in furtherance of the Ponzi scheme. Complaint ¶ 86.

Taylor and Smith accepted investors into Ascendus who did not meet the net worth standards required as part of Ascendus' investment advisory license, which 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, and Ascendus did not have the funds to make those payments. Complaint ¶ 2. When Taylor closed down Ascendus, in order to continue to receive compensation he had to persuade Ascendus' investors to move their money to LBS, at which point he would receive a commission from LBS. Complaint ¶¶ 27-29.

Penson Aided and Abetted Wrongdoing by Taylor and Smith

Investors were told that if they opened an account at Penson, their money could not be withdrawn by Taylor or Ascendus, and the Limited Trading Authorization ("LTA") reinforced this notion. Complaint ¶¶ 45-47. The LTA forms were on file with Penson, meaning that Penson knew that customer funds could not be accessed by Taylor or Ascendus without permission from the investors. Complaint ¶ 46.

Penson's own policies prohibit the use of faxed, non-notarized wire request forms to effectuate the transfer of customer funds to a trader or any other third party. Complaint ¶ 47.

For example, a July 11, 2001 enforcement order by the Nevada Division of Securities, imposing disciplinary sanctions on Penson, notes that the policies and procedure 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. Complaint ¶ 47. Even though the investors in Ascendus believed that their money was safe with Penson, Penson transferred $8.7 million from customer accounts to Ascendus and affiliated entities without following proper procedures and without obtaining the necessary approvals from its customers. Complaint ¶ 48. Penson also transferred securities from customer accounts to other customers based on instructions from Ascendus, in violation of the LTA's and Penson's own policies. Complaint ¶¶ 51–53. Many of these transfers were based on fraudulently-altered documents. Complaint ¶¶ 40-44.

Taylor and Penson utilized a number of fraudulent devices to artificially inflate the value stated in the Penson accounts. For example, Penson transferred funds and securities out of the accounts of one customer and into the accounts of customers unrelated to the first customer. Complaint ¶ 31(a), (d). To create the illusion that the accounts had earned profits which in fact had not been earned, Penson received money from Ascendus and deposited those funds into investor accounts, contrary to Penson's own internal policies. Complaint ¶¶ 31(f), 56-66. Penson recorded fictitious deposits into customer account records to create the false impression that the accounts had values greater than their true value which were reversed after the investors agreed to move their investments to FFCF/LBS. Complaint ¶ 31(g). Penson reported false information in records sent, or made available, to its customers including reporting trades

differently in online, paper, and end-of-year statements; reporting to customers that distributions from their accounts were not sent to third parties; and reporting false account balances to its customers. Complaint ¶¶ 31(h), 67-72.

All in all, when Taylor closed Ascendus and opened FFCF, 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. Complaint ¶ 9. However, the fraudulent account information made possible by Penson's actions that was provided or made available to investors indicated that the investors' account balances totaled at least $12,819,451.19. This reflected $5,233,723.58 in fictitious investment deposits that were purportedly invested in FFCF. Complaint ¶ 35.

Penson knowingly permitted Taylor to trade securities in customer accounts where Taylor and Ascendus would be granted performance-based fees, where those fees were barred by state or federal law, including the Utah Securities Act. Complaint ¶¶ 78-81. Taylor's fraudulent investment scheme could only succeed with the tacit or active assistance of Penson, including Penson's false reports to its customers. Complaint ¶ 32. The fraud perpetrated by Taylor would not have been possible, or would have been discovered much earlier, but for Penson's role in the fraud. Complaint ¶ 73.

Penson's Actions Caused the Receivership Entities Damage

As described above, the Receivership Entities sent funds to Penson, which Penson then applied to its customer accounts to make it appear as if the accounts had earned trading profits when in fact they had not. Complaint ¶¶ 31(f), 56-66. These transfers 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. Complaint ¶ 96. None of the Receivership Entities received a reasonably equivalent value from Penson in exchange for these transfers. Complaint ¶ 97. The Receivership Entities were insolvent at the time the transfers were made to Penson. Complaint ¶ 99.

As explained above, the investors in Ascendus were told that their money would be safe in Penson accounts. Complaint ¶¶ 45-47. Penson, however, violated its own policies and accepted fraudulent-altered documents that allowed the principals of Ascendus and FFCF to defraud their investors. *See generally* Complaint ¶¶ 40-44, 51-53. 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. In some instances, these commission payments were wired directly from the investors' Penson accounts by Penson to Taylor or entities he controlled. Complaint ¶ 17. Penson facilitated the payment of commissions to Ascendus knowing that Ascendus should receive compensation only if the trading in the investors' accounts was profitable and with the further knowledge that the accounts were losing money, not earning profits. Complaint ¶¶ 32(d), 76-77.

Significantly, Ascendus accepted investors contrary to the conditions imposed on Ascendus' investment license, making Ascendus liable to repay any such investor's funds, and Ascendus was without the funds to do so. Complaint ¶ 26. Ascendus also became liable to its investors when it owed more money to its investors than the combined value of the brokerage

accounts of the investors and the assets of Ascendus. Complaint ¶ 26. When Taylor sent false account statements to investors, Ascendus became liable to pay its investors, now tort creditors of Ascendus, the amounts by which the reported account values exceeded the actual account values. Complaint ¶ 25, 32, 73. Similarly, FFCF became liable to its investors by the amounts of the fictitious deposits, which was over $5,000,000.00 at the time the FFCF scheme began. Complaint ¶ 35. Penson was complicit in and enabled these false reports to the Ascendus investors and the fictitious deposits of the FFCF investors, because, inter alia, Penson accepted fraudulent transfers of money from the Receivership Entities which it deposited 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 and it allowed the improper transfer of funds from investors to third parties at the request of third parties. Complaint ¶¶ 5, 31(f), 56-59, 87.

