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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. 100924572

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 FFCF, 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.¹ 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.² 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

¹ 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.

² 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.³ 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.

³ 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 FFCF 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.⁴ 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.⁵

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

⁴ 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.

⁵ 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.⁶

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

⁶ 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.⁷ "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

⁷ 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.⁸

⁸ 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 |
| Total | 117 | | | 8,704,736.90 |

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.⁹

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

⁹ 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.¹⁰

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.¹¹

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

¹¹ 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.¹²

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.

¹² 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 |
| | | | |
| Total | 15 | 206,561.97 | |

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, 2005.¹³

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

¹³ 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."¹⁴

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;"¹⁵
- b. The compensation formula must include realized capital losses and unrealized losses, and be based on gains less the losses;¹⁶
- c. The compensation formula must be based on trading of "not less than one year."¹⁷

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

¹⁴ Investment Advisers Act of 1940, Section 205(b)(2)(B).

¹⁵ 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.

¹⁶ R164-2-1(E)(1)(a), R164-2-1(E)(1)(c).

¹⁷ 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").¹⁸

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.

¹⁸ 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 FFCE. In or about March 2006, Penson withdrew \$1,350.21 from AW's accounts and transferred it to FFCE. 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 FFCE.

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 16th 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

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

EXHIBIT 2



Penson Financial Services, Inc

FED WIRE REQUEST FORM

Date: _____

Penson Financial Account Number: _____

Penson 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: _____

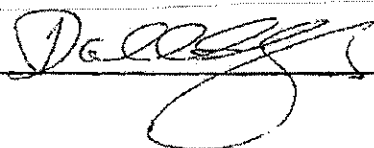
Customer's Address (Optional): _____

For Further Credit To:

Name: _____

Account Number: _____

Customer Signature:



Customer Signature (Joint Account):

Office Approval:

NOTARY

EXHIBIT 3

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.