ARGUMENT

Under the familiar standard for a 12(b)(6) motion to dismiss, the Court must "accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995). Rule 8 requires only that a complaint contain a "short plain statement of the claim showing that the pleader is entitled to relief." Utah R. Civ. P. 8. Thus, "under rules 8 and 12, a complaint must provide fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 17, 221 P.3d 194 (quotation omitted). Importantly, "the purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." *Archuleta v. St. Mark's Hosp.*, 2010 UT 36, ¶ 5, 238 P.3d 1044 (quoting *Whipple v. Am. Fork Irr. Co.*, 910 P.2d 1218, 1220 (Utah 1996)). The "granting of a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure," *Baur v. Pac. Fin. Corp.*, 383 P.2d 397, 397 (Utah 1963), and should not be granted unless "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 20, 232 P.3d 999 (quotation omitted). Penson has not met this high standard, and the Motion should therefore be denied.

Penson contends the Complaint should be dismissed for five reasons: First, Penson argues, based on a misunderstanding of the damages alleged in the Complaint, that the Receiver does not have standing because the Complaint does not plead that the Receivership Entities

suffered damages. Second, Penson claims that the affirmative defense of *in pari delicto* serves to bar any recovery. Third, Penson contends that the fraudulent transfer claims are both time barred and improperly pleaded. Fourth, Penson posits that certain of the causes of action in the Complaint are not recognized under Utah law. Fifth, Penson claims the Receiver failed to adequately plead his claim for aiding and abetting securities fraud. Each of these contentions is incorrect.

I. THE COMPLAINT ADEQUATELY PLEADS DAMAGES INURING TO THE RECEIVERSHIP ENTITIES.

To establish standing under Utah law "requires a showing of injury, causation, and redressability . . . ." *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 14, 233 P.3d 461 (quotation omitted). Penson challenges the Receiver's standing only on the grounds that the Complaint does not allege injury to the Receivership Entities distinct from the investors. *See* Memorandum in Support of Defendant Penson Financial Services, Inc.'s Motion to Dismiss the Complaint ("Memo."), at 5. To show injury, a plaintiff "must allege that it has suffered or will suffer [] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute." *Grantsville*, 2010 UT 38, ¶ 14 (quotation omitted). As shown below, the Complaint adequately alleges that the Receivership Entities themselves suffered damages.

A. The Complaint Alleges Damages to the Receivership Entities Through the Creation of Tort Creditors and Other Harm.

1. The Receivership Entities suffered damages because of Penson's acts, which, in concert with Smith and Taylor, resulted in the Receivership Entities' liability to tort creditors.

The Complaint alleges that Penson's conduct caused the Receivership Entities to suffer damages in the form of the creation of tort creditors to the entities themselves. Courts have repeatedly recognized in the receivership context that a receiver has standing to pursue a defendant where that party's conduct results in the creation of tort creditors to the entity in receivership. For example, in *Marion v. TDI, Inc.*, 591 F.3d 137 (3d Cir. 2010), the Third Circuit held that a "receiver no doubt has standing to bring a suit on behalf of the debtor corporation against third parties who allegedly helped that corporation's management harm the corporation." *Id.* at 148. *Marion* involved a Ponzi scheme whereby the Ponzi scheme operator would sell interests in certificates of deposit (which did not always exist), sometimes by mismatching the maturity dates of the investor's investment and the certificate of deposit itself. *Id.* at 141. The Court agreed the receiver had standing to sue based on the allegation that these defendants, "through their actions (and in [one defendant's] case, omissions as well) allowed [the] scheme to continue . . . ." *Id.* at 148. The receiver in *Marion* alleged that these defendants, through various fraudulent transactions, supplied the Ponzi scheme with the funds it needed to continue operating. *Id.*[1]

[1] *The Third Circuit in Marion* ultimately held that the receiver in that case failed to establish causation as a matter of law. *See Marion*, 591 F.3d at 150-51. However, the Third Circuit made that determination only after a trial and on facts different from those alleged the instant case. Importantly, here it is alleged that Penson actively participated in the improper conduct, while in *Marion* the facts established that, at best, the defendants lent the receivership entities funds with knowledge of the fraud being perpetrated by the Ponzi scheme operator. *Id.* Indeed, the Third Circuit commented in a footnote that "[a]n investor suit might bring in a wider scope of activity than this one—what [the Defendants] allegedly helped Bentley do to the investors." *Id.* at 151 n.20. As described herein, the Receiver has alleged exactly

Here, the Complaint alleges that Penson would inform the investors that their accounts had more funds, via fraudulent account statements, which had the effect of keeping Taylor's fraudulent and tortious conduct hidden. Furthermore, the Complaint alleges that Penson used a variety of fraudulent devices to inflate the values in the investors' accounts so that the funds could be transferred from Ascendus to FFCF, which is equivalent to the allegation that the defendants in *Marion* provided the Ponzi scheme with funds to keep it in operation. Thus, the Complaint contains allegations of damages to the Receivership Entities sufficient to "step[] over the relatively low standing threshold." *Marion*, 591 F.3d at 149.

Courts elsewhere have also recognized that standing exists to pursue third parties for created an entity's liabilities owed to tort creditors. *See, e.g.*, *Reneker v. Offill*, Case No. 3:08-CV-1394-D, 2009 WL 3365616, at *3 (N.D. Tex. Oct. 20, 2009)[2] (recognizing standing for receiver where "the harm that [the receiver] pleads is that, but for Godwin Pappas' negligence, the [receivership entities'] liability would have been reduced, because the [receivership entities] would have ceased their securities-laws violations at an earlier date"); *id.* ("[A]llegations that defendants actions increased the [receivership entity's] liability to third parties or caused the [receivership entity] to be liable to third parties when they otherwise would not have been are sufficient to allege an injury that is concrete, actual, and distinct from the investors' injury."); *Mosier v. Stonefield Josephson, Inc.*, Case No. 11–2666 PSG, 2011 WL 5075551, at *4 (C.D. Cal. Oct. 25, 2011) ("While certain allegations in the FAC could conceivably be said to allege injury to investors as well, this does not necessarily vitiate the Receiver's standing to pursue

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that type of misconduct by Penson. Thus, *Marion* remains persuasive authority on the question of standing.

[2] The Receiver has attached all non-published decisions cited in this brief as exhibits behind Exhibit 1.

claims on behalf of the receivership entities. Rather, . . . so long as an entity in receivership has suffered harm, an equity receiver has standing to pursue a claim for such injuries—even if the creditors of the receivership entity may also have a claim arising from the same underlying misconduct."); *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002–04 (9th Cir. 2005) (noting the fact that the "dissipation of assets limited the firm's ability to repay its debts ... is not, however, a concession that only the creditors, and not [the corporate entity] itself, have sustained any injury. [I]t is a recognition of the economic reality that any injury to an insolvent firm is necessarily felt by its creditors."); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1126-27 (D. Ariz. 2006) ("The defrauded investors in this case are tort-creditors of the receivership. Mid-America is entitled to seek return of these funds for the benefit of the receivership, so that it may reimburse its creditors and/or victims of its tortious actions.").

2. The Complaint alleges damages directly to the Receivership Entities under the First, Fifth, and Sixth Causes of Action.

Penson claims the Receiver lacks standing to assert his First (aiding and abetting violation of Utah Securities Act), Fifth (aiding and abetting breach of fiduciary duty) and Sixth (aiding and abetting fraud) Causes of Action because the Complaint fails to plead that the Receivership Entities suffered damages apart from those suffered by the investors. *See* Memo. at 4-10. Penson's argument stems from a fundamental misunderstanding of the damages alleged in the Complaint. In the Complaint, the Receiver has alleged that Penson materially aided and abetted Taylor and Smith's bad acts, which bad acts could not have occurred without Penson's assistance, and which resulted in the creation of tort creditors to the Receivership Entities.

For example, the Complaint alleges that Taylor caused Ascendus to send false account statements to investors, which resulted in Ascendus owing to the investors those falsely reported amounts when Ascendus lacked the net worth to pay the investors the amount by which the reported account values exceeded the actual account values. Complaint ¶ 25. Further, the Complaint alleges that Penson materially aided and abetted this fraud by, inter alia, transferring securities from one investor account to another, depositing funds from Ascendus into the individual investor accounts to create the illusion that the accounts had earned profits when they had not, reporting fictitious deposits into investor accounts, reporting false information to the investors,[3] and other fraudulent activities intended to manipulate the amounts of funds in the investors' accounts, all of this when Penson had assured the investors that the money could not be transferred into or out of their accounts without their approval. Complaint ¶¶ 40 – 44. Penson's own policies prohibit the very conduct that allowed Taylor and Smith to defraud the investors in Ascendus and FFCF. Complaint ¶ 47. These defrauded investors are now tort creditors to whom Ascendus and FFCF are liable. These liabilities would not have occurred but for Penson's role in the Ascendus and FFCF schemes. Therefore, the Complaint alleges the Receivership Entities suffered damages under the sixth cause of action, aiding and abetting fraud.

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[3] Relying on *Am. Tissue Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F. Supp. 2d 79 (S.D.N.Y. 2004) and *Johnson v. Chilcott*, 590 F. Supp. 204, 209 (D. Colo. 1984), Penson wrongly contends that only the investors were damaged by the false account reports it sent to the investors. *See* Memo. at 8-9. Those cases are distinguishable. *Am. Tissue*, a bankruptcy case, concerned false information included by a third party in a prospectus that was used to induce investors to purchase the bankrupt company's bond. *Am. Tissue*, 351 F. Supp. 2d at 94. Those facts are not present here. Rather, Complaint alleges that Penson provided investors with false information about their investments, which induced the investors to keep their money in the Receivership Entities, thereby increasing their liabilities. *Johnson* likewise involved misrepresentations by third parties used to raise funds to invest in the Ponzi scheme, to the Ponzi scheme's benefit. *Johnson*, 590 F. Supp. at 208-09. To the contrary, the Complaint explicitly alleges that Penson's misrepresentations *damaged*, not benefitted, the Receivership Entities. Complaint, ¶¶ 89, 127.

Likewise, the Complaint alleges damages resulting from Penson's aiding and abetting of Taylor's breach of his fiduciary duties. First, the Complaint alleges that Taylor breached his fiduciary duty to the Receivership Entities by, inter alia, obtaining commissions from Ascendus that he did not earn and by falsely inflating the value of the investors' accounts so that those funds could be transferred to FFCF. Complaint ¶¶ 17, 27 - 35. Second, the Complaint alleges that but for Penson's assistance, which included improperly paying unearned commissions directly to Taylor or to entities he controlled and the various fraudulent activities Penson undertook to inflate the value of the investors' accounts so that those funds could be transferred to FFCF without the investors finding out that the amounts in their accounts did not match the amounts reported to them by Ascendus and Penson. Complaint ¶¶ 27 – 82. Thus, absent Penson's conduct, Taylor and Smith would have been unsuccessful in their efforts that were a breach of their fiduciary duties to the Receivership Entities, and their breaches would have been identified much sooner. Complaint ¶ 73. Penson's conduct enabled Taylor's tortious conduct, allowed it to continue longer than it otherwise would have, and damaged the Receivership Entities through the creation of tort creditors to the Receivership Entities arising from this conduct, thereby increasing the Receivership Entities' liabilities. The Complaint therefore alleges damages tied to the Fifth Cause of Action.[4]

[4] The Receiver recognizes that in paragraph 118 of the Complaint he alleges that Penson's aiding and abetting of breaches of fiduciary duty caused damage to the Investors, but did not allege that its aiding and abetting of breaches of fiduciary duty caused damage to the Receivership Entities. This omission is a typographical error rather than a substantive omission. When the Complaint is read fairly as a whole, the Receiver alleges damages for the breaches of fiduciary duty just as he alleged damages for the claims for relief of aiding and abetting fraud, and the aiding and abetting securities violations. *See generally* Complaint. For example, the Receiver specifically alleges that the aiding and abetting fraud and securities violations caused damages to the Investors and the Receivership Entities. Complaint, ¶¶ 89, 127.

Similarly, the Complaint alleges damages connected with Penson's aiding and abetting Taylor's violation of the Utah Securities Act. First, the Complaint alleges that Taylor violated the Utah Securities Act by making untrue statements of material fact and omitting to state material facts to the investors, including the reporting of false profits and values in the investors' accounts, in a scheme that operated as a fraud upon the investors in violation of Utah Code Ann. § 61-1-1. Complaint ¶ 86. The Complaint also alleges that Taylor accepted performance-based fees when those fees were unlawful, and that Taylor and Smith accepted investors into Ascendus who did not meet the net worth standards required as part of Ascendus' investment advisory license. Complaint ¶¶ 26, 75-82.

Second, the Complaint alleges that Penson materially aided and abetted these violations of the Utah Securities Act by fraudulently inflating the values of the investors' accounts, Complaint ¶¶ 26, 31, enabling Taylor to collect performance based fees when Penson knew those fees were unlawful, some of which may have been paid directly to Ascendus by Penson out of the investors' accounts, Complaint ¶¶ 31, 32, 75-82, and by Penson knowingly allowing, and thereby enabling, Ascendus to accept investors contrary to Ascendus' investment license, Complaint ¶ 26. Finally, the Complaint alleges that the Receivership Entities themselves were harmed as a result of Penson's conduct, including but not limited to the liability Ascendus incurred to repay any investor who did not have the requisite $750,000 under management or net worth of $1.5 million when Ascendus did not have the funds to make those payments, Complaint ¶ 26, by the creation of creditors to the Receivership Entities who were owed money as a result of Taylor's and Smith's breach of the securities laws, Complaint ¶ 26, and also because absent

Penson's conduct, Taylor's and Smith's fraud would have been found out much earlier than it was. Complaint ¶ 73. Thus, the Complaint alleges harm to the Receivership Entities arising from the violation of the securities laws distinct from the damages suffered by the investors themselves. The Complaint therefore alleges damages to the Receivership Entities directly tied to the First Cause of Action. Therefore, the Receiver has standing to pursue the First, Fifth, and Sixth Causes of Action in the Complaint.

B. The Complaint Alleges Damages to the Receivership Entities Through Improper Payments to Penson.

The Complaint alleges that Penson accepted fraudulent transfers of money from the Receivership Entities and deposited those funds 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. Complaint ¶¶ 31(f), 95, 97. Thus, the Complaint alleges that direct transfers of money, which should never have occurred, flowed from the Receivership Entities to Penson, and that the Receivership Entities were harmed by these transfers. These allegations form the basis for Penson's fraudulent transfer claims against Penson. Indeed, Penson does not appear to challenge the Receiver's standing to pursue these claims. *See Wing v. Hammons*, Case No. 2:08-CV-00620, 2009 WL 1362389 (D. Utah May 14, 2009) (relying on *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), the Utah federal district court held the receiver of a company that conducted Ponzi scheme before his appointment had standing under Utah's Uniform Fraudulent Transfer Act to assert claims for fraudulent transfer against third parties). Therefore, the Receiver also has standing to pursue the Second Cause of Action in the Complaint.

C. The Issue of Causation, Based on the Well-Pleaded Allegations in the Complaint, Should be Addressed After the Parties Have Conducted Discovery, and Not at the Pleading Stage of This Case.

By this Motion, Penson contends that the damages were actually suffered by the investors themselves, as opposed to the Receivership Entities. *See* Memo. at 5. ("Thus, if the Receiver's theory of the case is correct, and Penson's conduct were held to be improper, any damages awarded would flow back to the Investors as redress for their injuries--damages would not be paid to the Receivership Entities."). To the contrary, and as more fully described above, the Complaint contains allegations that Penson's conduct resulted in direct harm to the Receivership Entities.

Regardless, the dispute over which party actually suffered the damages is one of causation, and "[w]hether Plaintiff can prove causation, and if so, the nature and extent of those losses, is an issue that survives a 12(b)(6) motion." *Hodgson v. Gilmartin*, Case No. 06-1944, 2006 WL 2869532, at *7 (E.D. Pa. Oct. 5, 2006) (rejecting "Defendants' argument the Complaint fails to allege actual injury to the Fund" where "the Complaint specifically states that the Fund suffered losses as a result of Defendants' deceptive acts"). Furthermore, "it is irrelevant to the issue of standing that 'a successfully prosecuted cause of action [will result in] an inflow of money to the estate that will immediately flow out again to repay creditors.'" *Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348–49 (3d Cir. 2001)). Thus, Penson's argument is really a fact dispute disguised as a challenge to standing concerning which parties suffered the harm alleged in the Complaint. This is an issue for trial, not disposition on a Rule 12(b)(6) motion. *See*

Hodgson, 2006 WL 2869532, at *7. In any event, the Complaint alleges the Receivership Entities suffered harm distinct from those suffered by the investors, as described above.

II. THE AFFIRMATIVE DEFENSE OF *IN PARI DELICTO* SHOULD NOT BE CONSIDERED ON A MOTION TO DISMISS AND IN ALL EVENTS IS INAPPLICABLE TO THIS CASE.

A. *In Pari Delicto* Is an Affirmative Defense and the Resolution of that Defense on a Motion to Dismiss Is Improper Under the Circumstances of this Case.

Penson concedes, as it must, that *in pari delicto* is an affirmative defense, and that a Rule 12(b)(6) typically does not permit the Court to dismiss a complaint on the basis of an affirmative defense. *See* Memo. at 11 n.5; *Zoumadakis v. Uintah Basin Med. Center, Inc.*, 2005 UT App 325, ¶ 10 n.6, 122 P.3d 891 ("[A]ffirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6)." (quotations and citation omitted)). There exists a narrow exception under Utah law, but only where the "inefficacy of a claim under the [affirmative defense] appear[s] unambiguously on the face of the complaint." *Ashby v. Ashby*, 2008 UT App 254, ¶ 10 n.2, 191 P.3d 35, *aff'd in part and rev'd in part on other grounds by Ashby v. Ashby*, 2010 UT 7, 227 P.3d 246. Because the Complaint does not allege facts sufficient to "unambiguously" establish the defense of *in pari delicto*, consideration of that affirmative defense at this time is procedurally improper under Rule 12(b)(6).

Tellingly, Penson does not inform the Court of the requirements to establish the affirmative defense of *in pari delicto*. Under Utah law, the defense applies only "when the parties are equally at fault." *State v. Garcia*, 866 P.2d 5, 7 (Utah Ct. App. 1993); *see also* 30A C.J.S. Equity § 111 (updated Sept. 2011) ("As to parties *in pari delicto*, the principles cognate

with the clean hands maxim include: equity will not relieve one party against another when both are in pari delicto; where both are equally in the wrong defendant holds the stronger ground; where the fault is mutual the law will leave the case as it finds it."). Here, the Complaint alleges that, in large part, the wrongdoers were Taylor and Smith acting contrary to the interests of the Receivership Entities. Thus, in order to establish its defense on this Motion, Penson must go outside the pleadings to demonstrate that Penson and the Receivership Entities were equally at fault. This type of extra-pleading investigation is prohibited on a Rule 12(b)(6) motion. *Zoumadakis*, 2005 UT App 325, ¶ 10 n.6; *see also Pearlman v. Alexis*, Case No. 09–20865–CIV, 2009 WL 3161830, at *3 (S.D.Fla. Sept. 25, 2009) ("Even to the extent that the amended complaint alleges wrongdoing by the Receivership Entities, an essentially equitable and necessarily fact-bound apportionment of responsibility between them and the defendants in this case would be an inappropriate exercise for a court ruling on a motion to dismiss.").

Beyond this failure, *in pari delicto* is an equitable defense, and to resolve it will require the Court to entertain evidence concerning where the fault should lie, a question which becomes even more difficult in the context of a Ponzi scheme and equity receivership. *See Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 144-45 (D. Mass. 2008) ("Moreover, the general appropriateness of allowing Sovereign to assert the *in pari delicto* defense depends on the degree to which it is responsible for the harms suffered by all the plaintiffs. Where a major fraud like Bleidt's has been perpetrated, allegedly facilitated in part by Sovereign, for what percentage of fault for the overall harm must Sovereign be responsible in order to justify liability despite the in pari delicto principle? It is not a question that is easy for the Court to answer on this record. Like

comparative negligence, it may be a question best left to the jury."). Moreover, even if the Complaint pleaded equal fault on the part of Penson, Tayor, Smith, and the Receivership Entities, which it does not, under Utah law the Court can choose to ignore the defense on public policy grounds. *See Gorringe v. Read*, 63 P. 902, 904 (Utah 1901). The public policy exception is particularly apropos in a case such as this, where the application of the defense would allow a wrongdoer to go free to the detriment of the innocent investors. *Id.* ("Even where the contracting parties are in pari delicto, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent . . . ."). For all of these reasons, resolution of the equitable defense of *in pari delicto* is inappropriate on a motion to dismiss.

B. The Appointment of a Receiver Wipes Away the Receivership Entities' Prior Bad Acts Such that *In Pari Delicto* Does Not Apply.

In the typical case, a party's wrongdoing would preclude its ability to recover from a fellow wrongdoer under the *in pari delicto* doctrine. The reason for this is that a party should not benefit from its own wrongdoing. However, in a receivership, the wrongdoer has been "ousted from control," and "removed . . . from the scene." *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995). By the Receiver's appointment, Taylor and Smith have been removed, and the Receivership Entities are no longer their "evil zombies. Freed from [their] spell, they become entitled to the return of the moneys–for the benefit not of [Taylor and Smith] but of innocent

investors . . . ." *Id.* Thus, "*in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id.*

Under this case law, Penson concedes that *in pari delicto* does not operate to bar the Receiver's fraudulent transfer claims and seeks to use it as a bar only against the Receiver's other tort-based claims on the grounds that certain cases have purportedly limited *Scholes* to fraudulent transfers. *See* Memo. at 15-16. The supposed distinction between a tort claim and a fraudulent transfer claim is a "distinction without a difference." *In re Edgewater Med. Center*, 332 B.R. 166, 178 (Bankr. N.D. Ill. 2005) ("Although *Scholes* concerned an Illinois fraudulent transfer action, and the instant case concerns actions in tort and contract, for present purposes, this is a distinction without a difference."); *see also FDIC v. O'Melveny & Myers*, 62 F.3d 17, 19 (9th Cir. 1995) ("[T]he equities between a party asserting an equitable defense and a bank are at such variance with the equities between the party and a receiver of the bank that equitable defenses good against the bank should not be available against the receiver. To hold otherwise would be to elevate form over substance-something courts sitting in equity traditionally will not do."). In both cases, when a receiver has been appointed, the wrongdoer has been removed and the "rationales for these equitable defenses lose their meaning." *In re Edgewater Med. Center*, 332 B.R. at 178; *see also Mosier*, 2011 WL 5015551 (C.D. Cal. Oct. 25, 2011) (holding *in pari delicto* inapplicable in a case brought by a receiver asserting, inter alia, aiding and abetting conversion claims, where the receiver "was not a party to any of the alleged misconduct" and recognizing that application of the defense would "hurt[] innocent third-party creditors, while benefitting an alleged wrongdoer").

Further, Penson relies heavily on *Knauer v. Jonathan Roberts Fin. Group, Inc.*, 348 F.3d 230, 236 (7th Cir. 2003) to support its argument that the Receiver's claims are barred by the equitable affirmative defense of *in pari delecto*. Opp. Memo. 7 – 8, 11 – 13. The *Knauer* case, however, involves significantly different allegations than those in this case. In *Knauer*, the receiver sought to hold the defendant broker dealers liable even though their "involvement in the Ponzi scheme as a whole was quite minor." 348 F.3d at 237. The only allegations against the defendant broker dealers involved their failure to supervise two employees, the same individuals who operated the Ponzi schemes as president and vice president of the two companies placed in receivership. *Id.* The *Knauer* court held that the *in pari delecto* affirmative defense barred the receiver's claims against the broker dealers because the employees were "more closely associated with Heartland and JMS [the companies running Ponzi schemes and now in receivership] than with the broker dealers." 348 F.3d at 237.

When considering the equities, the facts as alleged in the Complaint do not compel the same result here. The Receiver is not trying to hold Penson liable because Taylor and Smith were its employees and it failed to supervise properly their actions as was the case in *Knauer*. The Complaint instead alleges that Penson's malfeasance directly contributed and resulted in the loss of millions of dollars belonging to the investors, which it was supposed to safeguard. Complaint ¶¶ 45 – 49. Penson should not be able to avoid all liability for the fraud and fiduciary duty breaches to which it contributed based on an equitable defense. Under the facts alleged in the Complaint, Penson aided and abetted Taylor's wrongdoing, and it should be made to account in equity for the losses it directly caused.

Importantly, even the cases cited by Penson admit that at Court must consider the equities when evaluating the affirmative defense of *in pari delicto*. The *Knauer* case recognizes that evaluating the *in pari delicto* defense, even in the case where a receiver asserted a tort claim against a third party, required an "equitable balancing" before any result could be reached. 348 F.3d at 236. That case did not establish a per se rule against receivers asserting tort-based claims against third parties, as Penson seems to imply. The *Knauer* court recognized that it would have reached a different result if the broker dealers had been directly involved in the wrongful actions. *Id.* at 237, n. 6.

In undertaking such an equitable inquiry, it is clear that the defense should not apply based on the facts as they are alleged in the Complaint. Should the Court dismiss the complaint on the grounds that *Scholes* on its face concerned only a fraudulent transfer claim, this would allow the wrongdoer here, Penson, to escape free when it must admit that it acted wrongly to establish the defense claimed. *See Garcia*, 866 P.2d at 7 (defense of *in pari delicto* requires equal wrongdoing by all parties involved). Such a result is clearly inequitable and not warranted in the case where Taylor and Smith have been removed. *See O'Melveny & Myers*, 61 F.3d at 19 ("Moreover, when a party is denied a defense under such circumstances, the opposing party enjoys a windfall. This is justifiable as against the wrongdoer himself, not against the wrongdoer's innocent creditors"); *see also Fine*, 634 F. Supp. 2d. at 143 (the Court may "allow a receiver to avoid the defense if the equities so required. . . . It would thereby reinstate the legal separation between [the Ponzi scheme operator] and the [company in receivership], formerly

'evil zombies,' now released from his control"). Therefore, the doctrine of *in pari delicto* does not preclude the Receiver at the pleading stage from pursing his claims against Penson.

III. THE FRAUDULENT TRANSFER CLAIMS ARE NOT TIME-BARRED AND ARE PROPERLY PLEADED.

A. Under the Doctrine of Adverse Domination, the Limitations Period on the Receiver's Claims Against Penson Was Tolled Until the Receiver's Appointment on March 18, 2009.

Penson argues the Receiver's fraudulent transfer claims are barred as a matter of law. Penson is mistaken. Under "the common law doctrine of adverse domination, the statute of limitations for an entity's claim is tolled when the entity is controlled or dominated by individuals engaged in conduct that is harmful to the entity." *Warfield v. Carnie*, Case No. 3:04-cv-633-R, 2007 WL 1112591, at *15 (N.D. Tex. April 13, 2007) (citing *FDIC v. Jackson*, 133 F.3d 694, 698 (9th Cir. 1998)); *see also Scholes*, 56 F.3d at 756. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield*, 2007 WL 1112591, at *15; *see also Farmers & Merchants Nat. Bank v. Bryan*, 902 F.2d 1520, 1522-23 (10th Cir. 1990) (recognizing "the theory of 'adverse domination' as another equitable vehicle under federal common law for tolling the statute of limitations"); *F.D.I.C. v. Hudson*, 673 F. Supp. 1039, 1041-42 (D. Kan. 1987) (recognizing doctrine of adverse domination tolls statute of limitations) *cited with approval by Saunders v. Sharp*, 793 P.2d 927, 932 (Utah Ct. App. 1990) (but refusing to extend doctrine "beyond the limitation of actions against corporate wrongdoers" on procedural grounds).

In this case, the Complaint alleges that the Receivership Entities were dominated by wrongdoers. *See generally* Complaint. The appointment of the Receiver removed Taylor and Smith from the scene, and the Receivership Entities only then ceased to operate as their "evil zombies." *Scholes*, 54 F.3d at 756. The equitable doctrine of adverse domination therefore applies to toll the statute of limitations until the Receiver's appointment because prior to his appointment "it would have been impossible for the receivership entities to have asserted their legal rights . . . ." *Warfield*, 2007 WL 1112591, at *17.

Judge Anthony Quinn of this Court has already applied adverse domination in another suit brought by the Receiver in this receivership. *See* Order Denying Defendant's Motion for Partial Summary Judgment, *Klein v. Murillo*, Case No. 090921814, entered May 3, 2010, attached hereto as Exhibit 2 ("The Receivership Entities were under the adverse domination of their principals [and] [u]nder adverse domination, the statute of limitations does not begin to run on any claims that the Receivership Entities have against [defendant] until the Receiver was appointed."). Thus, the four-year statute of limitations began to run no earlier than March 18, 2009, when the Receiver was appointed and therefore the fraudulent transfer claims are timely brought.

B. The Utah Fraudulent Transfer Act Contains a Discovery Rule, Tolling the Statute of Limitations.

The Utah Fraudulent Transfer Act contains within it a statutory discovery rule which states that a fraudulent transfer claim is "extinguished" if not brought "within four years of the allegedly fraudulent transfer *or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.*" Utah Code Ann. § 25-6-10(1)

(emphasis added). The facts as alleged in the Complaint do not plainly reveal that the Receiver's fraudulent transfer claims have been extinguished under the applicable statute of limitations.[5]

As alleged in the Complaint, the transfers to Penson were made as part of a Ponzi scheme with actual intent to defraud. Complaint ¶ 96; *see also Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) ("[M]ere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud."). *In re Cohen*, 199 B.R. 709, 717 (9th Cir. BAP 1996) ("Proof of a Ponzi scheme is sufficient to establish the Ponzi operator's actual intent to hinder, delay, or defraud creditors for purposes of actually fraudulent transfers . . . ."). Because the transfers at issue to Penson were made with actual fraudulent intent, the discovery rule allows the Receiver to avoid all of the transfers by the Receivership Entities to Penson within one year of their discovery. *Rappleye v. Rappleye*, 2004 UT App 290 ¶ 19, 99 P.3d 348. The facts alleged in the Complaint do not "plainly reveal" that the Receiver did or could have reasonably discovered the fraudulent transfers to Penson more than one year prior to the filing of the Complaint. In fact, the Complaint is appropriately silent on that matter as a complaint need not predict and refute affirmative defenses in order to avoid dismissal under Rule 12(b)(6). *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). Rather, to answer this question would require the Court to go outside the facts alleged in the Complaint. Penson argues that on the day the Receiver was appointed, he knew all of the facts concerning the Receivership Entities and somehow knew of the claim against Penson. Opp. Memo. at 24 – 25. Such an argument does not pass the straight

[5] To the extent Penson claims the statute of limitations has run on any other cause of action, adverse domination would apply to revive those claims as well. *See* Memo. at 22 n.12 (contending the aiding and abetting claims have expired).

face test when considering the transfers at issue and the complex nature of the Ascendus and FFCF schemes.

C. The Statute of Limitations Is an Affirmative Defense and Should Not Be Considered on a Motion to Dismiss Under the Facts Alleged in the Complaint.

Pleading the statute of limitations is an affirmative defense. Utah R. Civ. P. 8(c). As described above, "complaints do not have to anticipate affirmative defenses to survive a motion to dismiss," and the defense is appropriately considered on a motion to dismiss only if "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that an action is untimely under the governing statute of limitations." *Lewis*, 411 F.3d at 842 (quoted in *Zoumadakis*, 2005 UT App 325, ¶ 61). At the very least, the question of whether the discovery rule applies in this case is a question of fact which cannot be resolved on a motion to dismiss. *See Ottens v. McNeil*, 2010 UT App 237, ¶ 57, 239 P.3d 308 (applicability of discovery rule is a question of fact); *Richards Irr. Co. v. Karren*, 880 P.2d 6, 10 (Utah Ct. App. 1994) (cannot resolve question of fact on motion to dismiss).

D. The Complaint Adequately Pleads a Cause of Action for Fraudulent Transfer.

To state a claim for fraudulent transfer with actual intent to defraud, the Receiver must allege (1) that a transfer was made, (2) with actual intent to hinder, delay, or defraud any creditor of the debtor. *See* Utah Code Ann. § 25-6-5(1)(a). In order to state a claim for constructive fraudulent transfer, the Receiver must allege (1) a transfer was made, (2) while the Receivership Entities were insolvent; and (3) the Receivership Entities did not receive reasonably equivalent

value in exchange for the transfer. *See id.* § 25-6-5-(1)(b). Penson does not and cannot contend that the Complaint does not adequately allege those elements, and thus the Complaint does state a claim under the Utah Fraudulent Transfer Act and this should end the Court's inquiry. Rather, Penson contends that the "Complaint fails to explain" the damages suffered by the Receivership Entities as a result of the fraudulent transfers. *See* Memo. at 25. Alleging damages with particularity is not an element of a cause of action for fraudulent transfer, Penson cites no law that it is, and thus Penson's contention to the contrary is without merit.

Furthermore, Rule 8 explains Utah's notice pleading requirement, which requires only that the Complaint "shall contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief." Utah R. Civ. P. 8(a). Under Rule 8, "[w]hat [a party is] entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required." *Cowley v. Porter*, 2005 UT App 518, ¶¶ 36–37, 127 P.3d 1224 (alteration in original). The Complaint meets this low bar. *See Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622 (describing Utah's "liberal standard of notice pleading").

The Complaint alleges that Penson received transfers from the Receivership Entities in order to inflate the value of the investors' accounts as part of the ongoing Ponzi scheme. Complaint ¶ 95. Further, the Complaint alleges that the transfers were made when the Receivership Entities were insolvent and that the Receivership Entities did not receive reasonably equivalent value from Penson in exchange. Complaint ¶¶ 97, 99. Thus, the Complaint adequately provides a "statement of the claim showing the party is entitled to relief"

under Rule 8(a)(1). Further, the Complaint alleges that the Receiver is entitled to recover from Penson the transfers of money from the Receivership Entities to Penson as an actual or constructive fraudulent transfer. Complaint ¶ 100. Thus, the Complaint contains an adequate "demand for judgment for specified relief." Penson's contention that the Complaint fails to state a claim for fraudulent transfer because it does not allege the damages with particularity is without merit and the Court should therefore deny the Motion on these grounds.

IV. THE COMPLAINT STATES A CLAIM FOR AIDING AND ABETTING FRAUD AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY.

A. Utah Law Recognizes or Would Recognize a Claim for Aiding and Abetting Fraud.

Relying on a 2002 slip opinion from Judge Leslie Lewis, Penson contends that Utah law does not recognize a cause of action for aiding and abetting fraud. *See* Memo. at 22 (citing *Coroles v. Sabey*, Case No. 010903873, Slip. Op. Feb. 27, 2002). The following year, the Utah Court of Appeals in *Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, 78 P.3d 616 reversed a trial court's dismissal of a fraud claim where the allegation was that the defendant "schemed with the Appellees to commit fraud and later agreed to conceal the fraud in furtherance of the scheme." *Id.* at ¶ 35. Thus, Utah courts recognize a claim for aiding and abetting fraud. *See also id.* ¶ 33 ("Furthermore, '[p]arties who *knowingly join a fiduciary in fraudulent acts*, whereby the fiduciary breaches his or her fiduciary duties, are jointly and severally liable with that fiduciary.'" (quoting 37 Am. Jur. 2d, Fraud and Deceit § 306 (2001) (emphasis added)). Moreover, the Restatement of Torts recognizes the tort of aiding and abetting tortious conduct, including fraud, *see* Restatement (Second) of Torts § 876(b), and the

Utah Court of Appeals has recognized this section of the Restatement in the context of a claim for aiding and abetting a sexual assault. *See D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 4 (Utah Ct. App. 1994), *declined to extend on other grounds by Clark v. Pangan*, 2000 UT 37, 998 P.2d 268. Thus, even if the Utah appellate courts have not expressly recognized the tort of aiding and abetting fraud, there is every indication that they would. The authority cited by Penson is not binding nor is it an accurate statement of Utah law, and the Court should deny the Motion on these grounds.

B. Utah Law Recognizes or Would Recognize a Claim for Aiding and Abetting Breach of Fiduciary Duty, and the Complaint Alleges Damages Flowing from the Breach.

Relying on the same non-binding 2002 district court slip opinion which has been abrogated by more recent appellate court decisions, Penson also claims that Utah law does not recognize a cause of action for aiding and abetting breach of fiduciary duty. *See* Memo. at 18-20. Again, the *Russell/Packard Dev. Inc.* case clearly demonstrates that Utah law does in fact recognize this cause of action. *See* 2003 UT App 316, ¶ 35 ("Furthermore, '[p]arties who *knowingly join a fiduciary* in fraudulent acts, *whereby the fiduciary breaches his or her fiduciary duties*, are jointly and severally liable with that fiduciary.'" (quoting 37 Am. Jur. 2d, Fraud and Deceit § 306 (2001) (emphasis added)). The 2003 *Coroles* decision cited by Penson is not to the contrary. In that case, another panel of the Court of Appeals which issued its decision less than one month after the *Russell/Packard* case, stated merely that "if" the cause of action does exist, the "Plaintiffs have not adequately pleaded it." *Coroles*, 2003 UT App 339, ¶ 37 n.20. As with a cause of action for aiding and abetting fraud, the Restatement (Second) of Torts recognizes a

cause of action for aiding and abetting breach of fiduciary duty, and the United States District Court for the District of Utah also recognizes the cause of action. *See Farm Bureau Life Ins. Co. v. Am. Nat. Ins. Co.*, 505 F. Supp. 2d 1178, 1189 (D. Utah 2007) ("The substantial support from other jurisdictions and the Restatement (Second) of Torts are persuasive. It appears that the Utah state courts, if faced with the issue, would recognize such a cause of action."). Thus, even if the Utah appellate courts have not explicitly recognized the tort of aiding and abetting breach of fiduciary duty, the foregoing law indicates that they would if squarely presented with the issue.

Furthermore, Penson contends that damages is an essential element of a cause of action for breach of fiduciary duty, and that the Receiver has not alleged damages flowing from the breach. *See* Memo. at 18-19. While the Receiver recognizes that he did not specifically allege that the breaches of fiduciary duty harmed the Receivership Entities as he did with the other tort-based claims, the Complaint, when read fairly, alleges that Taylor's and Smith's breaches of their fiduciary duties created tort creditors with claims against the Receivership Entities. This constitutes an allegation of damages to the Receivership Entities themselves, distinct from the investors, as discussed above. Thus, the Complaint alleges damages flowing from Penson's aiding and abetting Taylor's and Smith's breaches of their fiduciary duties.

V. THE COMPLAINT SUFFICIENTLY ALLEGES A CAUSE OF ACTION FOR AIDING AND ABETTING VIOLATION OF THE UTAH SECURITIES ACT.

Relying on case law stating that a clearing broker does not "materially aid" a securities act violation when it acts solely capacity as a clearing broker, Penson claims that the Complaint fails to allege that Penson materially aided Taylor's fraudulent sale or purchase of securities. *See* Memo. at 20-22 ("[T]here is a long line of cases standing for the proposition that clearing firms

do not provide 'substantial assistance' as a matter of law when they are alleged simply to be providing clearing services."). As discussed below, Penson misstates the standard under Utah law, but in any event the Complaint alleges that Penson acted as much more than a "simple" clearing broker, in that the Complaint alleges that Penson took affirmative steps to perpetrate fraud and further the Ponzi scheme. For example, Penson is alleged to have (1) inappropriately transferred funds and securities between accounts to inflate account values, Complaint ¶ 31; (2) wired money from accounts directly to entities controlled by Taylor notwithstanding that Penson knew Taylor was not authorized to receive those funds, Complaint ¶ 32; (3) improperly received funds from Ascendus and deposited those funds into investor accounts to create the illusion that the accounts had earned profits, Complaint ¶ 31(f); (4) fraudulently recorded fictitious deposits into customer accounts to create the false impression that the accounts had greater value than they did and then reversing those deposits after the investors agreed to move their funds to FFCF, Complaint ¶ 31(g); and (5) reported false information in records sent to investors and reported false account balances to its customers. Complaint ¶¶ 67 – 72. Furthermore, the Complaint alleges that but for Penson's fraudulent conduct, Taylor and Smith would not have succeeded in their securities violations and would not have been able to extend the life of the Ponzi scheme as long as they did. Complaint ¶ 73. Thus, the facts in the Complaint plainly allege that Penson acted as much more than a "simple" clearing broker and provided essential assistance to the fraudulent scheme perpetrated by Taylor and Smith. The cases cited by Penson are therefore inapposite.

Penson claims that to allege that it materially aided Taylor and Smith, the Complaint must allege facts sufficient to show "substantial assistance" with the transaction. *Id.* However, that is not the standard under Utah law. Under Utah law, all that need be alleged is that a violation of the act occurred, the defendant is a broker-dealer or agent, and that the defendant materially aided in the fraud. *See Steenblik v. Lichfield*, 906 P.2d 872, 877 (Utah 1995) (holding that "Utah Code Ann. § 61-1-22(2) deviates from the federal act by expressly imposing liability on every partner, officer, director, or the like. The plaintiff need not demonstrate that such a person was able to control the transaction. If it is established that the defendant functioned in or occupied one of these positions" then burden shifts to the defendant to establish an affirmative defense). Then, "the defendant has the burden of proving that he did not know and, in the exercise of reasonable care, could not have known of the violation of the Act." *Id.* The Complaint alleges that Taylor and Smith perpetrated securities violations, that Penson was the broker-dealer/clearing agent in connection with these violations, and that Penson materially aided in the fraud when, among other things, it allowed the improper transfer of funds from investors to third parties at the request of third parties. Complaint ¶¶ 5, 87. Therefore, the Complaint adequately states a claim under the First Cause of Action for aiding and abetting securities fraud and the Court should deny the Motion as a result.

CONCLUSION

Based on the foregoing, the Court should deny Penson's Motion to Dismiss in its entirety.

DATED this 8th day of December, 2011.

MANNING CURTIS BRADSHAW & BEDNAR LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2011, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT PENSON FINANCIAL SERVICES, INC'S MOTION TO DISMISS** upon the following:

___	VIA FACSIMILE	R. Wayne Klein
___	VIA HAND DELIVERY	299 South Main, Suite 1300
✓	VIA U.S. MAIL	Salt Lake City, UT 84111
___	VIA FEDERAL EXPRESS	*Court-Appointed Receiver*
___	VIA EMAIL	
___	VIA FACSIMILE	Richard D. Flint
___	VIA HAND DELIVERY	HOLLAND & HART LLP
✓	VIA U.S. MAIL	222 South Main Street, Suite 2200
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___	VIA EMAIL	*Attorney for Penson Financial Services*
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Lorene Nordgren